Cherie Hearts Group International Pte Ltd and others *v* G8 Education Ltd [2013] SGHC 116

Case Number : Suit No 211 of 2011

Decision Date : 28 May 2013

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Vincent Leow and Michelle Yap (Allen & Gledhill LLP) for the plaintiffs; Vikneswari d/o Muthiah and Mr Lionel Chan (Harry Elias Partnership LLP) for the defendant.

Parties : Cherie Hearts Group International Pte Ltd and others — G8 Education Ltd

Contract – Specific Performance

28 May 2013

Judith Prakash J:

Introduction

1 The trial of this action took place in 2011 and in April 2012, I delivered a judgment ([2012] SGHC 70) in which I granted the defendant, G8 Education Ltd ("G8"), specific performance of a contract dated 28 October 2010 between G8, the first plaintiff, Cherie Hearts Group International Pte Ltd ("CHG"), 19 other entities (who together with CHG were defined as "Sellers") and the second and third plaintiffs as covenantors. The contract was subsequently amended twice. The parties termed this contract the "Business Acquisition Contract" and I shall refer to it, as it was subsequently amended, as the "BAC".

2 Subsequent to my judgment, the parties attended before me on several occasions to work out the terms on which specific performance of the BAC should take place. I made various orders in this regard. G8 is not satisfied with some of those orders and has appealed. The orders that I made related to the amounts that G8 would be entitled to deduct from the purchase price at the time of completion of the BAC. It is relevant that, in a previous hearing, an order had been made for an assessment hearing to be conducted by the Registrar to determine certain amounts payable by CHG to G8. It was further ordered that pending such determination, these amounts were to be deducted from the purchase price and placed in escrow.

3 I had several hearings to try and fix a date for completion or "Financial Close" as the parties referred to it and in the course of these hearings, several orders had to be made to establish what was required from each side on completion. The aim of these hearings was to facilitate completion. During these hearings, G8 was represented by Harry Elias Partnership LLP ("HEP") and CHG by Allen & Gledhill LLP ("A&G"). Since then, Messrs Nalpon & Co have taken over conduct of the matter for CHG from A&G.

Orders made and relevant clauses

4 The appeal by G8 is against the following orders which I made on 31 January 2013:

(a) That no account shall be taken of the issue of the parents' deposit monies for the

purposes of Financial Close;

(b) That no account shall be taken of the issue of the rectification costs for the purposes of Financial Close;

(c) That no account shall be taken of the issue of the compensation for the missing motor vehicles for the purposes of Financial Close;

(d) That the order that interest under the Loan Agreement is to stop accruing on 12 November 2012 cannot be varied; and

(e) That clause 8 of the [BAC] (as varied) does not cover the expenses incurred by [G8] on behalf of [CHG] from 1 March 2011.

5 I set out below some relevant clauses of the BAC:

1.1 Defined terms

Businesses means all of the businesses of the Cherie Hearts Group ...

Financial Close means the earliest date where all the AO Centres and Other Centres have been given OBLS approval for the transfer to [G8's] nominated entity, or such other date as agreed by the parties.

Loan Agreement means the loan agreement between [CHG] as borrower and [G8] as lender dated 17 September 2010 as subsequently varied in writing by the parties.

2.2 Purchase Price

The Purchase Price is S$24,610,027, to be satisfied in the following manner:

(a) firstly, by way of payment of S$1.5 million to [CHG] upon execution of the Deed of Assignment of Franchise Agreements ... .

(b) secondly, by way of set off of the Total Indebtedness under the Loan Agreement in partial satisfaction of the Purchase Price;

(c) thirdly, by payment to Tembusu Growth Fund Limited of ...

(d) fourthly, by assumption of current financed liabilities of [CHG] to a maximum of $3,560,000 ...

(e) lastly, the balance Purchase Price is payable in Immediately Available Funds.

In relation to clause 2.2(b) above, the parties acknowledge that:

- An offset against Total Indebtedness under the Loan Agreement has occurred through the assignment of the Franchise Agreements ... .

