UDL Marine (Singapore) Pte Ltd *v* Jurong Town Corp
[2011] SGHC 45

Case Number : Originating Summons No 1133 of 2010/R

Decision Date : 28 February 2011

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Thio Shen Yi SC, Ang Wee Tiong and Olivia Low Pei Sze (TSMP Law Corporation) for the plaintiff; Dhillon Dinesh and Felicia Tan May Lian (Allen & Gledhill LLP) for the defendant; Sharon Lim (Attorney-General's Chambers).

Parties : UDL Marine (Singapore) Pte Ltd — Jurong Town Corp

Administrative Law – Judicial Review

28 February 2011

Lai Siu Chiu J:

Introduction

1 This case concerned an application for leave under Order 53 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules") by UDL Marine (Singapore) Pte Ltd ("the plaintiff") to apply for a quashing order and a mandatory order ("the application") against Jurong Town Corporation ("JTC"). The application arose out of JTC's refusal to renew the plaintiff's lease or to grant the plaintiff a fresh lease of the premises rented by the plaintiff at Benoi Road.

2 After hearing arguments from both parties and from the Attorney-General ("the AG"), I dismissed the application. The plaintiff has appealed against my dismissal (in Civil Appeal No. 238 of 2010) and I now set out the grounds for my decision.

Background

The parties

3 The plaintiff was the lessee of land located at 3 Benoi Road, Singapore 629877 ("the Premises"). The plaintiff used the Premises as a shipyard for its shipbuilding business.

4 JTC was the lessor of the Premises. JTC is a statutory board incorporated under the Jurong Town Corporation Act (Cap 150, 1998 Rev Ed) ("the JTC Act"). JTC held the Premises under a lease from the State ("the Head Lease").

The plaintiff's application to renew the Lease

5 The plaintiff's lease of the Premises ("the Lease") was due to expire on 31 December 2010. On 6 and 22 August 2008, the plaintiff applied to JTC to renew the Lease ("the Renewal Application").

6 In his affidavit filed in support of the application, Leung Yat Tung ("Leung"), the plaintiff's managing-director deposed that the Economic Development Board ("EDB") was involved in the

plaintiff's decision to make the Renewal Application. Leung stated that the plaintiff had initially intended to assign the Lease to a company known as Kim Hock Corporation Pte Ltd. Leung explained that the plaintiff decided to assign the Lease because it had heard from "market talk" and JTC's officers that JTC planned to redevelop waterfront sites, including the Premises, and that leases affected by such plans would not be renewed. Leung claimed that he was contacted by one Sidat Senanayake ("Senanayake"), an EDB officer, in late February 2005. Leung stated that Senanayake persuaded the plaintiff to call off its assignment of the Lease by representing, *inter alia*, that JTC had reconsidered its redevelopment plans. Senanayake eventually wrote to Leung on 26 May 2005 to inform him that JTC was agreeable to considering a conditional extension of the Lease, subject to EDB's support. Leung further detailed his interactions with EDB between February 2005 and November 2009 in his affidavit.

7 I should mention that JTC's consideration of the Renewal Application was delayed because of a waterfront study.

The alleged involvement of Keppel Singmarine Pte Ltd

8 Leung claimed that Hoe Eng Hock ("Hoe"), the executive director of Keppel Singmarine Ltd ("Keppel Singmarine"), approached him to propose that the plaintiff share the Premises with Keppel Singmarine. Leung asserted that Hoe told him that the Lease would not be renewed if the plaintiff did not agree to Hoe's proposal.

9 Hoe denied Leung's allegations in an affidavit filed in other proceedings between the plaintiff and JTC (see [18] below). Hoe claimed that he only offered to sublet a part of the Premises for a short period of approximately 12 months to ameliorate any space congestion that Keppel Singmarine might face.

JTC's rejection of the Renewal Application

10 JTC eventually informed the plaintiff, in a letter dated 20 November 2009, that it would not be renewing the Lease ("the First Rejection Letter").

