Tan Jin Sin and Another v Lim Quee Choo
[2009] SGCA 12

Case Number : CA 90/2008, Suit 401/2007

Decision Date : 06 March 2009

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA

Counsel Name(s) : C R Rajah SC (instructed) and Suppiah Thangaveloo (Thango & Co) for the appellants; Johnny Cheo Chai Beng (Cheo Yeoh & Associates LLC) for the respondent

Parties : Tan Jin Sin; Lim Lee Chin — Lim Quee Choo

Contract – Breach – Construction of contracts – Whether clauses were dependent or independent obligations

6 March 2009

Andrew Phang Boon Leong JA (delivering the grounds of decision of the court):

1 This was an appeal against the decision of the High Court in Suit No 401 of 2007 (see *Lim Quee Choo v Tan Jin Sin* [2008] SGHC 133 ("the GD")). We allowed the appeal and now give the detailed grounds for our decision.

The Agreement and the Undertaking

2 The respondent, together with Wong Peng Luan ("Wong"), are the co-administrators of the estate of the respondent's husband.

3 On 23 March 2004, the respondent and Wong obtained judgment for the sum of $3,381,656 and $12,000 in costs against Tan Wah Leng and Thian Kim Hoe ("the judgment debtors"). At that time, the judgment debtors were directors of Dauphin Offshore Engineering & Trading Pte Ltd ("Dauphin") and were the registered owners of 8.5 million shares out of the total issued and paid-up capital of 10 million shares in Dauphin. The remaining 1.5 million Dauphin shares were held by the appellants. The first appellant is the brother of Tan Wah Leng; the second appellant is the first appellant's wife.

4 The respondent and Wong commenced execution proceedings to seize the 8.5 million shares in Dauphin by way of Writs of Seizure and Sale ("WSS") Nos 58 and 61 of 2004. The sheriff seized the 8.5 million shares and the next step in the execution proceedings would have been to place an advertisement in the newspapers to elicit offers from the public for those shares. Before this was done, the judgment debtors requested for some more time to fully satisfy the judgment debt.

5 On 24 February 2005, the respondent, Wong, the judgment debtors, and the appellants entered into an agreement ("the Agreement"). As this appeal hinges on the proper construction of the Agreement, the document is set out in full, as follows:

AGREEMENT MADE THIS 24TH DAY OF FEBRUARY 2005

Between

LIM QUEE CHOO/WONG PENG LUAN ("the Plaintiffs") on the first part.

And

TAN WAH LENG/THIAN KIM HOE ("the Defendants") on the second part.

And

TAN JIN SIN/LIM LEE CHIN ("the Third Parties") on the third part.

WHEREAS

A. The Plaintiffs have obtained Judgment against the Defendants in Suit No 232 of 2004/X in the High Court of Singapore.

B. The Plaintiffs have commenced enforcement action in Writ of Seizure and Sale Nos. 58 and 61/2004/R in respect of 8,500,000 shares in Dauphin Offshore Engineering & Trading Pte Ltd held by the Defendants.

C. The Plaintiffs are prepared, at the Defendants' request, to withhold enforcement in Writ of Seizure and Sale Nos. 58 and 61/2004/R in accordance with the terms and conditions in this Agreement.

IN CONSIDERATION OF THE MUTUAL COVENANTS HEREIN, IT IS HEREBY AGREED THAT:

1. Subject to clause 2 below, the Plaintiffs shall withhold further enforcement action in Writ of Seizure and Sale Nos. 58 and 61/2004/R and shall not take steps to advertise in any way the sale of the 8,500,000 shares in Dauphin Offshore Engineering & Trading Pte Ltd held by the Defendants.

2. The Defendants shall fully satisfy the Plaintiffs' Judgment in Suit No 232 of 2004/X by 19 April 2005, failing which the Plaintiffs may continue with their enforcement action in Writ of Seizure and Sale Nos. 58 and 61/2004/R.

