ORG Powell Packaging Pte Ltd *v* Liten Logistics Services Pte Ltd [2012] SGHC 219

Case Number : Originating Summons No 1032 of 2011

Decision Date : 29 October 2012

Tribunal/Court : High Court

Coram : Lee Seiu Kin J

Counsel Name(s) : Ng Keng Chye and Justin Zehnder (Wong Alliance LLP) for the plaintiff; Aqbal Singh (Pinnacle Law LLC) for the defendant.

Parties : ORG Powell Packaging Pte Ltd — Liten Logistics Services Pte Ltd

Contract – frustration – leases

29 October 2012

Lee Seiu Kin J:

Introduction

1 This Originating Summons concerned a dispute over an option to purchase. The plaintiff obtained an option to purchase the lease over certain premises collectively. Due to the Government's compulsory acquisition of one of the premises, the defendant contended that the option could no longer be performed. The material facts are not in dispute.

The Properties

2 In May 2010, the defendant was the sub-lessee from Jurong Town Corporation ("JTC") of two industrial properties, namely: (a) No 36 Tuas West Road, Singapore 638384 ("No 36"); and (b) No 6 Tuas Avenue 20, Singapore 638820 ("No 6"). For convenience, I shall refer to the *sub-lease* over two properties above collectively as "the Properties".

The Preliminary Agreement

3 That month, the plaintiff's representative, Puah Kee Wat ("Puah") commenced negotiations with the defendant's representative, Lim Wui Liat ("Lim") on the purchase by the plaintiff of the Properties. Lim advised Puah that the defendant was not permitted under its lease from JTC to enter into any agreement for sale and purchase of the Properties until 15 August 2011, which was 36 months after the commencement of their sub-lease. The parties eventually executed a written agreement on 12 June 2010 ("the Preliminary Agreement"). The relevant terms of the Preliminary Agreement were as follows:

(a) In respect of No 36:

(i) Defendant to lease No 36 to plaintiff for 12 months from 1 August 2010 to 31 July 2011.

(ii) The gross monthly rent for No 36 shall be $65,000 comprising:

(A) $16,112.81 for property tax, land rent and licensing for electrical works, and

(B) $48,887.19 net rent.

(iii) Defendant to sell No 36 to plaintiff on 1 August 2011 at the price of $6,250,000 less $586,646.28 (which is the total of 12 months' net rent), amounting to $5,663,350.72 (there appears to be an error of $3).

(b) In respect of No 6:

(i) Defendant to sell No 6 to plaintiff on 1 August 2011 for $4,100,000.

(ii) Defendant to lease No 6 back from plaintiff from 1 August 2011 to 31 July 2014 at $35,000 per month.

(c) The parties would enter into a formal agreement the terms of which were to be negotiated with legal representation and pending that, upon payment by the plaintiff to the defendant of $65,000 being the rent for the first month of the lease for No 36, the defendant would cease all discussions with other parties on the Properties.

The Tenancy Agreement

4 On 22 September 2010, the parties executed a tenancy agreement in respect of No 36 ("the Tenancy Agreement"), which gave effect to the terms of the Preliminary Agreement set out above at [1](a), save that the commencement date of the lease was stated as seven days after the JTC approval of the tenancy and the end of the tenancy was stated as 31 August 2011, being one month later than what was specified in the Preliminary Agreement. Clause 4(l) of the Tenancy Agreement provided as follows:

(i) Subject to sub-clause (iii) hereinafter contained, the [defendant] shall grant to the [plaintiff] an Option to Purchase [No 36] together with [No 6] upon the terms and conditions of the Option to Purchase annexed hereto in Schedule 1 (the "**Option**") which shall be available for acceptance from 15 August 2011 to 29 August 2011. On 15 August 2011, the Security Deposit shall be deemed to be the option monies paid in respect of the Option.

(ii) In the event that the [plaintiff] exercises the Option, the [plaintiff] shall pay to the [defendant] the further sum of Singapore Dollars Sixty Five Thousand only (**S$65,000.00**) to be held as the security deposit under Clause 2(a) until completion of the sale and purchase under the Option for the balance of the Term. The New Security Deposit shall be paid by 29 August 2011 ...

