Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd and Others [2007] SGHC 30

Case Number : Suit 324/2005, RA 353/2006, 372/2006

Decision Date : 05 March 2007

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Chua Sui Tong (Wong Partnership) for the plaintiff; John Morris (Drew & Napier LLC) for the defendant

Parties : Robertson Quay Investment Pte Ltd — Steen Consultants Pte Ltd; Goh Joon Yap; Shahbaz Ahmad

5 March 2007 Judgment reserved.

Choo Han Teck J:

1 The plaintiff in this action was the owner and developer of the building known as "The Gallery Hotel" ("the hotel"). The first defendant was the company that provided the civil and engineering services in the construction of the hotel. The second defendant was the person employed by the first defendant, known as "the official checker". The plaintiff subsequently discontinued the action against the second defendant. The third defendant was the engineer responsible for the drawings in respect of the structural drawings for the project. The drawings were done in 1996 but was found by the second defendant to be underdesigned, and thus were corrected and then submitted to the building authorities in 1997. Unfortunately, the building contractor was given the uncorrected 1996 version of the drawings and that resulted in some structural columns being under built and rectification was thus necessary. The remedial work resulted in a delay of 101 days, from 1 September 1999 to 10 December 1999 ("the period of delay").

2 The plaintiff sued the defendants in this action in July 2005. The first and third defendants admitted liability and interlocutory judgment was entered against them with damages to be assessed. Damages for the costs of the remedial work had already been paid. The defendants were, however, dissatisfied with the following items of assessment by the assistant registrar –

i. Management fees and remuneration for executive directors of the plaintiff - $49,612.77

ii. Consultant charges - $19,935.48

iii. Management staff salaries - $88,141.37

iv. Interest on loans from shareholders and other related parties - $279,363.82

v. Interest on bank loans and overdraft facilities - $215,859.84

vi. Loss of rental income for adjoining units - $46,516.13

3 Interest was also awarded at the rate of 6% from the date of the writ to the date of payment. The plaintiff cross-appealed on the loss of rental income claimed at $276,882, which claim was dismissed by the assistant registrar. Mr Chua, counsel for the plaintiff, informed the court at the hearing of the appeals that the plaintiff would proceed with its cross-appeal only in the event that

the defendants succeeded in its appeal.

4 The two main items of the defendants' appeal are related, namely, items (iv) and (v) and so I shall consider them last. Mr Morris, counsel for the defendants, informed me at the hearing of these appeals that item (ii) had been resolved. I shall first consider item (i) of the defendants' appeal concerning the amount of $49,612.77 awarded for the loss in terms of management fees and remuneration for the executive directors of the plaintiff. These were the fees paid to a company called "Assobuild Realty Pte Ltd" and the plaintiff's executive directors. The plaintiff had agreed to pay this company and its executive directors to supervise and manage the construction of the project. So far as the evidence showed, there was no challenge to this or the evidence of the plaintiff's managing director Mr Ngo Soo Hiong that the *pro rata* payment for the additional 101 days was excessive. Mr John submitted that the plaintiff had not proved its loss on this item. His main contention was that the plaintiff did not provide the detailed account of the fees payable. This was strictly a matter of fact upon which the assistant registrar below had found on the testimony of the witnesses. I see no clear error that warranted any interference with the findings below. The appeal on this item is accordingly dismissed.

5 As item (ii) was no longer in issue, I next consider item (iii) which was salary paid to management staff, which came to a total of $88,141.37. Mr John argued that this would be payment for the salary of the managing operator's staff and not that of the plaintiff. Mr Chua submitted that the evidence relating to this item was adduced through Mr Ngo and was not challenged. Paragraphs 36 to 38 of Mr Ngo's affidavit of evidence-in-chief deposed that commencement of the third party's (Gallery Hotel) management contract was delayed by the remedial work, and in the meantime the essential key staff that were employed had to be paid, and it was the plaintiff who paid them. Mr John referred to two short questions he posed to the witness in cross-examination. The questions established, vaguely, that the management staff were not the plaintiff's employees, a fact not disputed in any event, and that these staff members were not identified in the affidavit. It may be that those staff need not have been employed until after the remedial work was completed, but that was not established. On the whole, I think that the plaintiff's evidence was sufficient. That seemed to be the assistant registrar's conclusion too. I did not think that it was an unreasonable conclusion. Consequently, I am not prepared to disturb the finding by the assistant registrar below and the defendants' appeal on item (iii) is thus dismissed.