3. The Third Parties hereby irrevocably agree to transfer all their 1,500,000 shares in Dauphin Offshore Engineering & Trading Pte Ltd to Lim Quee Choo for consideration of S$1.00 in the event the Defendants shall fail to comply with Clause 2 above and fully satisfy the Plaintiffs' said Judgment. Pursuant to this Clause 3, the Third Parties shall forthwith execute transfer forms in favour of Lim Quee Choo.

4. The Defendants shall also pay the sum of S$15,200.00 being costs awarded by the Courts so far, that remain unpaid on or before 24 March 2005. The Defendants shall also make an interim payment of S$25,000.00 by 2 March 2005.

5. This Agreement is confidential and all parties hereby undertake, in good faith, to maintain the strictest confidence.

[Signatures and witnesses omitted]

6 Also on 24 February 2005 (*ie*, the same day that the Agreement was made), the appellants entered into the following undertaking ("the Undertaking"):

To: LIM QUEE CHOO

UNDERTAKING

We, TAN JIN SIN and LIM LEE CHIN hereby irrevocably undertake and acknowledge that we agree to transfer all our 1,500,000 shares in Dauphin Offshore Engineering & Trading Pte Ltd to Lim Quee Choo or nominee for a total nominal consideration of S$1.00 in the event Tan Wah Leng / Thian Kim Hoe shall fail to abide by the Agreement dated 24 February 2005 between Lim Quee Choo / Wong Peng Luan on the first part and Tan Wah Leng / Thian Kim Hoe on the second part and us collectively on the third part.

This is in consideration of Lim Quee Choo / Wong Peng Luan forbearing to proceed with the execution proceedings as set out in the said Agreement.

Pursuant to this Undertaking, we enclose herewith our signed transfer forms in your favour.

We also undertake to sign all documents, pass all resolutions and do all things necessary to effect the transfers.

Dated this 24th day of February 2005.

Signed: (Tan Jin Sin) Witness: Raymond Ong (Advocate & Solicitor)

(Lim Lee Chin)

We, Tan Jin Sin and Lim Lee Chin acknowledge receipt of S$2/-

Signed: (Tan Jin Sin)/(Lim Lee Chin)

The events after the Agreement and the Undertaking had been made

7 On 2 March 2005, the judgment debtors duly made the interim payment of $25,000 (see cl 4 of the Agreement). On 17 March 2005, the respondent's lawyers wrote to the judgment debtors' lawyers concerning the other interim payment of $15,200 that was due on 24 March 2005 (see also cl 4 of the Agreement). The respondent's lawyers sent three further written reminders on 24 March, 30 March and 5 April 2005 (see the GD at [6(j)]). The last letter in this series of letters stated that if the $15,200 was not received by 2.00pm that day (*viz*, 5 April 2005), the sheriff would be informed to proceed with the advertisement for the sale of the shares immediately.

8 On 6 April 2005, the judgment debtors proposed a partial payment scheme, as follows: $5,000 would be paid by 7 April 2005; and a further $5,000 would be paid by 8 April 2005. The respondent agreed with the proposed scheme but stated that the judgment debtors had breached the terms of the "settlement" and that if the judgment debtors failed to pay as promised by 8 April 2005, the advertisement for the sale of the shares would be proceeded with immediately (see the GD at [6(l)]).

9 7 April 2005 came and went without any payment of the first $5,000 and a reminder was sent to the judgment debtors' lawyers. 8 April 2005 also came and went without any payment of the second $5,000. On the same day, the respondent's lawyers wrote to the sheriff to proceed with the advertisement. On 11 April 2005, the sheriff wrote to Singapore Press Holdings to publish the "Sheriff's Notice of Sale" for WSS Nos 58 and 61 of 2004 on 13 April 2005.

10 However, on 11 April 2005, a creditor of Dauphin presented a winding-up petition against Dauphin. The respondent's lawyers instructed the sheriff to proceed with the advertisement unless there was a court order to stay such an action, but the sheriff replied that the advertisement would be made only after the conclusion of the winding-up petition to avoid any complications. In the result, the sheriff did not proceed with the advertisement and no advertisement was actually published in the newspapers (see the GD at [6(s)]).