(iii) In the event that the [plaintiff] does not exercise the Option within the period specified the [defendant] shall be entitled to forfeit the Security Deposit paid under Clause 2(a) herein deemed to be the option moneys forfeited, and the [plaintiff] shall pay to the [defendant] the further sum of Singapore Dollars Sixty Five Thousand only (**S$65,000.00**) to be held as the security deposit (the "**New Security Deposit**") for the balance of the Term.

[emphasis in original]

The Option to Purchase

5 The Option to Purchase referred to in cl 4(l)(i) above ("the Option") was granted to the plaintiff on 22 September 2010 and was for the purchase of the leases over No 36 and No 6. The recital of the Option stated that in consideration of the payment by the plaintiff to the defendant of the sum of $130,000 as security deposit ("the Security Deposit") under the Tenancy Agreement, the plaintiff was granted an option to purchase both No 36 and No 6. The Option may be exercised between 15 August 2011 and 29 August 2011 by the plaintiff signing and delivering the acceptance copy to the defendant, and upon payment of $10. Clause 2 of the Option provided that the sale price for No 36 and No 6 was $10,350,000.

The acquisition

6 On 11 January 2011, seven months before the Option was open for exercise, the Government served a notice of compulsory acquisition ("the Acquisition Notice") in respect of No 36. The plaintiff's counsel gave notice to the defendant's counsel that it would *not* be exercising its right to rescind under cl 22(b) of the Option, which provides as follows:

> 22. Notwithstanding the other provisions in this Agreement, the sale and purchase is conditional upon the following:
>
> ...
>
> (b) *there being no acquisition declaration or notice of any public scheme or of any intended or contemplated acquisition by the government* … and/or encroachment affecting the Property in whole or in part at any time on or before the Completion Date;
>
> ...
>
> and on the happening of any one of the said events, the Purchaser shall be entitled *at the Purchaser's option* to rescind the Agreement by notice to the Vendor or the Vendor's solicitors ...
>
> [emphasis added]

7 The plaintiff proceeded to exercise the Option on 15 August 2011 in accordance with the terms of the Option. However the defendant took the position that the Option was frustrated by the Acquisition Notice and therefore the plaintiff no longer had a valid option to purchase the Properties. The plaintiff disagreed and took out this Originating Summons for the court to determine the rights of the parties. I should state that on 21 October 2011, the collector of land revenue issued an award for the compulsory acquisition of No 36 in the sum of $1.98 million to JTC as lessee, $9.3 million to the defendant as sub-lessee and $268,950 to the plaintiff as caveator. The award of $9.3 million eclipsed the value of $6.5 million ascribed to No 36 by the parties, which explained their keenness over it.

Whether the Option was frustrated

8 Before me, the defendant argued that the Option was frustrated the compulsory acquisition. To support its position, the defendant cited the decision of the Court of Appeal in *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman* [1994] 1 SLR(R) 233 ("*Lim Kim Som*").

9 In my view, *Lim Kim Som* can be distinguished from the present case on its facts because the option in that case did not contain a provision similar to cl 22 in the present case. The Option had contemplated the situation where the property was compulsorily acquired and therefore cannot be frustrated by such occurrence. Furthermore, on a plain reading of cl 22, it is clear that only the

purchaser, *ie* the plaintiff, had the right to rescind the Option when any of the stated events occurred and there is no provision giving the defendant the right to rescind.

10 I therefore made an order in terms of prayers 2 and 3 of the plaintiff's Originating Summons which state as follows:

> 2. A declaration that the Land Acquisition Notice dated 11 January 2011 made on [No 36] does not have the effect of frustrating [the Option].
>
> 3. Accordingly a declaration that the exercise of the Option by the Plaintiff on 15 August 2011 is valid and binding on the Defendant.