6 Item (vi) was a claim for the loss of rental income from September to December 1999, the period of delay, amounting to $46,516.13. Mr John argued that the evidence of loss was inadequately proved. Mr Chua submitted that the plaintiff's evidence of the prospective tenant's (Tan Nguang Heng) letter of 23 July 1999 was produced and that was sufficient to establish that there was a loss of that income when the completion of the building was delayed. Counsel submitted that the letter was only a letter of intent and not a lease. I agree with Mr Chua that the letter required the plaintiff to send a reply in acceptance, and once sent, there would have been a binding agreement. Mr Chua submitted that the plaintiff was unable to accept the terms because the building could not be let out from October as envisaged because of the impending delay. Thus, the question was whether this loss was sufficiently proved. As it stood, Mr Ngo had deposed that the plaintiff was unable to accept the tenant's offer and thus did not send the letter of acceptance. I do not think that the plaintiff therefore had to prove that the prospective tenant had changed its mind. That would be a matter for the defendants to show. The evidential burden fell on it. Accordingly, the defendants' appeal on this item is also dismissed.

7 I now consider items (iv) and (v) of the appeal. These two items were claims for loss by reason of interest payments that the plaintiff had to make on shareholder loans and bank loans respectively. Ostensibly calculated to cover the period of delay, these payments were a little more complicated,

but once the concept was properly explained the issue was not as troublesome as it might have been argued below. Essentially, the plaintiff had borrowed money from the two sources to finance the construction of the hotel. The cost of financing, as Mr John submitted, was something that had been planned from the beginning and was thus unrelated to the damage caused by the defendants. It was analogous, he submitted, to a plaintiff car owner making a claim from a tortfeasor for the payment of hire purchase on account of damage to the car by the tortfeasor. Such a claim was unsustainable because the cost of the hire purchase had to be paid by the plaintiff in any event. Mr Chua, however, argued that the situation here was different because the financing costs had to be "capitalised, and had to form part of the construction costs". While this might be an accounting procedure, it would mean that it was a factor that had to be taken into account should the plaintiff sell the building subsequently, hence, theoretically, actualising a lower capital gain.

8 At this point, it should be noted that the accounting procedure was not in issue, nor were the calculations of the capitalised sums. The question was whether capitalising the interest payments in this manner entitled the plaintiff to claim it as a loss within the meaning of loss contemplated in *Hadley v Baxendale* [1854] 9 Ex 341. I accept that the analogy of the hire purchase payment is an attractive illustration. The problem with analogies is that they are often not the same as the thing or situation they are being compared with. But, in this case, it is clear that the capitalisation of interest, through an accounting procedure, does not change its nature from interest to capital. To succeed, the plaintiff had to show actual loss because I think that the loss contemplated in *Hadley v Baxendale* could only be an actual loss (which might include imminent loss) and not a notional loss. Since a loss of profit in the event that the hotel was sold in the future would be a future loss, clear evidence would be required to prove such loss. Since that was not possible, there was no loss on this head to be recovered.

9 Conventionally, if a property owner does not wish to sell his property, he would hope to profit by letting out his property. The capitalised interest payments would thus have been expected to be recovered through rentals received, but that is a question of fact, depending on whether the property was indeed let out. If it was, the compensation would be the lost rental. Hence, the real question was whether the plaintiff had proven that it was reasonably foreseeable that the hotel would be rented out (as opposed to operating the hotel itself, or selling it). The assistant registrar dismissed the plaintiff's claim for loss of rental (hence the cross-appeal) on the ground that this alleged loss did not flow directly from the defendants' breach and that the plaintiff failed to prove that it was within the reasonable contemplation of the parties at the time of the contract that the hotel would be rented out. The evidence found by the assistant registrar was that the plaintiff's initial intention was to sell the hotel, and until a buyer was found, it would operate the hotel itself. This intention was known by the defendants. I accept these findings from the court below. Consequently, the defendants' appeal on items (iv) and (v) succeeds, and the plaintiff's cross-appeal fails and is dismissed. The orders below relating to items (iv) and (v) are varied accordingly.

10 Finally, in respect of the award of interest at 6 %, interest was awarded by the assistant registrar from the date of the writ to the date of payment. The writ was issued on 10 May 2005, but it was not served until 19 September 2005 by reason of amendments having to be made to it. I am of the view that the defendants, who were not responsible for the delay in service of the writ, would thus be ordered to pay the interests only from 19 September 2005.

11 I shall hear arguments on costs of these appeals at a later date if parties are unable to agree on costs.