11 The plaintiff wrote several letters to JTC and EDB between November 2009 and June 2010 even though JTC had indicated in the First Rejection Letter that its rejection of the Renewal Application was final.

12 On 19 May 2010, JTC wrote to the plaintiff to advise that EDB and JTC had jointly evaluated the plaintiff's business plans and had concluded that they were unable to support the Renewal Application ("the Second Rejection Letter").

The plaintiff's meeting with JTC and EDB on 16 June 2010

13 Following the Second Rejection Letter, the plaintiff wrote to the chairmen of JTC and EDB. JTC responded that both JTC and EDB would arrange to meet with the plaintiff to clarify their policies.

14 The plaintiff met with representatives of JTC and EDB on 16 June 2010, ("the 16 June 2010 Meeting"). Leung claimed that one Tang Wai Yee ("Tang"), a JTC officer, explained that waterfront land was scarce and so JTC had to allocate such land to companies with the best business plans. Leung also alleged that Tang informed him that JTC required a minimum amount of investment from companies applying for leases of waterfront land and that the plaintiff's proposed investment of $20.6m was too low.

The plaintiff's proposal to take over a lease of 17 Pandan Road

15 On 4 June 2010, the plaintiff wrote to JTC with a proposal that the plaintiff take over the current lease of land located at 17 Pandan Road ("the 17 Pandan Road Lease") if JTC agreed to extend the 17 Pandan Road Lease. JTC did not reply to this letter.

16 Leung deposed that he raised the plaintiff's request for a renewal of the 17 Pandan Road Lease at the 16 June 2010 Meeting. Leung claimed that Tang responded that it would "look funny" if JTC were to reject the Renewal Application but approve the plaintiff's application for the 17 Pandan Road Lease. Leung also claimed that when he asked Tang if the plaintiff had been "blackmarked [*sic*] permanently" by JTC, Tang responded that she could not answer Leung.

17 JTC filed an affidavit in response to Leung's claims regarding the 17 Pandan Road Lease. JTC's Deputy Director of the Aerospace, Marine and Cleantech Cluster, Loh Yew Pong ("Loh"), deposed that he was present at the 16 June 2010 Meeting but could not confirm if Leung's recounting of the comments made by Tang was verbatim. Loh explained nevertheless that those comments should be understood in context. The plaintiff did not submit any application for the 17 Pandan Road Lease. Loh explained that JTC was "rightfully curious" as to how the plaintiff's business plan in relation to the Lease, which was rejected by JTC, would impress JTC in relation to another plot of land. As for the response to the plaintiff's question on whether it was "blackmarked", Loh explained that Tang's response, if in fact it was given, was a prudent answer because the meaning of "blackmarked" was unclear.

Suit No 502 of 2010

18 On 21 July 2010, the plaintiff commenced proceedings against JTC in Suit No 502 of 2010 ("Suit 502"). The plaintiff claimed, *inter alia*, the following reliefs in Suit 502:

(a) a declaration that JTC's refusal to renew the Lease was and is wrongful;

(b) a declaration that JTC is estopped from refusing to renew the Lease or refusing to grant a new lease;

(c) an order that JTC renew the Lease or grant a new lease; and

(d) further, or in the alternative, that the plaintiff be awarded equitable compensation and/or damages to be assessed.

19 At the hearing before this court, counsel for JTC (Dhillon Dinesh) informed the court that Suit 502 had been fixed for an expedited hearing between 16 and 25 February 2011.