- In relation to the AO centres and Other Centres, the Buyer will receive the profits and bear the expenses of those Businesses from 1 March 2011, subject to the legal transfer of such Business to the Buyer or its nominated entity on satisfaction of all conditions

precedent (including lease assignment and lodgement of the child care licences with the Department by 28 February 2011). In the meantime, monies advanced under the Loan Agreement shall incur interest as provided therein provided that on 1 March 2011 an offset against the Total Indebtedness under the Loan Agreement shall occur in partial satisfaction of the Purchase Price.

8.4 Seller's Parent Credit Accounts/Bond Monies

At Financial Close the Sellers must pay to the Buyer an amount equal to the total of or all:

(i) payments or prepayments;

(ii) deposits; and

(iii) credits or bond monies,

received by the Sellers from clients of the Business, for services to be provided, sold or supplied by the Business after Financial Close (Prepayments).

Reasons for my decision

Parents' deposit monies

6 The submission made by G8 was that pursuant to cl 8.4 of the BAC, CHG had to pay G8 on Financial Close all deposit monies in the parents' credit accounts and/or bond monies that it had received for the ten childcare centres sold to G8. On 15 November 2012, G8 had, through HEP, informed CHG of its obligations in this regard. It had also asked for a list of the bonds supplied by the parents. However, no substantive reply was received to this request until 28 January 2013, the date of the hearing. On that date, A&G stated that CHG had only received $10,210 in respect of the centre run by Teeny-Tiny Childcare Centre & Development Pte Ltd ("Teeny Tiny Centre") and that there were no deposit monies for the other centres. G8 did not accept this response and submitted that there must have been deposit amounts taken by the other centres as well.

7 The response to this from CHG was that no bond monies or deposits had been received from the parents at all. The deposits referred to in cl 8.4 were deposits that were to be made for services to be rendered after Financial Close and nine of these centres had not been operated by CHG and the other Sellers since March 2011, a period of nearly two years. The sum of $10,210 in respect of the Teeny-Tiny Centre was for the January 2013 school fees for that centre and, therefore, did not fall within cl 8.4.

8 The order that I made was that parties were entitled to reserve their respective positions in respect of the claim to deposits but, for the purposes of Financial Close, no account was to be taken of this item. This was because there was no proof before me of any amount received on account of deposits from the parents of children in the ten childcare centres or any evidence as to what the quantum of such deposits might be. Whilst the clause provided for deposits received to be paid over, it would only operate if indeed such deposits had been paid to the Sellers.

Motor vehicles

9 Under cl 5.3(x) of the BAC read with Schedule 3 entitled "Plant and Equipment", on completion CHG was obliged to furnish G8 with all properly executed documents required to transfer to G8 any

motor vehicle included as part of the Plant and Equipment under Schedule 3. It was G8's position that there were three motor vehicles that were covered by this clause and that the same had to be delivered to it on completion and if they were not, G8 would be entitled to full compensation for their non-delivery.

10 CHG's position was that it owned two motor vehicles at the date the BAC was originally entered but that these motor vehicles had thereafter been sold. It was asserted that the motor vehicles had been handed over to G8 in May 2011 after G8 had taken over some of the childcare centres but, shortly thereafter, on 25 May 2011, the vehicles had been returned to CHG by G8. The vehicles were then sold and after hire purchase commitments were met, CHG recovered $3,800 for one and $2,400 for the other.

11 Whilst it was apparent that at least two motor vehicles were covered by the BAC and should have been available for delivery to G8 on completion, I was not in a position to determine either the truth of CHG's assertion that it had handed over the vehicles to G8 but that they had been rejected or to determine the value of the vehicles in the event that G8 had not rejected them. It was not even possible for me to ascertain whether there were two vehicles or three that had to be delivered. G8 wanted full compensation but the amount of this could not be determined by me because the evidence required was lacking. I needed a valuation of the vehicles plus information as to whether any amounts were owing on account of hire purchase. I therefore decided that the best course to take would be to refer the issue of the motor vehicles to the Registrar who was holding the assessment to decide whether it was a breach of the BAC for CHG to have sold the vehicles and, if so, to determine what damages were payable to G8 in respect thereof. I was not in a position to determine what amount should be deducted from the Purchase Price on completion to account of G8's claim in respect of the vehicles.

