Grossner Jens v Raffles Holdings Ltd
[2003] SGHC 290

Case Number : Suit 1371/2002

Decision Date : 28 November 2003

Tribunal/Court : High Court

Coram : Tan Lee Meng J

Counsel Name(s) : C R Rajah SC (instructed) and Sean Lim (Hin Tat Augustine and Partners) for plaintiff; K Shanmugam SC, Stanley Lai, Mak Wei Munn and Edmund Eng (Allen and Gledhill) for defendants

Parties : Grossner Jens — Raffles Holdings Ltd

Contract – Formation – Certainty of terms – No agreement reached on material terms – Whether there was concluded contract

Contract – Implied contracts – Quantum meruit – Whether plaintiff entitled to claim reasonable sum on basis of restitutionary quantum meruit

1. The plaintiff, Jens Grossner ("JG"), who is in the business of hotel brokerage and has his own firm, JG Immobilien, claimed that he is entitled to be remunerated by the defendants, Raffles Holdings Ltd ("Raffles"), a Singapore company that owns a chain of hotels and resorts around the world, for brokering the sale of Swissotel to the latter. Raffles contended that they had no binding contract with JG for brokerage services and added that even if they had a binding contract with him, he is not entitled to any remuneration because they did not acquire Swissotel as a result of his services.

A. Background

2. JG's business relationship with Raffles began when he represented the owners of the Zoofenster hotel in Berlin, Germany, during unsuccessful negotiations for an operating lease. Subsequently, he offered to help Raffles acquire two hotels in Paris and a hotel in Zurich. His efforts proved fruitless as the sale of the said hotels did not materialise.

3. In late 1999, JG informed Raffles' senior vice-president, Mr Anthony Yip, that SAirRelations AG ("SAir") were interested in selling Swissotel Holding AG ("Swissotel"), which owned and operated a chain of hotels around the world. He claimed that he and his business associate, Mr Peter Buhrer, who used to provide consultancy services to the SAir group of companies, were in a position to broker a sale of Swissotel to Raffles.

4. On 31 January 2000, JG wrote to Raffles to propose a brokerage arrangement for the acquisition of Swissotel. In his letter, he stated as follows:

> As already explained to you, "swissotel" is officially not on the market and the matter has to be treated strictly confidential….
>
> On the basis of a confirmation letter by RAFFLES, we will undertake the process of informative resp. mediative activities and get in contact with "SAir" in Switzerland….
>
> We do not collect any fees before the conclusion of a contract. *Only when a conclusion comes to pass as a result of our activities do you have to pay the broker's commission named hereunder*:
>
> For our informative respectively mediative activities concerning "swissotel", you i.e. RAFFLES is to

pay commission in the amount of 1.0% of the transaction-volume plus the value added tax (VAT), if applicable, deserved and due upon conclusion of a contract.

(emphasis added)

5. Raffles did not accept the terms of remuneration proposed by JG. On 14 February 2000, Ms Emily Lim, Raffles' business development manager, replied to JG's letter as follows:

Further to your letter of 31 Jan 00 as well as our subsequent conversation, we wish to recap our agreement for JG Immobilien to assist us, acting on our instructions, in the acquisition of the Swissotel Group for which JG Immobilien's *success-based fee is at the lower of 1% of the transaction price or a capped amount, which is to be agreed when you establish an indicative price from the owners*.

Please also provide us a scope of services which will be provided by JG Immobilien as well as your proposal on how best to take this deal forward.

(emphasis added)

6. JG did not inform Raffles about the scope of the services to be provided by him and his company. Neither did he inform Raffles about the indicative price for Swissotel. As a result, the capped amount of commission, which was essential for the purpose of determining the remuneration to which JG was entitled for arranging the sale of Swissotel to Raffles, was never agreed upon.