20 It would be useful to highlight an affidavit that Loh filed in Suit 502 in response to the plaintiff's application for an interlocutory injunction ("the LYP Injunction Affidavit"). Loh had stated in the LYP Injunction Affidavit that JTC required that applicants for waterfront land commit to investing at least $100m as fixed asset investment to ensure maximisation of land usage. As will be seen below, the plaintiff relied on this statement in the LYP Injunction Affidavit to explain to this court its delay in making the application and also as support for its substantive application for judicial review. I should add that Loh had explained in his affidavit filed in these proceedings that his statement in the LYP Injunction Affidavit was made in the context of an attempt on his part to explain the loss that JTC would suffer if an interlocutory injunction was granted. Loh explained that JTC would actually consider a "basket of factors" when assessing an application for a lease, and not just the applicant's proposed

fixed asset investment.

The amounts that the plaintiff's neighbours had committed to investing

21 According to Leung, the plaintiff discovered in early October 2010 that its neighbours had obtained a renewal of their leases even though they had committed to invest at values that were lower than the amount that the plaintiff proposed. Leung deposed that he discovered that Cosco Marine Engineering (S) Pte Ltd ("Cosco"), which was granted an extension of its lease for a period of 30 years, had committed to investing only $5m over three years without providing a detailed business plan for its future operations. Another neighbour, Asia-Pacific Shipyard Pte Ltd ("Asia-Pacific Shipyard"), which was granted an extension of its lease for a period of 20 years, had committed to investing only $6m over a period of five years without a specific business plan.

22 JTC responded to Leung's allegations by Loh's affidavit. Loh deposed that Leung's recounting of the details of the leases of Cosco and Asia-Pacific Shipyard in Leung's affidavit was incorrect and that he did not understand how Leung was in a position to judge their businesses or business plans since he was not privy to the two companies' submissions to JTC. Loh also stressed that Cosco and Asia-Pacific Shipyard had obtained leases of different plots of land and that JTC considered every application on its own merits.

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23 On 2 November 2010, the plaintiff filed the application praying, *inter alia*, for the following:

(a) leave to apply for a quashing order to remove into the High Court and quash JTC's decision to reject the Renewal Application and to refuse to grant a new lease of the Premises;

(b) leave to apply for a mandatory order to oblige JTC to reconsider the Renewal Application or the plaintiff's application for a grant of a new lease of the Premises; and

(c) an order that JTC's decision rejecting the Renewal Application or the plaintiff's application for a grant of a new lease of the Premises be stayed until the determination of the plaintiff's application for a quashing order and a mandatory order or until further order.

The parties' submissions

24 The plaintiff's arguments in support of the application were as follows:

(a) Under O 53, r 1(6) of the Rules, an application for leave to make an application for a quashing order must be made within three months after the date of the proceedings. The plaintiff was informed of JTC's decision not to renew the Lease on 19 May 2010 in the Second Rejection Letter. Therefore, the three month period prescribed in O 53, r 1(6) of the Rules would have expired on 18 August 2010.

(b) The plaintiff should not be denied leave because of the delay.

(c) JTC's decisions were susceptible to judicial review.

(d) The plaintiff had sufficient interest to apply for prerogative orders because it was the party directly affected by JTC's decision.

(e) The material before the court had met the threshold of a *prima facie* case of reasonable

suspicion. In particular, the plaintiff raised the following arguments:

(i) JTC exercised its discretionary power to lease waterfront land irrationally, unreasonably and/or in bad faith.

(ii) JTC breached the rules of natural justice and/or failed to give effect to the plaintiff's legitimate expectations.

(f) The plaintiff did not have alternative remedies.

(g) Finally, the plaintiff submitted that if the court granted leave, the court also had the power to order that JTC's decision to reject the Renewal Application be stayed.

25 JTC's arguments against the application were as follows:

(a) The plaintiff's explanation for the delay should not be accepted.

(b) JTC's decision to reject the Renewal Application was not justiciable.

(c) The plaintiff did not discharge its burden of establishing a *prima facie* case of reasonable suspicion of irrationality, illegality or breach of natural justice on the part of JTC.

