

Yeo Boong Hua and others v Turf Club Auto Emporium Pte Ltd and others
[2012] SGHC 227

Case Number : Suit No 27 of 2009
Decision Date : 12 November 2012
Tribunal/Court : High Court
Coram : Choo Han Teck J
Counsel Name(s) : Tan Gim Hai Adrian, Ong Pei Ching, Nurul 'Aziah Binte Muhammad Hussin and Yeoh Jean Wern (Drew & Napier LLC) for plaintiffs; Poon Kin Mun Kelvin, Farah Salam and Christine Huang (Rajah & Tann LLP) for 1st, 2nd, 3rd, 4th and 7th defendants; Sim Chong and Yip Wei Yen (JLC Advisors LLP) for 5th defendant; Khor Wee Siong (Khor Thiam Beng & Partners) for 8th defendant
Parties : Yeo Boong Hua and others — Turf Club Auto Emporium Pte Ltd and others

Civil procedure – Setting aside of consent order

12 November 2012

Choo Han Teck J:

1 The story in this long running dispute began in 2001. It had been the subject of several court orders, including two from the Court of Appeal. There were two parts to the plot, each separated from the other by the event known as the "Consent Order", an order of court made by consent on 22 February 2006 in a consolidated action. Following the Consent Order, further disputes arose between the parties, culminating in Suit No 27 of 2009 ("the present suit"), which involved, in essence, an attempt to set aside the Consent Order on the grounds of mistake, breach and frustration. On 2 November 2012, I dismissed the action in the present suit for the reasons that follow.

2 The three plaintiffs in the present suit were Yeo Boong Hua, Lim Ah Poh and Teo Tian Seng (collectively, "the plaintiffs"). They were in the business of trading in used cars and had come together to bid for the lease of premises formerly known as the Singapore Turf Club ("the Premises") when the Singapore Land Office ("SLO") invited tenders in early 2001. The plaintiffs thought that it would be a business opportunity to lease the Premises, and hoped to set up low-end supermarkets and childcare centres (where people could leave their children while shopping for groceries and used cars). With this in mind, they formed Bukit Timah Carmart Pte Ltd ("BTC") to be their representative company for the tender exercise. When the tender exercise closed on 2 March 2001, SLO received only two bids, one from BTC and the other from the second defendant, Singapore Agro Agricultural Pte Ltd ("Singapore Agro"), the representative company used by the third, fifth, sixth, seventh and eighth defendants, namely Koh Khong Meng ("Koh"), Tan Huat Chye ("HC Tan"), Ng Chye Samuel ("Ng"), Tan Chee Beng ("CB Tan"), and Ong Cher Keong ("Ong") (collectively, "the Singapore Agro representatives").

3 According to the plaintiffs, they commenced discussions with the Singapore Agro representatives on 2 March 2001 in relation to the forming of a joint venture company so that no matter which faction (*ie*, BTC or Singapore Agro) were to succeed in obtaining the lease granted by SLO ("the head lease"), it would hold such lease on trust for both factions ("disputed oral agreement"). The plaintiffs averred that there was an understanding between all parties that they

would set up a joint venture company which would sublease the Premises from BTC or Singapore Agro (whichever succeeded in the tender for the head lease). Parties then executed a Memorandum of Understanding dated 8 March 2001 ("MOU"), the salient portions of which were as follows:

This memorandum of understanding is made between the following joint venture parties as follows on Day 08th Month March Year 2001.

1. Johnny Yeo Boong Hua
2. Michael Lim Ah Poh
3. Raymond Teo Tian Seng hereby referred to as First Party; and
4. Roger Koh Khong Meng
5. Samuel Ng Chye
6. Tan Huat Chye
7. Singapore Agro-Agricultural Pte Ltd or Nominees hereby referred to as Second Party and with respect to the premises Parcel A at A at [sic] Former Bukit Timah Turf Club (hereby known as parcel A) ...

Both Parties have discovered that they have both tendered for the above property after the results of the tenders are announced on 2 March 2001.

It is the common intention that both parties to jointly operate this project based on the following share structures:

A) That the share for the proposed incorporated company be as follows:

1. First Party 37.5%
2. Second Party 62.5%

Total = 100%

B) Whether the award of the Land Office contract goes to [Singapore Agro], or [BTC], the proportion of shares shall be as the same as per clause Item A.