7. On 30 March 2000, JG sent Raffles some non-confidential information regarding the profit and turnover figures of Swissotel and its subsidiary, Gate Gourmet, that was freely available to the public. On 6 April 2000, Raffles asked JG to answer a number of questions regarding Swissotel and reminded him to state the indicative price for Swissotel. JG did not answer Raffles' questions. He also did not provide any information on the indicative price for Swissotel.

8. JG arranged one meeting for representatives of SAir and Raffles on 22 May 2000. SAir's representatives included Mr Wolfgang Werle, the president and chief executive officer of the company, and Mr Jurg Foster, the chief financial officer of SAir, while Raffles was represented by their then president and chief executive officer, Mr Richard Helfer, and Mr Yip. There is a dispute as to what was discussed at this meeting. JG and Mr Buhrer claimed that the proposed sale of Swissotel to Raffles was discussed at the meeting, However, Raffles' representatives asserted that this subject was not discussed and that the meeting was not very fruitful as it concerned other matters, such as the joint marketing of the Swissotel and Raffles brands in Asia and Europe and the procurement of airline food and related supplies. At the end of the meeting, SAir proposed that Raffles liaise directly with them with respect to the proposed areas of co-operation. Raffles pointed out that as the question of a sale did not appear to be on SAir's agenda at that time, there was no further role for JG to play in the matter.

9. Mr Helfer testified that upon his return to Singapore, he broached the subject of an acquisition of "all or a portion of the Owner's interest in Swissotel" when he sent a draft confidentiality agreement on 29 May 2000 to SAir's Mr Werle for his comments. No reply was received by Raffles but both parties continued from time to time to discuss ways of collaborating in the hotel business.

10. At the end of 2000, Raffles received information that SAir were considering the sale of Swissotel. Around January 2001, Swissotel was officially put up for sale. A private sale to Raffles

was not on the cards as SAir appointed Credit Suisse First Boston ("CSFB") to handle a competitive bidding exercise for prospective purchasers of Swissotel. By a fax dated 22 February 2001, CSFB invited Raffles to submit a bid for the purchase of Swissotel. In their fax, CSFB explained that the bidding process was divided into two phases. The first was the indicative offer stage and the second was the negotiation phase. CSFB explained that on the basis of the indicative offers received by them, a final decision will be made as to whether the sale of any or all of the business would be taken. If a decision was taken to proceed with the sale, "certain prospective purchaser(s) will be invited to proceed further into the next phase of the sale".

11. After being invited by CSFB to bid for Swissotel, Raffles appointed their own merchant bankers, Morgan Guarantee, to study the bid documents and prepare a bid proposal for Swissotel. Raffles' proposal for the acquisition of Swissotel was submitted to CSFB on 28 February 2001. In due course, Raffles were identified as the "preferred bidder" and were invited to enter into negotiations, which culminated in the sale to them of Swissotel. The acquisition of Swissotel by Raffles was completed in June 2001.

12 After learning that Raffles had succeeded in acquiring Swissotel, JG claimed credit for having brokered the sale and demanded from Raffles a commission for the sale. Raffles contended that he was not entitled to any commission and offered him an ex gratia payment in the form of an "introduction fee". The amount offered to JG was DM80,000 to DM100,000. This offer was rejected by him.

13 In November 2002, JG commenced the present proceedings to claim from Raffles a commission of 1% of the purchase price of Swissotel. Raffles furnished two reasons why JG's claim ought to be dismissed. First, they contended that although they had discussed the question of brokerage services regarding the acquisition of Swissotel with JG, the proposed brokerage contract was not finalised. There was no binding contract because important terms, namely the scope of brokerage services to be performed by JG and his remuneration, had not been agreed upon. Secondly, it was asserted that even if there was a contract, JG did not earn any commission because he did not succeed in brokering the sale of Swissotel to Raffles, which had to bid for Swissotel in the competitive bidding exercise conducted by CSFB.