Rectification costs

12 Under cl 5.1 of the BAC, CHG was obliged to allow G8's representatives access to the various centres on the day prior to Financial Close to inspect the same and ensure that they were in substantially the same condition and order that they had been in as at the date of the BAC (*ie* 27 October 2010). If the centres were no longer in substantially the same condition and order, then CHG had to do all things reasonably required by G8 to return the centres to that condition and order.

13 It was G8's position that the centres needed work to be done on them to return them to the condition they were in on 27 October 2010. G8 wanted to set off the sum of $888,800 from the Purchase Price towards account of the costs that it alleged it would incur in rectifying the childcare centres. I was given a document entitled "CHGI Centres Makeover Projected Costs" which contained a breakdown of work to be done at the various centres and the estimated costs thereof. The items of work included things like painting the premises, repairing the flooring, providing new furniture and curtains, repairing leaking roofs and rewiring.

14 G8's claim for these costs was first indicated, somewhat obliquely, to CHG by HEP's letter dated 16 November 2012 to A&G. In para 5d. of the letter, HEP stated that before Financial Close, CHG must:

> Allow [G8] to inspect [the Teeny Tiny Centre] no later than 3 days before Financial Close, and upon request by [G8], to do all things reasonably required by [G8] to have the premises of the centres returned to the condition and order they were in as at 28 October 2010, with fair wear and tear excluded. We are further instructed that [G8] is currently inspecting the remaining 9 children centre to determine whether any rectifications need to be made in respect of issues that

arose before 1 March 2011, and our client will update you on the outcome of the inspections at the soonest.

15 A&G's response was that an inspection of the Teeny Tiny Centre had taken place on 7 November 2012 and no questions regarding the condition of the premises had been raised by G8 during the inspection. Further, CHG objected to G8's intention to raise issues regarding the condition of the other nine childcare centres because G8 had had control over these centres since 1 March 2011 and had never raised any such issues previously. HEP replied on 29 November to state that G8 would be providing CHG with details of the works that needed to be carried out on the centres and which works had arisen before 1 March 2011.

16 On 27 December 2012, HEP sent A&G a "schedule setting out the rectification costs for the respective childcare centres". This "schedule" was the document that I refer to in [13] above.

17 When the parties appeared before me, G8 submitted that the sum of $888,800 should be deducted from the Purchase Price at Financial Close and placed in escrow pending determination of the actual amount due. CHG objected on the basis that the schedule did not disclose that the centres were not in the same condition on 1 March 2011 as they had been on 27 October 2010. No list had been furnished to CHG showing the condition of the centres on either of the two dates or how the same had changed between those dates. G8 responded that the schedule was essentially a depreciation schedule and the centres had to be returned to substantially the same condition they had been in on 27 October 2010. CHG maintained its objection to any deduction from the Purchase Price and also argued that apart from quantum, it was entitled to object on the basis that, as required under cl 5.1, it had not been given an opportunity to rectify the centres and bring them back to the same condition as they had been in previously.

18 I decided that no amount should be deducted from the Purchase Price on the basis of an academic calculation of the degree to which the various centres had depreciated between 27 October 2010 and 1 March 2011. Even if I had been inclined to make such a deduction, I did not have any expert evidence as to the rate of depreciation. All I had was a bare schedule. In order to claim rectification costs from CHG, G8 would have had to first show what condition the various centres were in on 27 October 2010 and then show how the same had changed on 1 March 2011. After that it would have to provide proof as to how much it would cost to put the centres back into the original condition. None of this evidence was available to me.

Interest under the Loan Agreement

19 At a hearing on 8 October 2012, I ordered that Financial Close was to take place three weeks after G8 had lodged all 15 applications for licences of the 15 childcare centres with the relevant ministry on the OBLS. In respect of all centres apart from the two Gloryland Centres and the Teeny Tiny Centre, G8 was to lodge the applications by 15 October 2012. In respect of the Gloryland and Teeny Tiny Centres, CHG had to provide G8 with the requisite information for the applications and G8 was to lodge the applications within seven days of receipt of the information.

20 At a subsequent hearing on 5 November 2012, I was informed that, based on the order made on 8 October 2012, Financial Close was scheduled to take place on 5 November 2012. HEP informed me that G8 could not complete on that day because the Housing & Development Board ("HDB") needed time to transfer the leases of the childcare centres to G8 and needed three weeks from 28 October 2012 when it had been informed of the OBLS applications. So, the earliest date for Financial Close would have to be 19 November 2012.