...

[emphasis added]

4 It was the plaintiffs' case that HC Tan was the main party of the events surrounding these arrangements, and that CB Tan (HC Tan's son), Koh and Ong had acted under the directions of HC Tan. In characterising the case as "a tale of businessmen versus bankrupts" (HC Tan, Ng and Ong were adjudged bankrupts), the plaintiffs referred to the defendants as "the bankrupts and their cronies" with whom the plaintiffs were unhappily engaged in business dealings, and from whom the plaintiffs were seeking to disentangle themselves. The defendants however viewed the plaintiffs' corporate manoeuvres as a witch hunt aimed at pressuring the Singapore Agro representatives to

cause TCAE and TCPL to declare dividends. The defendants denied that any business relationship commenced between the two factions on 2 March 2001. They claimed that such relationship only started from the time of the MOU, which, both parties agreed, was executed before the announcement of the successful tender party. This disagreement underpinned a larger dispute between the two factions – while the plaintiffs asserted that the MOU reflected only part of an oral agreement between the parties arising from the 2 March 2001 discussions, the defendants argued that the MOU constituted the complete agreement between them. The MOU was subsequently varied orally, such that two, instead of one, joint venture companies were to be formed for the purpose of jointly exploiting the head lease. These two companies were Turf Club Auto Emporium Pte Ltd ("TCAE") and Turf City Pte Ltd ("TCPL"), the first and fourth defendants.

5 Singapore Agro was awarded the head lease by SLO for the Premises in April 2001. Singapore Agro signed the head lease with the SLO on 10 July 2001 ("2001 head lease"), which was for a term of three years running from 1 September 2001, and which provided that the landlord "may at his absolute discretion grant a fresh tenancy for a further term of three years subject to new terms and conditions and revision of rental upon the expiration of the [original] term". Singapore Agro granted sub-leases to TCAE and TCPL on the same day ("2001 sub-leases"). The plaintiffs eventually held 37.5% of shares in TCAE as well as in TCPL (each plaintiff holding 12.5%). Counsel for the plaintiffs, Mr Adrian Tan, submitted that by paying \$78,000 each, the plaintiffs effectively paid for the head lease. This, he suggested, lent credence to the plaintiffs' argument that Singapore Agro was simply an agent holding the head lease for the benefit of TCAE and TCPL.

6 It did not take long before disputes arose between the plaintiffs and the individual defendants. The plaintiffs claimed that the defendants had, acting on the behest of HC Tan, stripped the plaintiffs of their directorships in TCPL after the plaintiffs discovered and inquired about unusual movements of funds in the company. The parties tried to out-manoeuvre each other by the corporate route, with the result that a large part of 2001 and 2002 were occupied by general meetings followed by solicitors' letters. The disputes resulted in the plaintiffs commencing Originating Summons No 1634 of 2002 ("OS 1634") on 15 November 2002 in relation to TCPL's affairs. They also commenced Suit 703 of 2004 ("Suit 703") on 25 August 2004 for orders dealing with the accounts of TCAE and, alternatively, for TCAE to be wound up. In the meantime, following the expiry of the 2001 head lease and sub-leases, SLO granted Singapore Agro a fresh head lease for a period of three years on 10 September 2004 ("2004 head lease"). On the same day, Singapore Agro granted sub-leases to TCAE and TCPL ("2004 sub-leases").

7 OS 1634 and Suit 703 were consolidated on 28 January 2005 and the consolidated suit was settled on 22 February 2006 by the Consent Order. As the Consent Order formed the crux of the dispute, I shall set it out in full:

UPON THIS ACTION coming on for hearing on 30 September 2005, 6 October 2005, 13 October 2005, 20 October 2005, 4 November 2005 and 11 November 2005 and 22 February 2006 AND UPON HEARING Counsel for the Plaintiffs and Counsel for the Defendants, AND whereas the Plaintiffs and the Defendants have agreed to fully and finally settle their disputes in respect of Originating Summons 1634 of 2002/D (the "Originating Summons") and Suit No 703 of 2004/S (the "Suit"), it is BY CONSENT ORDERED as follows:-

1. The terms of this Order shall constitute a full and final settlement of all claims that the 1st, 2nd and 3rd Plaintiffs (collectively the "Plaintiffs") may have against the 1st to 5th Defendants in the Originating Summons and the 1st to 3rd Defendants in the Suit (collectively "the Defendants"), howsoever arising out of or in relation to the Originating Summons or the Suit.