B. Whether there was a concluded contract

14. Raffles' assertion that they had no binding contract with JG will first be considered. Depending on circumstances, negotiating parties may enter into a binding contract even though there are a few terms which have yet to be agreed upon. This was recently reiterated by the Court of Appeal in *The Rainbow Spring* [2003] 3 SLR 363. However, the position is very different where important terms have not been agreed upon for as Maugham LJ put it in *Foley v Classique Coaches Ltd* [1934] 2 KB 1, 13, "unless all the material terms of the contract are agreed there is no binding obligation". In the present case, the parties did not reach agreement on crucial terms such as the remuneration for JG if he succeeds in brokering the sale of Swissotel to Raffles and the scope of the services to be rendered by JG.

15. When JG offered on 31 January 2000 to broker the sale of Swissotel to Raffles, the latter made it clear in their reply of 14 February 2000 that they required him to state the scope of services which will be provided. Despite being reminded to do so, JG did not furnish the required information. Without such information on the scope of his services, it is difficult to know what were his obligations under the proposed contract.

16. More importantly, the parties did not reach agreement on the remuneration package for JG.

Raffles, which had rejected JG's proposal for payment of a commission of 1% of the purchase price, wanted the commission to be capped and for this purpose, JG was requested to provide information to Raffles regarding the indicative price for Swissotel. JG failed to provide the required information. The reason for this could be that he did not know what the indicative price was. As the commission payable to JG was never sorted out, why JG claimed 1% of the sale price as his commission cannot be fathomed. After all, when cross-examined, he admitted as follows:

> Q. … [Y]ou confirmed that you had to negotiate an amount with [Raffles] after he told you the purchase price.
>
> A. That's right.
>
> Q. Right. So even though you knew that was the position, you decided to make the demand for 1%.
>
> A. Yes.

17. JG also admitted that although the remuneration had not been agreed upon, he was claiming the said 1% only because he did not know the actual amount paid by Raffles to SAir for Swissotel.

18. It cannot be seriously argued that JG's scope of duties and remuneration may be implied from the previous course of dealing between him and Raffles. Admittedly, in *Hilas & Co v Arcos Ltd* (1937) 147 LT 503, the House of Lords held that in the light of the previous dealings between the parties in question, some of the terms of the contract could be ascertained from previous transactions between the said parties and the custom of the trade. However, there are insufficient deals between JG and Raffles to warrant any such implication.

19. I thus hold that there was no concluded brokerage contract between JG and Raffles. JG has only himself to blame for this state of affairs for if he had given Raffles the requested information on the scope of his services and the indicative price for Swissotel so that the capped commission could be worked out, the position would have been different.

C. Whether JG Succeeded In Brokering The Sale Of Swissotel To Raffles

20. Even if there was a binding contract between JG and Raffles, his claim would still have been rejected for the simple reason that it was not established that he succeeded in brokering the sale of Swissotel to Raffles. It is common ground that JG is to be remunerated only if he is responsible for effecting the sale of Swissotel to Raffles. In his letter of 31 January 2000 to Raffles, he stated that only "when a conclusion comes to pass as a result of our activities do you have to pay the broker's commission named hereunder". In their reply on 14 February 2000, Raffles referred to the payment of a "success-based" fee to JG.

21. To begin with, the basis of JG's offer to broker a deal for the sale of Swissotel to Raffles was that it was a private sale. In his letter of 31 January 2000, he stated that Swissotel was officially not on the market and that the proposed sale had to be treated with strict confidence. The situation changed totally after SAir instructed CSFB to conduct a competitive bidding exercise for the sale of Swissotel.

22. Raffles asserted that after CSFB invited them to make a bid for Swissotel in February 2001, Mr Yip informed JG about the changed circumstances. In April 2001, Mr Yip told JG that Raffles was about to conclude an agreement with SAir for the acquisition of Swissotel. He added that as a

matter of goodwill, Raffles may be prepared to give him an ex gratia amount, which was referred to as an "introduction fee".