21 CHG then submitted that interest on the Loan Agreement (as defined in the BAC) should stop running as from 5 November 2012 because there was no reason why G8 could not have put in the applications to the HDB by 21 October 2012 when the application for the Teeny-Tiny Centre was ready instead of waiting till 28 November 2012. If OBLS approval depended on the HDB then it was for G8 to ensure that the HDB had been informed early.

22 I accepted CHG's argument. I agreed that Financial Close had been delayed by reason of a default on the part of G8 in lodging the applications with the HDB for assignment of the tenancies. I therefore held that interest on the amounts due to G8 under the Loan Agreement should cease to run as of 12 November 2012 being the date falling three weeks and one day after 21 October 2012.

23 At the hearing on 28 January 2013, G8 submitted that there had been a change in circumstances which justified a variation in the order that I had made stopping the accrual of interest. It argued that during the 5 November 2012 hearing, parties had proceeded on the basis that there was no impediment to OBLS approvals being obtained. Subsequently, during the hearing that took place on 12 November 2012, HEP had raised the issue of CHG's failure to make payment of arrears of rent due for the Teeny Tiny Centre to HDB. A&G then informed the court that CHG would be arranging to make payment of the arrears but in the event, such payment was only made on 22 November 2012. Due to this delay in payment, the ministry's approval of the applications for the assignment of the tenancies and the transfers of the childcare licences was also delayed. OBLS approval for Teeny Tiny was obtained only on 20 December 2012. It was submitted that since CHG's delay resulted in the approvals for the Teeny Tiny Centre being pushed back, interest under the Loan Agreement should only stop accruing on 20 December 2012, being the date on which all OBLS approvals had been obtained. CHG's response to this submission was that at all times G8 had been aware of the arrears of rental for the Teeny Tiny Centre because G8 had been paying the rent itself for a year and had then stopped doing so.

24 I declined to vary the order. I took the view that once I had ordered interest to stop accruing because of the default of the lender, G8, I could not vary that order and reinstate the interest payment. If, to G8's knowledge, there were arrears of rental at the time I made the order, it should have brought the arrears to my attention. In any case, once the order had been made it could not be changed except on appeal.

Deduction of expenses incurred after 1 March 2011

25 Clause 8.1 of the BAC provides:

> **8.1 Payments made in respect to the period after Financial Close**
>
> (a) If the Sellers have on or before Financial Close made payment of any Outgoings in connection with the Business, which relates to a period after Financial Close and has[*sic*] given [G8] Notice within a reasonable time prior to Financial Close specifying those payments, [G8] agrees to pay to the Sellers that amount at Financial Close (by adjustment to the Completion Payment) to the extent that it relates to the period after Financial Close, with the exception that this clause does not relate to:
>
> ...
>
> (b) Where [G8] accepts a Liability in respect of an Outgoing in connection with the Business for a period before Financial Close and the Sellers have not paid or reimbursed that Outgoing, the Sellers must at Financial Close either:

(i) pay to [G8] the amount of the Liability; or

(ii) permit the deduction of the amount of the Liability from the Completion Payment,

at [G8's] election.

(c) For the purposes of sub-clauses 8.1(a) and 8.1(b) the reference to an 'Outgoing' includes rent and outgoings under the Premises Lease and any other reasonable outgoings or expenses payable by the Sellers for or in respect of the Business or the Premises.

26 G8 submitted that the expenses incurred by it for the operation of the childcare centres constituted "Outgoings" incurred in connection with the Business for a period before Financial Close and fell within cl 8.1(b). Hence, the court might take the view that such expenses might be legitimately set off from the balance Purchase Price payable on Financial Close. Further or alternatively, pursuant to cl 8 of the BAC, the court might take the view that CHG was to pay G8 any such sums due and owing to G8 on Financial Close.