Valuation Exercise

2. Pursuant to this Order of Court, Messrs KPMG Business Advisory Division shall be appointed for the purpose of this exercise. Messrs KPMG Business Advisory Pte Ltd shall be appointed to conduct the investigation pursuant to paragraph 5. Messrs KPMG Corporate Finance Pte Ltd (the "Independent Valuer") shall be appointed to conduct an independent and fair valuation of the shares of Turf City Pte Ltd and Turf Club Auto Emporium Pte Ltd (collectively referred to as "the Companies")(the "Valuation Exercise"). The Valuation Exercise and the investigation shall be completed within sixty (60) days of the date of appointment of Messrs KPMG Business Advisory Division, or such other time period as all parties may agree to in writing ("Completion Date")
3. The Plaintiffs, the 2nd Defendant and the 3rd Defendant in the Suit shall, at the time of appointing KPMG Business Advisory Division, deposit with KPMG Business Advisory Division their respective signed share transfer forms of the respective Companies accompanied by the share certificate(s) of the parties' respective shares in the Companies, which share transfer forms and share certificates shall be held by KPMG Business Advisory Division as a stakeholder to subsequently effect a transfer of the shares or to return the said share transfer forms and share certificates to the parties in accordance with paragraph 9 below.
4. For the purpose of the Valuation Exercise, the Plaintiffs and the Defendants may refer any and all matters which they deem relevant to the Independent Valuer for his consideration and review (including, without limitation, the facts and allegations raised in the Originating Summons and the Suit.)
5. The Independent Valuer shall have unfettered and absolute discretion in conducting the Valuation Exercise as he deems fit and the Plaintiffs and Defendants undertake not to interfere, impede, obstruct or do anything to prevent or hinder the Independent Valuer's discharge of his duties in respect of Valuation Exercise. Without prejudice to the generality of the foregoing, the Independent Valuer shall in arriving at a fair valuation take into consideration and review, inter alia, the following:-
 - (a) an account and investigation of the past accounts and transactions of the Companies, and in particular, a full inquiry and investigation of the allegations raised by the Plaintiffs (as well as take into account the Defendants' response and defences to the same) in the Originating Summons and the Suit, including but not limited to the following:-
 - (i) an account of all contracts relating to the construction and/or renovation and/or the construction costs involved in the development of the demised premises, including a detailed breakdown of work done or payments made to third parties or costings and the making of all necessary inquiries;
 - (ii) an account detailing the services performed by Architects' Group Associates' Pte Ltd for and/or on behalf of the Companies in relation to the demised premises and their charges, including a detailed breakdown of work done or payments made to third parties or costings and the making of all necessary inquiries;
 - (iii) an account all monies and/or interest due to the Companies under the sub-tenancy agreements entered into with the 2nd Defendants and the making of all necessary inquiries;