23. JG's response to Mr Yip in his letter of 14 April 2001 is rather telling as he referred to the change in "the conditions of the acquisition". He wrote as follows:

> We refer to your telephone conversation with the undersigned and would like to thank you for offering us an introduction fee which shall come to pass as a result of our activities so far … instead of the previous to that agreed commission, *since the conditions of the acquisition have changed recently*.
>
> As agreed between us the introduction fee will be deserved and due only upon conclusion of the transaction and *the amount of the said fee will be decided by mutual agreement*.
>
> (emphasis added)

24. After agreeing to negotiate the introduction fee, JG altered his position 9 days later when he wrote on 23 April 2001 as follows:

> We have performed accordingly to our agreement with RAFFLES and nevertheless if our deserved and due remuneration will be called commission or introduction fee, it has to be based on the agreed 1% o the transaction price.

25. JG's *volte face* cannot be countenanced. I reject his testimony that when he used the term "changed circumstances" in his letter of 14 April 2001, he was merely referring to the renaming of his commission as "introduction fee". After all, he readily accepted during cross-examination that if there had been a genuine competitive bidding process for the sale of Swissotel, the position would have changed so dramatically that his alleged agreement with Raffles, if binding, would have to give way to new arrangements. When questioned, he said so in no uncertain terms as follows:

> Q. Let's say on the 14th of February, you and Mr Yip and Ms Lim are in a room and … then somebody says "What happens if … nothing comes out of this and there is a separate bidding process", what would your answer be? You would have to re-negotiate the fee, correct, because that's a very different situation?
>
> A. … I would not only have to re-negotiate the fee, *I would have to re-negotiate the whole thing*.
>
> (emphasis added)

26. When asked why he relied on his old arrangements with Raffles when the situation had drastically changed, JG claimed that he was entitled to do so because the competitive bidding process undertaken by CSFB was not a genuine bidding exercise. Although he was not altogether coherent, he furnished two reasons for this. First, he insinuated that SAir and CSFB had wrongfully fixed the bidding exercise in favour of Raffles. Secondly, he asserted that the only purpose of the competitive bidding exercise for Swissotel was to ascertain whether or not Raffles' offer for Swissotel was reasonable enough for SAir to accept.

27. If the allegation that there was wrongdoing in the bidding exercise has substance, it must follow that both SAir and CSFB were part of a conspiracy. When questioned repeatedly on this matter, JG finally conceded that this must be so. He said as follows:

Q. The logical consequence of what you are saying is that the Board of Directors of Swissair, the national pride of Switzerland, were in breach of their duties and that Credit Suisse Boston were part of the conspiracy and had also acted wrongly?

A. Yes.

28. In his letter of 28 December 2001 to Mr Helfer, JG had also alleged that the bidding exercise conducted by CSFB had been fixed. In the penultimate paragraph of his letter, he stated as follows:

By the way, just to bring up the point once more – although not being relevant to our remuneration claim and without prejudice – we refuse to believe that the so-called bidding has been an official one or took place without restraint on trade. We intend to ask the duly qualified authority in Switzerland to check on those proceedings, just to prove that your [argument] is incorrect as well as insincere.

29. JG's associate, Mr Buhrer, went one step further on 31 January 2002 when he wrote to Dr Mario Corti, one of the most senior officials in SAir, to complain about the competitive bidding process handled by CSFB. The English translation of his letter is as follows:

This includes the "bidding process" issue. We can effect this in a fundamental manner which is also usable for the courts competent for the impending proceedings as means of evidence by an official investigation. This would be done by a criminal complaint against the parties involved and advising them. An investigation resulting therefrom by the district public prosecutor regarding a crime whose investigation is mandatory would obtain clarity in respect of these rumours.

30. The serious allegation of wrongdoing on the part of SAir or CSFB was not substantiated in any way. As JG was unable to establish that the competitive bidding process was a sham, this allegation need not be further considered.

