Tan Yeow Tat and Another v Tan Yeow Khoon and Others
[2003] SGHC 14

Case Number : OS 406/2002

Decision Date : 30 January 2003

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Molly Lim SC and Philip Ling (Wong Tan & Molly Lim LLC) for the Plaintiffs; Leslie Chew SC and Chan Kia Pheng (Khattar Wong & Partners) for the Defendants

Parties : Tan Yeow Tat; Tan Guek Tin — Tan Yeow Khoon; TanYeow Lam; Ong Yew Huat

Civil Procedure – Experts – Expert appointed by order of court to conduct valuation of assets – Findings to be binding absent manifest error – Whether manifestly in error

1. The plaintiffs and defendants are siblings. The second plaintiff is the eldest of the four. The others are her brothers of whom the first defendant is the eldest. The two plaintiffs owned 25% shares between them in three family companies namely, Soon Hock Transportation Pte Ltd; Soon Hock Container & Warehousing Pte Ltd; and Cogent Container Services Pte Ltd. The defendants own the remaining 75%. The first defendant also owned a business known as Wah Tien. The plaintiffs alleged that the first defendant directed lucrative contracts from the family companies to contractors through Wah Tien. Through this way Wah Tien, and thus the first defendant, profited, unnecessarily in the plaintiffs' view because they were of the view that the contracts ought to have gone directly to the contractors. Consequently, an attempt was made to remove the plaintiffs as directors of the family companies. This led to a major dispute and the prospect of litigation loomed over these matters. The parties held a meeting on 7 November 1995, and resulting from that meeting, Bih Li & Lee, the solicitors for the plaintiffs wrote a letter dated 28 November 1995 to the defendants then solicitors Lee Bon Leong & Co. In the said letter the plaintiffs proposed, upon terms stated, to sell their 25% shareholding in the three family companies to the defendants. A dispute subsequently arose as to whether Bih Li & Lee's letter of 28 November created a valid and binding contract. The parties commenced proceedings by way of two Originating Summonses to resolve that dispute. The combined hearing before Rubin J ended with the court's finding that the contract created a valid and binding agreement. The order of court dated 23 February 1998 contained the terms of the letter in verbatim form with the intention that they were to be complied with as orders of court. Following that, the parties appointed an expert to undertake various audit work in respect of the three companies, and to work out the purchase price of the plaintiffs' 25% shareholding in the companies. Ong Yew Huat, the nominal third defendant in the present proceedings was appointed the expert. There were some disagreement over the terms of reference and so the parties appeared before Rubin J again on 18 August 1999. The terms were finalised in a Supplementary Order of Court of the same date. The terms of reference formally signed by the plaintiffs and defendants on 23 August 1999.

2. On 15 May 2000 the expert wrote to the parties setting out his draft findings and inviting response from them. I shall revert to the details of the above documents shortly. The defendants did not respond, and on 8 June 2000 the expert submitted his report incorporating his findings in the draft previously sent. This spurred a series of correspondence between the solicitors for the parties. The cause of the excitement was the different understanding of some of the terms, including, the phrase "all transactions" that appeared in the Order Of Court dated 28 February 1998. The parties then tried to have this question of definition resolve by way of a summon-in-chambers before Rubin J. Eventually, Rubin J held that he was *functus officio* after he made his orders of 28 February 1998. The solicitors for both sides then withdrew the summons-in-chambers and each commenced a fresh action by way of an Originating Summons. This present originating summons was commenced by the plaintiffs

on 23 March 2002, essentially for a construction of the terms and effect of the 23 February 1998 orders of court, as well as ancillary and consequential orders. The defendants have also taken out an Originating Summons No. 1733 of 2002 similarly for a construction of another aspect of the orders of court of 23 February. That Originating Summons was fixed for hearing before an Assistant Registrar on a date subsequent to the present hearing. The application before the Assistant Registrar was taken out by the plaintiffs to strike out the Originating Summons on the ground that the terms in question are clear and cannot be disputed. I had directed that the application be heard before me together with the defendants' Originating Summons. A date will be fixed for that hearing.

3. It should be mentioned that the expert's valuation was intended and understood by the parties to be a non-speaking award, that is to say that no grounds need be given. Having declared that the award would be a non-speaking award the expert proceeded to speak; and thus Miss Molly Lim, SC submitted that the plaintiffs were free to challenge his valuation of $2,949,363 for the two plaintiffs' 25% shareholding of the three companies which they would not otherwise be able to. It was not disputed that a sum of $2,000,000 and a further sum amounting to $79,113.58 had been paid. The plaintiffs are also claiming immediate payment of the remaining $897,899.42 since it would have been payable in any event, that is regardless of whether they succeed in this application before me. However, the defendants are not paying because of their claim in the other Originating Summons in which they say would reduce the valuation significantly if they succeed. I now revert to the plaintiffs' application in this Originating Summons.