- (iv) an account of all monies received and/or income generated for the use of the open field/open area as a landfill/dumping ground and the making of all necessary inquiries.
- (b) the future earning capacities of the Companies including but not limited to the expected revenue and income from the remaining tenure of the sub-tenancy agreements entered into by the Companies respectively with the 2nd Defendants.
6. To assist the Independent Valuer in this regard, the Plaintiffs and Defendants shall provide the Independent Valuer and/or KPMG Business Advisory Pte Ltd with full access to all cause papers, documents referred to in the respective List of Documents and Supplementary List of Documents (if any), existing expert or such other reports and such other documents that the Independent Valuer and/or Messrs KPMG Business Advisory Pte Ltd may require for the purpose of conducting the Valuation Exercise, and the Plaintiffs, Defendants and/or the Defendants' agents and/or servants, and/or the Companies' employees, agents and/or servants shall assist the Independent Valuer and/or Messrs KPMG Business Advisory Pte Ltd with any or all enquiries in this regard. The Independent Valuer shall be at liberty to engage a quantity surveyor and such other professionals or experts or technical advisors as he deems necessary or appropriate to arrive at a fair valuation and/or to determine the propriety (or lack thereof as the case may be) of the past contracts and transactions entered into by the Companies or on their behalf. The cost of appointing a quantity surveyor or such other professionals or experts or technical advisors shall, once such cost is agreed to between the Plaintiffs and the Defendants, be apportioned between the Plaintiffs and the Defendants (other than the Companies) in the proportion of their respective shareholdings in the Companies. For the avoidance of doubt, if both the Plaintiffs and the Defendants are unable to agree on a fair and reasonable fee for the engagement of a quantity surveyor or such other professionals or experts or technical advisors as the Independent Valuer may propose, the Independent Valuer shall have the power to refer the issue of cost to the Court for a final determination of the same and thereafter, the parties shall be bound by the same.
7. All decisions, findings and conclusions as determined by the Independent Valuer in the conduct of the Valuation Exercise shall be contained in a written report ("Valuation Report") to be submitted to the Plaintiffs and Defendants simultaneously within one (1) week from the Completion Date, and such Valuation Report shall be final, conclusive and binding on the Plaintiffs and the Defendants. For the avoidance of doubt, all investigations and queries undertaken by Messrs KPMG Business Advisory Division shall be strictly limited to and for the purpose only of undertaking and completing the Valuation Exercise and investigation herein and the Plaintiffs and the Defendants shall hold harmless and indemnify Messrs KPMG Business Advisory Division against all loss, damages and claims of whatsoever nature arising out of or in connection with Messrs KPMG Business Advisory's obligations provided in this Order of Court.

Buy-Out/Liquidation of the Companies

8. The Independent Valuer shall notify the Plaintiffs and Defendants simultaneously in writing of the share price for each of the Companies (the "Share Price") which Share Price shall be contained in the Valuation Report which report the Independent Valuer shall submit simultaneously to the Plaintiffs and Defendants.
9. Within twenty-eight (28) working days (excluding Saturdays, Sundays and Gazetted Public Holidays) of the receipt of the Valuation Report from the Independent Valuer ("the Bid Closing

Date”), the Plaintiffs and Defendants shall engage in a “closed bid” exercise to determine whether the Plaintiffs or the Defendants will purchase or buy-out the other party’s respective shareholdings in the Companies (if at all), the particulars of which are set out in detail as follows (“Closed Bid Exercise”):-

- (a) each party shall be at liberty to, without being compelled to, submit to the Independent Valuer by hand on or before the Bid Closing Date a sealed/closed bid to purchase the other party’s respective shareholdings in the Companies at a price per share at least equal to, if not more, than the Share Price (the “Bid Price”)(the “Closed bid”), together with a cashier’s order made in favour of the other party of a sum equivalent to the Bid Price multiplied by the number of shares held by the other party in the Companies (the “Cashier’s Order”)(the Closed bid and Cashier’s Order shall be contained in a sealed envelope which shall be referred to as the “Bid Package”). Any Bid Package where the Cashier’s Order submitted is for a sum less than the Bid Price, shall be void and disregarded by the Independent Valuer for the purpose of the Closed Bid Exercise;
- (b) the Independent Valuer shall, within two (2) working days (excluding Saturdays, Sundays and Gazetted Public Holidays) after receipt of each party’s Bid Package (if any) and in the presence of both the Plaintiffs’ and the Defendants’ respective solicitors, open the Bid Package(s) if any, containing the said Closed Bids at a designated time, date and place to be agreed to between the parties;
- (c) In the event where only one party submits a Closed Bid (“the Sole Bidder”), the other party shall be bound to sell and transfer all of their respective shareholdings in the Companies to the Sole Bidder at a price equivalent to that stated in the Closed Bid, and the Sole Bidder shall be bound to purchase the same. The Independent Valuer shall forthwith hand over the Cashier’s Order to the other party and proceed to facilitate and effect the transfer and registration of the shares to the Sole Bidder utilizing the signed share transfer forms and share certificates referred to in paragraph 3 above.
- (d) In the event where both parties each submit separate Closed bids, the party with the lower Bid Price shall be bound to sell and transfer all of their respective shareholdings in the Companies to the party with the higher bid price (“the Higher Bidder”) who shall be bound to purchase the same at the said higher bid price. The Independent Valuer shall forthwith deliver the Higher Bidder’s Cashier’s Order to the other party and shall proceed to facilitate and effect the transfer and registration of the shares to the Higher Bidder by using the signed share transfer forms and share certificates referred to in paragraph 3 above.
- (e) In the case of paragraph 11(c) or 11(d) above, upon completing the transfer of shares, the Independent Valuer shall release all the share certificates of the parties held by him to the Sole Bidder or the Higher Bidder and thereafter shall be released of his stakeholding rights under paragraph 3 above.
- (f) In the case of paragraph 11(c) or 11(d) above, the party selling their respective shareholdings in the Companies whether to the Sole Bidder or Higher Bidder, shall if applicable, resign as directors of the respective Companies (and if such party include a corporation, then the corporation’s representative or nominee shall resign), and the Sole Bidder or Higher Bidder (or their representative or nominee) shall be appointed as directors of the Companies (if they are not already directors).

