Portcullis Escrow Pte Ltd *v* Astrata (Singapore) Pte Ltd and another [2010] SGHC 302

Case Number : Originating Summons No 690 of 2010 (Summons No 4174 of 2010)

Decision Date : 12 October 2010

Tribunal/Court : High Court

Coram : Philip Pillai J

Counsel Name(s) : Ang Siok Hoon (Rajah & Tann LLP) for the plaintiff; Andy Leck (Wong & Leow LLC) for the first defendant; Jaikanth Shankar (Drew & Napier LLC) for the second defendant.

Parties : Portcullis Escrow Pte Ltd — Astrata (Singapore) Pte Ltd and another

Civil Procedure – Leave to Appeal

12 October 2010 Judgment reserved.

Philip Pillai J:

1 This is an application by the first defendant ("Astrata") for leave to appeal under s 34(2) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA") against the judgment in Originating Summons No 690 of 2010 ("OS 690") of 26 August 2010 declaring that:

> (a) The conditions set out in the Escrow Agreement dated 23 October 2007 (in particular, clauses 7(i)(c) and 7(ii)(b)) have been satisfied and the second defendant ("Tridex") is entitled to demand the release of:
>
> (i) the Comprehensive Source Code underlying the system supplied to Tridex; and
>
> (ii) the Comprehensive Engineering Diagrams as defined in the Escrow Agreement (collectively, "the Escrow Documents").
>
> (b) The Plaintiff ("the Escrow Agent") is entitled to recover its costs of its application from the defendants to be agreed or taxed ("the Declaration").

2 The grounds for this application for leave to appeal upon which Astrata relies are as stated in *Lee Kuan Yew v Tang Liang Hong and another* [1997] 2 SLR(R) 862 at [16]: (a) *prima facie* case of error; (b) a question of general principle decided for the first time; and (c) a question of importance upon which further argument and a decision of a higher tribunal would be to the public advantage. The three grounds in *Lee Kuan Yew v Tang Liang Hong* were affirmed by the Court of Appeal in *Virtual Map (Singapore) Pte Ltd v Singapore Land Authority and another application* [2009] 2 SLR(R) 558 at [32].

3 The three parties had under a consent order agreed that, notwithstanding the Declaration, Tridex would not demand or call for the release of the Escrow Documents and the Escrow Agent would not release the same pending the final disposal of the related judgments under appeal. The upshot of this consent order is that there would be no risk of the release of the Escrow Documents until after the final disposal of these appeals by the Court of Appeal. Astrata's counsel explained the objective of this particular leave application as being to protect Astrata's interests in the event those

appeals were unsuccessful. In the event those appeals were successful, an injunction would be in place and/or the related litigation would be stayed pending arbitration.

4 The pivotal question resulting in the Declaration turned on the construction under Singapore law, of a standard form precedent contractual clause, and in particular the word "reconstruction" in a trilateral Escrow Agreement which operated as a trigger event to entitle the customer to obtain delivery of the Escrow Documents from the Escrow Agent. Astrata's written submission at para 12 sets out seven arguments which it submits reveal *prima facie* cases of errors by the Court in granting the Declaration. Apart from reciting these seven arguments, all of which were fully raised, argued and considered by the Court, Astrata has furnished no arguments before me as to why any of these arguments disclosed any *prima facie* case of error. Astrata explained that it had merely recited the arguments in this leave application before me, in order to preserve their ability to persuade the Court of Appeal that these reveal *prima facie* case(s) of error, should I not grant them leave to appeal.