31. JG further undermined his credibility when he next suggested that SAir had adopted the competitive bidding process for the sale of Swissotel because they merely wanted to check whether Raffles' offer was "within the range they could reach". He also made the absurd suggestion that his assertion must be true simply because Raffles managed to acquire Swissotel. When cross-examined, he said as follows:

Q. This evidence that you're giving as to why Swissair went into the bidding process and that they used the Raffles Hotel bid as a benchmark with these other bids, … all these are your guesswork, correct?

A. No, it's a possibility.

Q. …. Which means you are guessing that it happened? …

A. It would be guessing if Raffles wouldn't have got it. But they got it.

32. Although JG was very evasive when cross-examined, he finally admitted that he had no basis for his allegation when he said as follows:

Q. Now, you have no knowledge yourself of what were the reasons why Swissair called for a competitive tender nor do you know whether they were benchmarking the Raffles Hotel bid

against other bids, right?

A. No, that I don't have.

33. As JG did not substantiate his allegation that the competitive bidding process managed by CSFB was rigged, it must follow that he, in his own words, "would have to re-negotiate the whole thing". This is consistent with his statement in his letter of 14 April 2001 that the introduction fee will be decided by "mutual agreement". In view of the fundamental change of circumstances resulting from the competitive bidding exercise conducted by CSFB, it is surprising that JG claimed that he was instrumental in closing the deal for Swissotel between Raffles and SAir. In paragraphs 102 and 103 of his affidavit of evidence-in-chief, he claimed as follows:

> 102. I reiterate that it was my efforts that enabled the Defendants to close the Swissotel Transaction with SAirRelations….
>
> 103. … I had brought the Defendants to meet the right people (at SAirRelations) at the right time and advised them on the right approach to the matter. I verily believe that was why they were invited by SAirRelations to make an offer for Swissotel and was finally selected as the "ideal" partner.

34. JG admitted that he did not have much to do in relation to the Swissotel deal during cross-examination when he said as follows:

> Q. Now … let's try and … understand what exactly you had done…. I think you had … arranged for one meeting and you had sent … Raffles Hotel twice some publicly available information. Correct?
>
> A. Well, they requested, yes.
>
> Q. And your basis of claiming 1% commission is that work which you did which I just outlined. Correct?
>
> A. Yes, because they didn't ask for more.

35. The only concrete thing that he did was to arrange a meeting on 22 May 2000 between representatives from SAir and Raffles. The value of this meeting was disputed. After having had the opportunity to evaluate the testimony and demeanour of the witnesses, I prefer the evidence of Mr Helfer and Mr Yip that the sale of Swissotel was not discussed at the meeting. In short, JG's claim that he had organised a successful meeting on 22 May 2000 cannot be taken seriously. One is thus left in the dark as to what else he did to further Raffles' interest in the acquisition of Swissotel.

36. When JG was invited to explain how his brokering activities had secured the Swissotel deal for Raffles, he was unable to do so. He said as follows:

> Q. Give me a concrete piece of evidence within your knowledge which links Swissair's decision to sell it to Raffles Hotel and your introduction…. If you cannot, say you cannot.
>
> A. Well, that I can't.

37. When asked why SAir decided to sell Swissotel to Raffles, he also could not shed any light on the matter. He said as follows:

> Q. You don't know the reasons why Swissair chose Raffles Hotel, correct?