11 When the date came for payment of the judgment debt (of $3,381,656 and $12,000 costs) on 19 April 2005 (see cl 2 of the Agreement), the judgment debtors did not make any payment; the interim payment of $15,200 (pursuant to cl 4 of the Agreement) was also never paid (see the GD at [6(t)]).

The decision below

12 The trial judge ("the Judge") first held that the case could be decided on the following point alone (see the GD at [7]–[9]):

> 7(b) … A reasonable person interpreting clause 1 would not have expected clause 1 to be breached if only mere preparations were made but no advertisement was actually published. In other words, to a reasonable person in the position of the addressee, the normal understanding would be that *so long as the addressee did not in fact publish any advertisement, no breach of clause 1 would have occurred and it would have been irrelevant whatever preparatory steps might have been taken* with a view to publication.
>
> …
>
> 8 It was not disputed that no advertisement of the WSS was published. No enforcement action was in fact carried out under the WSS apart from the mere preparatory steps to advertise. There was no discernible loss which could be established… I could therefore see no prejudice to the judgment debtors and [the appellants]… *The mischief sought to be prevented by the prohibition in the agreement was to keep confidential the sale of the 8.5 million shares that had been seized by the sheriff.* But where no publication had taken place, the purpose or intention behind the prohibition had not been violated.
>
> 9 Accordingly, this case could simply be decided on this point alone…
>
> [emphasis added]

13 The Judge then proceeded to consider alternative rulings should his conclusion that the Agreement had not been breached be incorrect. They can effectively be distilled as follows:

> (a) The respondent's obligation to forbear (under cl 1 of the Agreement), the judgment debtors' obligation to satisfy the judgment debt by 19 April 2005 (under cl 2 of the Agreement) and the second paragraph of the Undertaking were not condition precedents to the formation of the Agreement and the Undertaking "as that would not accord with the intentions of the contracting parties and would not accord with commercial sense" (see the GD at [16]–[21]).
>
> (b) The performance of cl 3 of the Agreement (*ie*, the obligation to transfer the 1.5 million shares) did not depend on the performance of cl 1 of the Agreement (*ie*, the obligation to forbear). The obligation to transfer the 1.5 million shares arose upon the judgment debtors' failure to make the interim payments due under cl 4 of the Agreement. Moreover, if cll 1 and 2 of the

Agreement were read together with the second paragraph of the Undertaking, no additional condition precedent to the first paragraph of the Undertaking was created apart from the fact that the appellants had irrevocably undertaken to transfer all their shares to the respondent if the judgment debtors "shall fail to abide by the Agreement". Accordingly, when the judgment debtors failed to abide by cl 4 of the Agreement, the respondent was entitled to call on the appellants to transfer the 1.5 million shares without waiting till 19 April 2005 (see the GD at [22]–[45]).

(c) No term requiring forbearance until 19 April 2005 as a condition for the appellants' obligations to transfer the shares to the respondent should be implied as it was not necessary or reasonable under the circumstances to do so. The breach of cl 1 of the Agreement was never precipitated by the respondent or the co-administrator (see the GD at [46]–[50]).

(d) The respondent had not committed a repudiatory breach of the Agreement; even if there was a breach of cl 1 of the Agreement, it was at most a non-material and technical breach since no advertisement was in fact published and neither the appellants nor the judgment debtors suffered any real damage or appreciable loss (see the GD at [51]–[57]).

The issues

14 The arguments raised on appeal before us could be reduced (in substance) to one fundamental question: What was *the bargain* between the appellants and the respondent under both the Agreement as well as the Undertaking? In order to answer this pivotal question, two issues arose in argument before us.

15 The *first* was whether or not the prohibition in cl 1 of the Agreement was (as the appellants argued) inextricably connected to cll 2 and 3 of the same *or* (as the respondent argued) was, instead, independent of the clauses just mentioned. If the former was the correct construction, this did not, *ipso facto*, conclude the appeal in favour of the appellants. The appellants would then need to demonstrate that there had in fact been a breach of cl 1 by the respondent which entitled them (the appellants) to treat their obligation pursuant to cl 3 as having ceased.