4. It is essential to set out the disputed O 2(1)(b) of the orders of court of 28 February 1998. That order reads as follows:

> "(1) That the book value of the Companies as at 31 October 1995 be audited by 30 April 1998 so that the following adjustments can thereafter be made to the audited book value of the Companies:
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> (a) the market value of the immovable properties of each of the Companies;
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> (b) the payments made by the Companies other than for business purposes, for the period 1 January 1990 to 31 October 1995;
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> (c) the transactions between the Companies and Wah Tien for the period 1 January 1990 to 31 October 1995; and
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> (d) the transactions between the Companies and Hoon Nam for the period 1 January 1990 to 31 October 1995[.]"

The plaintiffs dispute concerned O 2(1)(b) and (c) whereas the defendants' dispute encapsulated in the other Originating Summons concerned O 2(1)(a).

5. I now consider the plaintiffs' contentions in respect of O 2(1)(b). In the course of business of the three companies, cash and cheques were issued to the directors who, in turn, paid them over to third parties on behalf of the companies. One of the mutual complaints the parties had against each other was that the respective directors paid such money for their own purposes and not for the purposes of the companies. Hence, the order of court required the expert to make adjustments in his valuation to take into account money paid *other than for business purposes*. The plaintiffs grievance was that the

expert only adjusted payments to the plaintiff directors and not the payments to the defendant directors. The expert's position in regard to this complaint may be seen from three passages. The first is from what appears to be a draft report dated 15 May 2000 sent to the parties for comment. In that passage he wrote:

> "Both parties have represented to us that there were many instances of cash withdrawals made by the Directors for operating expenses. However, to date, we have not received sufficient compelling documentary evidence from the parties to support their contention. We have taken the position that, in order for the parties to do so, we would require sufficient documents to establish an accounting trail, and that verbal representations would be insufficient for this purpose. Therefore, unless it can be established otherwise, all payments made to the Directors will be recorded in their individual Directors' accounts, if this has not already been done".

The second passage comes from his Final Report dated 8 June 2000 in which he wrote:

> "3.5 Clause 2(1)(b) - non-business payments - For the purpose of determining the [Adjusted Book Value], adjustments will be made for payments made by the companies for non-business purposes during the period 1 January 1990 to 31 October 1995. It would not include transactions which arose in the period 1 January 1990."

The third passage comes from the expert's solicitors' letter of 20 October 2000 to the plaintiffs' solicitors. In that passage his solicitors wrote:

> "We wish to clarify that our clients' Ms Agnes Tan did not represent to your clients that the amounts taken by the [defendants] from the Companies were irrelevant. Our clients had in fact taken such amounts into consideration in the preparation of the Report. The payments which fall within the terms of the Order of Court and which affect the net book value of the Companies have been taken into account by our clients, whereas those which do not have not been taken into account. Further, you will note that under the Terms of Reference, our clients are not required to determine the [defendant] directors' accounts".

6. The plaintiffs' second complaint, that is, in respect of O 2(1)(c) is founded on this passage from the expert's report:

> "For the purpose of determining the [Adjusted Book Value], adjustments will be made for transactions with Wah Tien and Hoong Nam *which are not for business purposes*" (my emphasis)

Counsel submitted that the order of court did not limit the adjustment to transactions that were not for business purposes. In other words, all transactions, business or not, must be adjusted. If the business transactions with Wah Tien are ignored, then the profits that Wah Tien made as a middleman between the three companies and their general contractors would not be accounted for and thus diminish the value of the plaintiffs' shareholding. This was also the plaintiffs' response to the expert's explanation in his 15 May 2000 draft report declared as follows:

> "Clauses 2(1)(c) and (d) of the Order of Court state that adjustments should be made in respect of "transactions between the Companies and Wah Tien/Hoon Nam" for the period. The

Defendants have, in submitting their proposed adjustments, interpreted these clauses to mean all transactions with these Companies.

Certain transactions with Wah Tien related to certain goods/services rendered to the Companies for the construction of the buildings of the Companies. As such, it would be inequitable to reverse such payments to Wah Tien. To do so will lead to the implication that the buildings of the Companies were constructed with zero or minimal cost. We were unable to conduct a separate assessment of the costs incurred by Wah Tien with other subcontractors. This is because the Terms of Reference do not include Wah Tien and as such, we have no access to Wah Tien's accounts.

We are therefore of the view that it would be unfair and unreasonable to interpret cl 2(1)(c) and (d) of the Order of Court to include all transactions with Wah Tien and Hoon Nam, and have proceeded on the basis that adjustments would only be made for payments to these companies for non-business purposes."

7. Mr. Leslie Chew, SC appearing for the defendants submitted that the parties specifically agreed that the expert report "shall be final and binding on the parties in the absence of manifest error". The apparent simplicity of this term was ignored because the plaintiffs maintained that a party is entitled to challenge the grounds of a non-speaking report if the maker had in fact proceeded to give grounds and the grounds were in fact wrong. Before proceeding further, it will be useful to set out the basic premise for upholding a "final and binding" award with all its warts and errors undisturbed. To this end, I need only cite a passage from the judgment of Megaw LJ in *Baber v Kenwood* [1978] 1 Lloyds L R 175, 179:

> "The parties desire a measure of certainty and by their words which they have used in their contract they seek to obtain it. They accept the risk, which applies equally either way, that an expert may err; but they prefer to accept the risk rather than the alternative whereby either party would have the right to create the delay, the expense and, to be frank, the uncertainty of proceedings in Court, by the allegation that the expert has erred".