A. I don't know the reasons, no.

38. In truth, JG found it difficult to explain how he clinched the Swissotel deal for Raffles because there was nothing for him to do in the fundamentally altered circumstances resulting from the introduction of the competitive bidding exercise for the sale of Swissotel. In this regard, reference ought to be made to *Tamplin v Barratt* (1889-90) TLR 30. In that case, the plaintiffs, a firm of housing agents, agreed to handle the sale of the defendant's house for a commission of 2 ½ % of the sale price. After waiting three months without a sale being effected, the defendant sold his house at a public auction. The house was bought by one Mr Simonds, who had been introduced by the plaintiffs to the defendant prior to the auction as a probable purchaser. The plaintiffs' claim for a commission based on 2 ½% of the purchase price paid by Mr Simonds was dismissed by Mathew and Wills JJ. Mathew J said that the contract in question did not say that the plaintiffs were entitled to a commission whether the sale took place by public auction or not. If that was the intention, it should have been made clear in the contract. His Lordship accepted that it was not intended that the defendant should be liable to pay two commissions, one to the plaintiffs and one to the auctioneer. Wills J referred to the public auction as a "new intervention".

39. The decision in *Tamplin v Barratt* is relevant to the present case where there is also nothing in the alleged contract between Raffles and JG to indicate that where there is a "new intervention" in the form of a competitive bidding exercise handled by CSFB, JG is still entitled to a commission. Like the defendant in *Tamplin v Barratt,* Raffles cannot be expected to pay two parties, namely Morgan Guarantee for assisting them in the competitive bidding exercise and JG.

40. After taking all circumstances into account, I hold without any hesitation whatsoever that JG is not entitled to claim any commission from Raffles even if he had a brokerage contract with Raffles for the simple reason that his efforts did not result in the acquisition by Raffles of Swissotel.

D. Quantum Meruit

41. The only remaining issue concerns quantum meruit. Whether or not JG had a contract with Raffles, the question of quantum meruit does not arise. If he had a contract with Raffles, the terms provided that he is only to be paid a commission if he succeeds in brokering the sale of Swissotel to Raffles. As he did not succeed in this task, the following passage from *Chitty on Contracts*, 28th ed, vol 2, paragraphs 31-143, which was adopted by the Court of Appeal in *Lee Siong Kee v Beng Tiong Trading, Import and Export (1998) Pte Ltd* [2000] 4 SLR 559, 570, makes his position very clear:

> Remuneration under a quantum meruit may be awarded where there is a contract but it does not provide for remuneration, or does not do so for the circumstances which have arisen. But where the contract makes express provision for the agent to be remunerated only upon the happening of a certain event, he will not normally be entitled to claim reasonable remuneration on such a basis. Such a claim would depend upon an implied promise to pay a reasonable sum if the event does not occur, and such an implication cannot normally be made because it would be inconsistent with the express terms of the contract.

42 If JG had no contract with Raffles, what he did for Raffles did not put him in a position to claim a reasonable sum on the basis of restitutionary quantum meruit. As has been mentioned, he had merely sent Raffles some documents that were freely available to the public and had arranged one meeting, at which the sale of Swissotel to Raffles was not even discussed. He did not, or could not, even answer Raffles' query regarding the indicative price for Swissotel. More importantly, even if he did not have a contract with Raffles, his claim for reasonable expenses runs counter to the clear

understanding the parties had from the very start regarding a "success-based" fee. As such, regardless of whether or not JG had a binding contract with Raffles, he is not entitled to claim a reasonable sum for his services.

E. Conclusion

43. JG has only himself to blame for undermining his claim against Raffles from the very start with his incoherent, evasive, contradictory and often absurd answers during cross-examination. His business associate, Mr Buhrer, did not advance his case an inch further. JG should have, as he had agreed to do so in his letter of 14 April 2001, negotiated with Raffles the "introduction fee" offered to him on an ex gratia basis. It is not for the courts to determine what Raffles should pay him on an ex gratia basis. In any case, it should not be overlooked that in *Walford v Miles* [1992] 2 AC 128, the House of Lords made it clear that an agreement to negotiate, like an agreement to agree, is unenforceable simply because it lacks the necessary certainty.

44. Undoubtedly, this was a blatant attempt by JG to claim a commission to which he is clearly not entitled. His claim is thus dismissed with costs.