- (g) Further, in the event that the Sole Bidder or Higher Bidder are the Plaintiffs, the Defendants, in particular the 2nd Defendants, shall use its best endeavours to facilitate and procure the assignment/transfer/novation of the 2nd Defendants' head lease with the Singapore Land Office, to the Companies (subject always to the consent, if required, of Singapore Land Office).
- (h) In the event where no bid is received by the Independent Valuer within the Bid Closing Date, the Independent Valuer shall return to the parties their respective signed share transfer forms and share certificates held by him under paragraph 3 above and thereafter shall be released of his stakeholding obligations under paragraph 3 above.
10. That the parties be at liberty to apply in respect of the ancillary issues relating to the winding up of the Companies, if any.
11. *The Plaintiffs and the Defendants undertake not to do anything or cause anything to be done which would in any way affect, vary and/or alter the status quo of the Companies, both in terms of on-going liabilities/ obligations to which the Companies are subject to, and assets and/or benefits which the Companies presently enjoy, including but not limited to doing anything to affect the head lease between the 2nd Defendants and the Singapore Land Office and sub leases presently entered into between the 2nd Defendants and the Companies. In particular, the Plaintiffs and Defendants undertake that in respect of the respective sub leases presently entered into between the Companies and the 2nd Defendants, the Plaintiffs and Defendants and/or their agents and/or employees and/or servants shall not do anything that would alter or affect the said sub leases including doing anything to effect, procure or cause the termination of the said agreements.*

Costs

12. (1) The Plaintiffs shall place the sum of S\$21,562.50; and
- (2) the Defendants (other than the 1st Defendant and the 3rd and 4th Defendants in Originating Summons No 1634 of 2002/D and the 1st Defendant of the Suit) shall place the sum of S\$35,937.50.

with their respective solicitors to meet the agreed fees of S\$50,000 (being professional fees) and a further sum of up to S\$7,500 in respect of tax and disbursements) to be incurred by the Independent Valuer in the discharge of his duties and the conduct of the Valuation Exercise.

13. There shall be no order as to the costs of the actions.
14. Parties and the Independent Valuer and/or Liquidators (if appointed) be at liberty to apply.

Dated this 22nd day of February 2006

[emphasis added]

8 That brings us to the events occurring after the Consent Order. Messrs KPMG was appointed on 25 April 2006 to carry out the work envisaged in the Consent Order. It rendered two valuation reports

on 10 August 2007, in relation to TCAE and TCPL respectively, some 15 months after the reports were supposed to have been issued on 25 June 2006. In both reports, TCAE and TCPL were valued as at 31 May 2006. It appears that the valuation was done by KPMG on the assumption that there was no confirmation that the 2004 head lease would be extended for another three-year term. After the 2004 head lease and sub-leases expired on 30 August 2007, SLO granted Singapore Agro a further three-year lease commencing on 1 September 2007 ("2007 head lease"). Singapore Agro did not however renew or extend the 2004 sub-leases to TCAE and TCPL. The plaintiffs were aggrieved and complained that this was a breach of the Consent Order. They also demanded that KPMG carry out a revaluation of those companies. KPMG declined and reminded parties to continue with the next stage under the terms of the Consent Order and bid for the shares of TCAE and TCPL.