16 If, on the other hand, the respondent's construction was correct, that would conclude the appeal in her favour simply because even a breach of cl 1 by the respondent would be of no legal moment as cll 1 and 2 were independent of each other. That being the case, as the judgment debtors had not fully satisfied the respondent's judgment against them by the appointed date (*viz*, 19 April 2005) pursuant to their obligation under cl 2, the appellants were thereby liable (pursuant to cl 3) to transfer, forthwith, all their shares to the respondent.

17 Expressed in legal terms, this first issue centred on whether or not the clauses concerned were "dependent" or "independent" obligations. As Sir Kim Lewison aptly points out (see *The Interpretation of Contracts* (Sweet & Maxwell, 4th Ed, 2007) at para 15.15):

> Which species of obligation has been created is *a question of construction, but if the obligation constitutes the whole or a substantial part of the consideration for the contract, the court is likely to construe it as a dependent obligation*. [emphasis added]

We pause to note, parenthetically, that the contiguous concept of *divisible* obligations – whilst only broadly applicable to the case at hand – has been recognised by our courts (see, in particular, the Singapore High Court decision of *Tong Aik (Far East) Ltd v Eastern Minerals & Trading (1959) Ltd* [1963] MLJ 322).

18 The *second* issue arose as a result of the fact that – leaving aside cl 1 of the Agreement for the moment – there had clearly been a breach of *cl 4* of the same (as the judgment debtors had not paid the costs as undertaken in that particular clause). The issue that then arose was this: Could the respondent mount an alternative argument pursuant to the Undertaking given by the appellants inasmuch as they (the appellants) had "[failed] to abide *by the Agreement*" between the parties and were therefore liable to transfer all their shares to the respondent? In this regard, the respondent argued that the Undertaking had *extended* the scope of the Agreement inasmuch as a breach of *cl 4* of the Agreement would now *also* require the appellants to transfer all their shares to the respondent.

19 Let us consider each of these issues *seriatim*.

Was clause 1 of the Agreement independent of (or related to) clauses 2 and 3 of the same?

20 After carefully considering the Agreement as set in its *context* (and see the decision of this court in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029) as well as having regard to the principles set out above (at [17]), we arrived at the conclusion that cl 1 of the Agreement must be read together with (and *not* independent of) cll 2 and 3 of the same as this was, in both substance as well as form, the bargain entered into between the parties. In the circumstances, it was imperative to give effect to the legitimate expectations of the parties which arose from such a bargain (in this regard see the decision of this court in *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 3 SLR 405 at [40] as well as Lord Steyn, "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997) 113 LQR 433).

21 The bargain between the parties was simply this: Pursuant to cl 3 of the Agreement, the appellants had promised to transfer all their shares to the respondent if the judgment debtors did not fulfil their obligation pursuant to cl 2 of the Agreement by fully satisfying the respondent's judgment against them by the stipulated date (*viz*, 19 April 2005). If the respondent's construction as set out above was to be preferred, then that would have been an end to the matter because the judgment debtors had not fulfilled their obligation pursuant to cl 2 of the Agreement, thus triggering (so the respondent argued) the appellants' obligation (pursuant to cl 3 of the Agreement) to transfer all their shares to the respondent.

22 However, at this juncture, it must be asked *why* the appellants were willing to be (in substance) *de facto* "guarantors" for the judgment debtors in the first instance? It was clear, in our view, that they were so willing to do so simply because they had desired to assist the judgment debtors by "buying" the latter more time to satisfy the respondent's judgment against them (the judgment debtors). If this is the case, then the *bargain* between the appellants and the respondent must surely (and *necessarily*) be related to *cl 1* as well, inasmuch as the respondent had promised to "withhold further enforcement action in WSS Nos 50 and 61/2004/R and shall not take steps to advertise in any way the sale of the 8,500,000 shares in Dauphin Offshore Engineering & Trading Ltd held by the Defendants [the judgment debtors]".