Whether the Option over the Properties collectively was severable

11 The defendant's second argument before me was that since the condition in cl 10(a)(i) of the Option was not satisfied, the defendant had the right to rescind the Option under cl 10(h). Clause 10 provided as follows:

> 10. (a) The sale and purchase shall be subject to the following:-
>
> (i) the Purchaser obtaining the JTC Approval;
>
> (ii) such terms and conditions as JTC may impose from time to time at its absolute discretion
>
> **(hereinafter collectively referred to as the "Requisite Approvals")**
>
> For the avoidance of doubt, the JTC Approval shall be deemed to have been granted on the date of the letter from JTC informing the Vendor of the JTC's approval/consent to the sale and purchase of the Property or the assignment of the JTC Head Lease to the Purchaser, whether or not the Requisite Approvals are given subject to the acceptance of the terms and conditions by the Vender and/or the Purchaser.
>
> ...
>
> (g) Each party agrees to render the other party full assistance and co-operation in any appeal by such other party for the Requisite Approvals or any of them.
>
> (h) In the event that the Requisite Approvals are not obtained by 30 November 2011 ... *for reasons beyond the control of the parties*, then either party shall be at liberty to rescind the Agreement by giving the other party written notice in that behalf and upon such notice being given, the Agreement shall be declared null and void, in which event the Deposit ... shall be refunded to the Purchaser ...
>
> [emphasis added]

12 It was not disputed that, after receiving the Acquisition Notice, the plaintiff's solicitors, Wong Alliance LLP ("WA") wrote to the defendant's solicitors, M/s KhattarWong ("KW") on 23 February 2011 to give it notice that the plaintiff intended to proceed with the sale and purchase of the Properties and exercise the Option notwithstanding the compulsory acquisition. The defendant replied through KW on 1 April 2011 stating that the Acquisition Notice had "frustrated" the Option. In view of my holding at [9] above, the defendant's position was incorrect. I would find that the defendant did not

have a right of rescission.

13 On 15 August 2011, WA sent a letter to KW enclosing a cashier's order for $10 in exercise of the Option. On 16 August 2011, KW replied to restate the defendant's position that the Option had been "frustrated" by the Acquisition Notice and returned the cashier's order. Once again, the parties joined issue on this in subsequent correspondence. By 26 August 2011, the defendant had discharged KW and started corresponded directly with WA; and when the parties could not resolve their differences, the plaintiff filed this Originating Summons on 30 November 2011.

14 After the plaintiff exercised the Option on 15 August 2011, it proceeded on the basis that the Option was validly exercised and consistently acted on that basis. The defendant initially proceeded on the basis that the Option was frustrated and it was no longer bound by it. However, on 26 August 2011, after KW had been discharged, the defendant, apparently acting without the benefit of legal advice, wrote to WA on a without prejudice basis, enclosing forms for submission to JTC in relation to the transfer of the Properties from the defendant to the plaintiff. On this basis, the plaintiff changed its stand and took the position that although JTC could no longer transfer No 36 due to the Acquisition Notice, it could nevertheless proceed with the application for the transfer of No 6.

15 However, on 3 October 2011, the defendant refunded to the plaintiff the $130,000 Security Deposit which, under the Preliminary Agreement and Option, had formed part of the purchase price of the Properties upon exercise of the Option. On 27 October 2011, the plaintiff wrote to the defendant, enclosing an application to JTC for the transfer of the lease for No 6 only for the defendant to transmit to JTC. The defendant replied on 5 November 2011 informing the plaintiff that the application it enclosed on 27 October 2011 was not in order. The defendant did so because WA wrote to the defendant on 3 November 2011 to point out that cl 10(h) of the Option, which provided that the right to rescind, in the event that the Requisite Approvals were not obtained by 30 November 2011, was subject to the proviso that such failure must be "for reasons beyond the control of the parties". WA reminded the defendant of its obligations under the Option to submit the application to JTC and reserved the plaintiff's position on the matter. On 21 November 2011, WA wrote to the defendant pointing out that it understood that JTC had still not received the application for transfer of the lease for No 6.