9 The plaintiffs filed Summons No 4117 of 2007 ("Summons 4117") on 13 September 2007 praying *inter alia* for a fresh valuation to be done. In November 2007, the matter came before Chan Seng Onn J who made no order on that application but granted the plaintiffs leave to amend the summons. The plaintiffs amended their summons on 25 January 2008, seeking an order *inter alia* that Singapore Agro assign the renewed head lease to TCAE and TCPL or, alternatively, to grant fresh sub-leases to them. The amended summons were dismissed on 23 June 2008 in *Yeo Boong Hua and others v Turf City Pte Ltd and others and another suit* [2008] SGHC 93. Instead of appealing against the order dismissing Summons 4117 or proceeding with the final obligations under the Consent Order, *ie*, to bid for the shares in TCAE and TCPL, the plaintiffs commenced the present suit seeking to set aside the Consent Order. They also commenced a separate action against KPMG for negligence. That action encompassed all the recriminations among the plaintiffs, the defendants and KPMG over the time taken for the report to be issued, and disputes that arose in the course of KPMG's work. One of those disputes concerned the appointment of a Quantity Surveyor ("QS") to assist KPMG. In essence, the plaintiffs had wanted to nominate the QS but KPMG did not agree.

10 By the present suit, the plaintiffs sought to set aside the Consent Order. However, given the complicated and extended litigation that spanned 12 years, and having the history marked out by the Consent Order, it was necessary to understand what grounds the plaintiffs were relying on for setting it aside. It was also crucial to understand the consequences that would flow from the setting aside of the Consent Order. The gravamen of the plaintiffs' complaint was that Singapore Agro obtained an extension of the head lease without extending the sub-leases to TCAE and TCPL. The plaintiffs alleged that by doing so, the defendants were in breach of clause 11 of the Consent Order ("Clause 11"). The question was whether the extension of the head lease had affected, varied or altered the status quo of the two companies within the meaning in Clause 11, which also applied to "assets and/or benefits which [TCAE and TCPL] presently enjoy", and that included the doing of "anything to affect the head lease between [Singapore Agro] and the Singapore Land Office and sub-leases presently entered into between [Singapore Agro] and [TCAE and TCPL]".

11 It was clear from the express language of Clause 11 that the parties referred to the head lease and sub-leases as were then in force. At that time, no one envisaged that KPMG would take 15 months to complete their valuation exercise. No deadline was therefore imposed on KPMG. Consequently, it was clear that no thought was given to the situation where the head lease expired before the parties could bid for the shares in TCAE and TCPL. The parties seemed to envisage a valuation and buy-out before the expiry of the 2004 head lease and that meant that the sole owner could do whatever it wanted regarding the 2004 head lease and sub-leases. In these circumstances, I am of the view that the court would not, on its own, imply any condition into the Consent Order to cover the situation which the parties did not envisage, *viz*, that KPMG would take 15 months to complete its valuation exercise. Either party could have taken stronger steps to compel KPMG to expedite its work, or to apply to the court for directions, or to agree to make a "blind" bid without KPMG's report. I was thus of the view that there was no breach of the Consent Order and no basis for

it to be set aside.

12 The question remains as to what remedies are available to the plaintiffs even if the Consent Order was not set aside. Mr Adrian Tan submitted that in the event that the Consent Order was not set aside, the plaintiffs were still entitled to damages for a breach of the Consent Order, and that the defendants would have to account to the plaintiffs in respect of the head lease. The plaintiffs' case was founded on the basis that the disputed oral agreement between the plaintiffs and the individual defendants going back to 2001 required the defendants to hold the head lease for the benefit of both sides. I was however of the view that, having agreed to resolve their disputes by way of a single Consent Order, the parties were only entitled to remedies for breach of the Consent Order. Neither side has any claim if the Consent Order was not breached. This was also my finding in determining the issues before me in Summons 4117 against which the plaintiffs did not appeal. That is not to say that the plaintiffs have no recourse against the defendants. If the individual defendants were directors and shareholders of Singapore Agro as well as TCAE and TCPL, they might have been in breach of their duties to the latter if they had proceeded to obtain an extension of the head lease without giving the benefit to the two companies. That was not however the pleaded cause of action in the present suit. As far as the plaintiffs are concerned, the war may still go on, but this battle has been lost.

13 The action in the present suit was dismissed with costs to be taxed if not agreed.

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