23 If, as the respondent argues, cl 1 was independent of cll 2 and 3, there would have been *no reason whatsoever* for the appellants to have entered into the Agreement in general and into the specific obligation contained in cl 3 thereof. Put simply, the appellants did so only because of the undertaking entered into by the respondent in relation to the specific (and correlative) obligation contained in cl 1 of the Agreement.

24 Be that as it may, as we have already noted above, this particular construction of cll 1, 2 and 3 of the Agreement does not conclude the appeal in favour of the appellants without more. The appellants must also demonstrate that the respondent was in breach of cl 1 of the Agreement, which

breach released them from their obligation to transfer all their shares to the respondent pursuant to cl 3 of the same.

25 It is, in our view, clear that the respondent was indeed in breach of cl 1 of the Agreement. Under cl 1, the respondent was under an obligation *not* to "*take steps to advertise* in *any way*" the sale of the judgment debtors' shares. In point of fact, the respondent had – on no fewer than *three* separate occasions – instructed the sheriff to publish the advertisement in relation to the sale of the judgment debtors' shares. The fact that the sheriff had declined to publish the advertisement (because of the pending winding-up petition taken out against Dauphin) is merely a fortuitous happenstance. The fundamental obligation embodied in cl 1 of the Agreement was whether the *respondent* had "[*taken*] *steps to advertise* in *any way*" the sale of the judgment debtors' shares. It was clear, in our view, that they *had* taken such steps; how many more steps would have separated the sheriff confirming with Singapore Press Holdings to publish the advertisement from the actual publication of the advertisement? On the facts presented, the respondent's repeated instructions to the sheriff to publish the advertisement represents, in our view, an irrefutable example of taking material and concrete steps towards advertising the sale.

26 However, as noted above, the respondent had a second legal string to its bow – to which our attention must now turn.

Did the Undertaking extend the scope of the Agreement?

27 The respondent's alternative argument was that even if her construction of the Agreement (specifically with regard to the independence of cl 1 from cll 2 and 3 thereof) was not accepted and that there had in fact been a breach of cl 1, the appellants were nevertheless obliged to transfer all their shares to her pursuant to a breach of *the terms of the Undertaking* (specifically, the obligation in the first paragraph thereof inasmuch as the appellants had, by breaching *cl 4* of the Agreement, thereby "[failed] to abide by the Agreement"). In other words, the respondent argued that the Undertaking had – by virtue of the words quoted in parentheses in the preceding sentence – *extended* the scope of the Agreement so that *any* breach of *any* of the clauses of the Agreement (*ie*, including *cl 4*) would result in the appellants having to transfer all their shares to the respondent.

28 Whilst this particular argument was ingenious, we could not, with respect, accept it. Once again, the *context* in which the Undertaking was entered into by the parties is of crucial significance. As the appellants correctly pointed out, the main focus of the Undertaking was to underscore the underlying rationale of the Agreement, which was (as we have pointed out above) to "buy time" for the judgment debtors in order to enable them to fully satisfy the respondent's judgment against them by the stipulated date (*viz*, 19 April 2005). The second paragraph of the Undertaking confirms that this is the case. Further, the phrase which the respondent relied upon ("shall fail to abide by the Agreement") is to be found in the first paragraph of the Undertaking. However, it appears to be phrased more by way of a recital than a substantive term as such.

29 In the circumstances, the Undertaking was, in our view, entered into *ex abundanti cautela* and was not intended (as the respondent argued and as the Judge in the court below accepted) to extend the scope of the Agreement (bearing in mind that the Agreement as well as the Undertaking were signed by the parties on the same day). In any event, it is, as we have just mentioned, imperative that we focus on what was the *raison d'être* of both the Agreement as well as the Undertaking which (it is important to reiterate) was to "buy time" for the judgment debtors in order to enable them to fully satisfy the respondent's judgment against them by 19 April 2005.

Conclusion

30 For the reasons set out above, we allowed the appeal with costs both here and below, and with the usual consequential orders to follow.