In that case the issue concerned the certification of the price of shares by an auditor as being in his view to be the fair selling price. Similar views were expressed by the Court of Appeal in *Jones v Sherwood* [1992] 1 WLR 277. Dillon LJ in that case went so far as to say that there is no real distinction between speaking and non-speaking awards for the latter may say little or much; or they may be "voluble or taciturn if not wholly dumb". *Ibid* page 284.

8. Relying on the authorities cited, Mr. Chew, SC contended that there was no manifest error in the expert report that required correction. He referred to the expert's letter of 15 May 2000 setting out his draft report and stating that he (the expert) would be finalising his report within two weeks "based on the above approach". The expert's letter closed by stating: "If any of the parties have a different view on any of the issues above, we are of the view that the parties should resolve it amongst themselves or seek an appropriate direction from the court". Neither party responded. The expert delivered his report on 8 June 2000. Some three months later, the plaintiffs' solicitors wrote to the expert expressing their view that the report failed to take into account the directions under the court order fully. On 20 October 2000 the solicitors for the expert replied. On behalf of the expert, the

letter asserted that there were no manifest error in the report and proceeded to address the matters raised by the plaintiffs' solicitors. Those matters were essentially the same ones raised in this Originating Summons. The expert relied mainly on his understanding of the terms of reference which appeared on his firm's stationery. The terms were settled by him at a meeting (in which the plaintiffs' advisor Mr. YC Chee was also present) and agreed by the parties. Miss Lim, SC argued that the expert did not tell them that he had placed limitations on his job by confining himself, so far as O 2(1)(b) was concerned, to payments to plaintiffs other than for business purposes; she said that her clients thought that they refer to all payments whatsoever. In respect of the other complaint, under 2(1)(c), the expert explained the limitations to his job and he took the view that his task was not an investigative one and as such was unable to review all the previous audited accounts of the three companies. He maintained that all relevant document that he required had been examined. He conceded that there were some minor double accounting and would rectify those errors. Miss Lim, SC took issue with his explanations and submitted that the expert had no right to interpret the court order, that his role was to carry out the orders into effect.

9. The clarity of the legal principles involved in the adjudication of such applications make it unnecessary for me to elaborate on the law, save to briefly and humbly, set out the principle that in such cases the courts must be slow to interfere in the findings of an expert appointed by the parties and whose findings the parties had agreed to abide as being final in the absence of manifest error. But I would hold that speed, finality, and economy, being the underlying basis for this approach do not excel in virtue at the expense of accuracy and correctness. However, to justify judicial intervention the inaccuracies or errors must be manifest, and they must gain their significance from the context of the case in which they appear.

10. In this case, counsel explained that the plaintiffs did not respond to the expert's letter of 15 May 2000 since it was not the final report and they thought that the final report might be different. Although it should not be a strict rule that the failure to respond (to such invitation) must be held against the party applying to correct the report, the invitation in question was quite specific. In it the expert set out his understanding of the already detailed terms of reference, and stated that he would be finalising his report on the basis of what he had written. In the face of an invitation worded as such, it would be remiss on the part of the plaintiffs to pass it over without objection or query had there been any. When the report was issued there were no objection for weeks. Although that in itself is a minor point, but it has a slight bearing on the question as to whether the report had any manifest error. The expert's response to the plaintiffs' criticism of his report indicated to me that he had reconsidered the matters complained of even if he had not (which he denied) taken them into account earlier on. He had given his explanations which I am loathe to challenge without the assistance of a qualified expert. I am aware that Miss Lim, SC takes the bold view that the errors she had complained of on behalf of the plaintiffs were manifest errors because the order of court was clear. That may be so, but it does appear to me that there is room for interpretation in the orders and the terms of reference. Having proceeded in the way he believed to be correct, the expert's approach ought not to be impugned by making out an argument, even if it was a strong one, that he was wrong. Such errors are not manifest errors. Manifest errors, generally, are those that arise in circumstances that have no room for professional interpretation. Much as Miss Lim, SC thinks that this is so in the present case, having regard to the exchange of correspondence between her firm and the expert's solicitors, I do not think that she is right; and if the expert had adopted an interpretation contrary to a better one, I think that that is the prerogative implicitly conferred on him by the agreement of the parties, and now explicitly by the court. For these reasons this application is dismissed. I shall hear the question of costs at a later date if parties are unable to agree costs. I further order that the outstanding sum of $897,899.42 with interest at 6% per annum from 1

September 2001 be paid by the defendants to the plaintiffs within 14 days but without prejudice to the defendants' case in their claim in the other originating summons.