16 The 30 November 2011 date passed without the Requisite Approvals being obtained. On 27 January 2012, the defendant's newly appointed solicitors, Pinnacle Law LLC, wrote to WA to state that the defendant had rescinded the Option pursuant to cl 10. Presumably, the defendant was relying on cl 10(h), since there were no Requisite Approvals obtained by 30 November 2011.

17 I agreed with the plaintiff's submission that it had done all within its powers to obtain the Requisite Approvals. However, the defendant had not. Thus, I find that that the condition stated in cl 10(h), being "the failure to obtain the Requisite Approvals by 30 November 2011" must be for reasons "beyond control of the parties", was not satisfied. Accordingly, the defendant did not have the right to rescind the Option; and that the defendant's letter dated 27 January 2012 did not operate to rescind the Option.

18 However I declined to grant an order in terms of the plaintiff's prayers 4 and 5:

4 In respect of the property known as No 6 Tuas Avenue 20, Singapore 638820 ("No 6"):

(i) A declaration that the purchase price of No.6 is S$4.1 million;

(ii) A declaration that the sum of S$48,887.19 per month, paid by the Plaintiff to the

Defendant in the period of August 2010 to August 2011 (total sum of S$635,533.47), as well as the sum of S$130,000.00 previously paid by the Plaintiff to the Defendant as the security deposit under the Tenancy Agreement (therefore an aggregate amount of S$765,533.47) be applied towards the purchase price of S$4.1 million for No. 6;

(iii) Accordingly, a declaration that the balance amount payable (exclusive of GST) by the Plaintiff to the Defendant upon completion of the purchase of No. 6 is S$3,334,466.53; and

(iv) That the Defendant do proceed forthwith to submit to the Jurong Town Corporation the application for the Jurong Town Corporation's approval in respect of the Assignment/Transfer of Lease on No. 6 as well as to take all steps as necessary and required to execute a proper conveyance and to ensure the delivery of the title in No. 6 to the Plaintiff.

5 In respect of the property known as No. 36 Tuas West Road, Singapore 638384 ("No 36"):

(i) A declaration that the purchase price of No. 36 is S$6.25 million;

(ii) A declaration that the Plaintiff holds the beneficial interest in the award of S$9.3 million made in favour of the Defendant by the Collector of Land Revenue dated 21 October 2011 (the "Defendant's Award");

(iii) Accordingly, a declaration that the Plaintiff is entitled to be paid a sum representing the difference between the Defendant's Award and the purchase price of S$6.25 million for No. 36 (i.e. the sum of S$3.05 million); and

(iv) A declaration that the Plaintiff is entitled to be paid the sum of S$3.05 million directly out of the Defendant's Award.

19 The plaintiff argued that, having regard to the Preliminary Agreement and the prior negotiations between the parties, the Option in fact contains two options, one for the purchase of No 36 at $6.25 million and another for the purchase of No 6 at $4.1 million. Although the Preliminary Agreement of 12 June 2010 did separate the two properties, cl 8 thereof called for the preparation of a "formal Agreement" to be prepared by each side's solicitors "who shall advise each Party accordingly, and shall contain such necessary terms and conditions as may be reasonable to benefit each Party mutually". In the event, the parties' solicitors drew up the Option which was granted on 22 September 2010, the consideration for which was the security deposit of $130,000 under the Tenancy Agreement. The Option for purchase of No 36 and No 6 was for the sum of $10.35 million without ascribing an individual value to each property. Nothing in the language of the Option suggested that the purchase of the Properties could be severed.

20 Finally cl 26 of the Option provided as follows:

> The terms of this Option supersedes any previous representations, warranties, information, agreements or undertakings (if any) whether such be written or oral and the terms herein shall solely govern the parties [*sic*] rights respectively. Neither the Vendor nor its agents shall be bound by or liable for any alleged representation, promise, inducement or statement of intention not so set forth in this Option.

21 I therefore held that the Option did not contemplate that it could be severed in the manner set out in prayers 4 and 5.