27 The issue of what expenses incurred by G8 in relation to the childcare centres could be deducted from the Purchase Price on Financial Close came up several times during the hearings before me. On 16 October 2012, HEP wrote to A&G setting out G8's draft statement of account detailing the deductions to be made from the Purchase Price upon completion. Among these was the sum of $3,708,389 which was described as "reimbursement of G8's expenses from 1 March 2011 to August 2012" and had been derived as follows:

Expenses incurred by G8 from 1 March 2011 to August 2012 (excluding HQ costs)	7,580,513
Less:	
(1) Revenue received by G8 from 1 March 2011 to August 2012	2,831,016
(2) Revenue received from [CHG] from 1 March 2011 to August 2012 (pursuant to Court Order)	1,041,108

28 CHG objected to the deduction of this amount. First, it did not accept that G8 had incurred total expenses of $7,580,513 as asserted. G8 had not produced any documentary evidence of the amount apart from a bare assertion. Second, the court had ordered on 8 October 2012, prior to the HEP letter in question, that all expenses incurred by G8 in operating the childcare centres from 1 March 2011 should be assessed by the Registrar. G8 had not previously taken the position that any expenses which it had allegedly incurred should be deducted from the Purchase Price on Financial Close. Given the number of childcare centres involved and the 18-month period in respect of which G8 had incurred these expenses, the assessment was likely to be complicated and time consuming and there was no reason why G8's obligation to make payment of the balance of the Purchase Price on Financial Close should be suspended until after assessment by the Registrar.

29 Having heard arguments on 23 October 2012, I made an order that G8's expenses from 1 March 2011 to August 2012 should not be deducted from the Purchase Price. Subsequently, on 5 November 2012, I ordered that balance of the Purchase Price payable was not to be placed in escrow pending the determination of the expenses. It was this issue that was raised again at the hearings in January 2013. At these later hearings, G8 drew my attention to cl 8.1 and submitted that by virtue of this clause, the deductions were legitimate. As regards the argument about substantiation, G8 pointed out

that in January 2013, it had provided CHG with a report by the accounting firm Korda Mentha Neo ("KPMG") verifying that the expenses claimed by G8 were substantiated by documentary evidence. KPMG had verified only two categories of expenses, wages and rent. After deducting the revenue received by G8 for the relevant period (which was also verified by KPMG), the net expenses that G8 had paid from 1 March 2011 to December 2012 in respect of wages and rent amounted to $2,748,461.64. G8 asked for that amount to be deducted from the Purchase Price.

30 CHG did not accept that cl 8.1(b) covered the situation of the expenses paid by G8 between 1 March 2011 and August 2012. It submitted that the clause dealt with the situation where there was a specific obligation that had to be paid by the Sellers and G8 accepted the liability to pay. This had to be distinguished from the situation before the court which was that the buyer, G8, had taken over the running of the childcare centres and for that reason had to meet the expenses of the centres. This clause did not operate to allow a deduction in that situation. The clause envisaged payments made by G8 in respect of liabilities which were incurred by the Sellers during the course of running the childcare centres. G8's response was that under cl 8.1(c), the term "Outgoings" included rental under the leases for the premises and other reasonable outgoings or expenses payable for the Business. Such reasonable expenses must necessarily include wages. Therefore, payments made by G8 to cover rental and expenses could be adjusted against the Purchase Price on Financial Close.

31 Having construed cl 8.1 in the context of the BAC, I agreed with CHG that it did not cover the situation that had in fact occurred. The situation that cl 8.1(b) envisaged was a situation in which G8 accepted the liability to pay for an expense of a childcare centre while that centre was still under the control of the Sellers before Financial Close. It was therefore an expense that the Sellers should have borne rather than G8 because the Sellers were running the childcare centres. Such expense would be taken over by G8 on the basis of an ad hoc agreement between the Sellers and G8. The BAC was constructed on the basis that control of the childcare centres would pass from the Sellers to G8 upon Financial Close. It did not contemplate that G8 would be able to take over control of the childcare centres before completion using its powers under the Loan Agreement and the security documentation related to the same. Once G8 used such powers to effect the takeover, the situation was no longer covered by the BAC but was controlled by the loan documentation. I therefore concluded that payment by G8 of any expenses incurred in running the childcare centres after enforcing its rights under the loan documentation was not within cl 8.1(b).

32 In the event, therefore, I ordered that the expenses incurred by G8 in running the childcare centres between 1 March 2011 and August 2012 could not be deducted from the Purchase Price.