5 I turn to the next ground of "a question of general principle decided for the first time". Astrata argues that the critical clauses 7(i)(c) and 7(ii)(b) of the Escrow Agreement are commonly used standard form precedents. Astrata argues that they have found no reported cases in Singapore, Malaysia, England, Australia and Canada on the meaning of "reconstruction" within such escrow agreements. Accordingly, it argues that this is a question of general principle decided for the first time. They argue that the tax and stamp duty cases referred to in the original decision are not analogous to this particular Escrow Agreement where the identity of the shareholders in the reconstructed companies, it says, is less significant especially when Astrata Group, Inc ("AGI") was formerly a publicly listed company. Astrata insists that in the Supply Agreement between Astrata and Tridex (which is not before me, as the parties thereto have agreed is to be governed by English law and disputes thereunder to be resolved by arbitration) it may not matter to this customer (*ie* Tridex) whether or not private equity investors of the supplier (*ie* Astrata) have changed. Even if the clause has been triggered by AGI's Chapter 11, were Tridex not to be concerned about a change of shareholders, commercially, Tridex is at liberty to waive its rights under the Escrow Agreement by notice to all parties. The fact that Tridex has invoked but not enforced its Escrow rights is a contraindication that the change of controlling shareholders of the counterparty, on the contrary, does matter to Tridex. The crucial question in these proceedings has turned on a construction under Singapore law of the meaning and scope of "reconstruction". Whilst indeed many of the cases on the meaning and scope of "reconstruction" cited were tax and stamp duty cases, the case of *In re South African Supply and Cold Storage Company* [1904] 2 Ch 268 which was cited and referred to in the original Declaration decision (at [33]), turned on the common law meaning and scope of "reconstruction" in a contractual context. The meaning and scope of "reconstruction" has been long determined at common law for about a century and consistently applied in Singapore. There are no conflicting judicial authorities on the Singapore and common law meaning and scope of "reconstruction". Standard form precedent or model provisions which adopt expressions like "reconstruction" as trigger events leading to prescribed outcomes, are designed and used in light of the established common law and cases which have defined its meaning and scope. This provides commercial clarity, certainty and allocates risk as agreed by all parties, particularly in escrow agreements in which precision and clarity are commercially vital. In these premises, I can find no principle of law that was being decided for the first time in the original Declaration decision.

6 I turn to the final ground that "this is a question of importance upon which further argument and a decision of a higher tribunal would be to the public advantage". The same arguments raised in [5] above pertain equally in support of this ground as indeed the settled meaning and scope of "reconstruction" under the case law is of standard market usage. Astrata further argues that the question whether or not "reconstruction" in an escrow agreement should be construed as requiring substantially the same shareholders would be one upon which further argument and a decision of a

higher tribunal would be to the public advantage. It seems clear that the question of importance is to be determined not merely by the importance one party may place on the question but rather upon whether objectively the question has such importance that a higher tribunal's decision on this question would be to the public advantage. It was submitted without elaboration that it would be to the public advantage if further argument and a decision of a higher tribunal could be received upon this question. It would be too far to suggest that every time a word is used in a particular contract, and its meaning, scope and application to the particular facts at hand render it to be of such importance to one party, that that would *ipso facto*, render it to be to the public advantage for further argument and a decision of a higher tribunal to be secured. I do not think that whether or not the turn of events resulting in AGI's Chapter 11 was within Astrata's subjective intention as being within the meaning of "reconstruction" in clauses 7(i)(c) and 7(ii)(b) of the Escrow Agreement is a question of such importance that further argument and a decision of a higher tribunal would be to the public advantage.

7 For completeness I will deal with two remaining submissions raised by Astrata to support its application for leave. First, it was suggested by Astrata, in reliance of passing comments at [23] by Kan Ting Chiu J in *Essar Steel Ltd v Bayerische Landesbank and others* [2004] 3 SLR(R) 25, that the value of the transaction could be an independent ground for leave to appeal. No compelling authorities were cited in support of this comment. Second, Astrata pointed out that should the Escrow Documents be released to Tridex, it would lose all practical hope for continuing the performance of its bilateral Supply Agreement with Tridex. Astrata observed that there was little value in the arbitration proceedings it had commenced against Tridex under the Supply Agreement because Tridex is a $2 company and further that if the Escrow Documents are released and copied, irreparable damage may be done. All these are business risk matters which were known to all parties when the Escrow Agreement between Astrata, Tridex and the Escrow agent was negotiated and the business risks were contractually allocated. It is undoubted that the risk that has materialised through AGI's Chapter 11 turned out to be highly commercially hazardous for Astrata. The nexus, however, between this materialised commercial hazard and the legal grounds for leave to appeal remains elusive.

8 Leave to appeal the Declaration in OS 690 not granted.