The AG's submissions

26 Under O 53, r 1(3) of the Rules, an applicant for leave to apply for a mandatory order, prohibiting order or quashing order must serve the *ex parte* originating summons, the statement referred to in O 53, r 1(2) and the supporting affidavit on the AG. The AG would then have the right to attend and be heard at the hearing of the application (*Chan Hiang Leng Colin and others v Minister for Information and the Arts* [1995] 2 SLR(R) 627 at [4]-[5]; also see *Singapore Civil Procedure 2007* (G P Selvam chief ed) (Sweet & Maxwell Asia, 2007) ("*Singapore Civil Procedure 2007*") at para 53/8/26).

27 The AG intervened in the application and opposed it on the following grounds:

(a) The plaintiff's dispute with JTC was not a matter of public law. Only disputes concerning public law matters were susceptible to judicial review.

(b) The plaintiff's application for leave to apply for a quashing order was filed out of time and the application for leave to apply for a mandatory order was not made timeously. The plaintiff's reasons for its delay were unsatisfactory.

28 The AG also opposed the plaintiff's prayer for the court to stay JTC's rejection of the Renewal Application and refusal to grant a new lease until the determination of the substantive judicial review application. The AG argued that the plaintiff's prayer in that regard was unsustainable as regards its application for leave to apply for a mandatory order. This was because O 53, r 1(5) of the Rules which was the provision that gave the court the power to grant a stay, applied only to applications for leave to apply for a prohibiting order and a quashing order. In any case, JTC had already made its decision and so there were no "proceedings" to be stayed. I did not have to consider this argument because of the decision to dismiss the application.

The test for whether leave should be granted

29 A court faced with an application for leave under O 53, r 1 of the Rules is only required to consider whether the material before it reveals "a *prima facie* case of reasonable suspicion" that the applicant would obtain the remedies that he has sought ("the *Colin Chan* Test") (see *Chan Hiang Leng Colin v Minister for Information and the Arts* [1996] 1 SLR(R) 294 ("*Chan Hiang Leng Colin*") at [25] and *Public Service Commission v Lai Swee Lin Linda* [2001] 1 SLR(R) 133 at [21]-[22] ("*Linda Lai*") at [21]-[22]; also see *Singapore Civil Procedure 2007* at para 53/8/22).

30 I should point out that some recent decisions have gone further than the *Colin Chan* Test. In *Yong Vui Kong v Attorney-General* [2011] 1 SLR 1 ("*Yong Vui Kong*"), the court was willing to fully consider the application for judicial review on the merits while hearing the application for leave (*Yong Vui Kong* at [16]-[19]). A notable feature of *Yong Vui Kong* was that the court was not faced with any factual disputes. The court there was only concerned with pure questions of law that were fully canvassed (*Yong Vui Kong* at [16]). There the court found (at [17]) support for this approach in an observation made by the Court of Appeal in *Pang Chen Suan v Commissioner for Labour* [2008] 3 SLR(R) 648, at [56]:

> 56 We should like to add by way of guidance to judges who hear *ex parte* applications for leave for judicial review that the purpose of requiring leave is to enable the court to sieve out frivolous applications. A case such as the present which clearly raises issues which require more than a cursory examination of the merits should have been heard as a substantive application. There is no reason why an *ex parte* application such as Pang's could not have been heard *inter partes* and disposed of on the merits as a substantive application. As for this appeal, given our conclusions on the substantive issues in this case, we indicated to State Counsel that he should advise the Commissioner that Pang's claim for workmen's compensation should be processed immediately without the necessity of another court hearing, at which the Commissioner was bound to fail.

Belinda Ang J in *Chai Chwan v Singapore Medical Council* [2009] SGHC 115 ("*Chai Chwan*") also made observations on the approach to be taken at the leave stage. She commented on the difficulties of applying the *Colin Chan* Test if the court deciding on the leave application has had a contested hearing of the application (*Chai Chwan* at [31]).

31 My view was that it was not appropriate to adopt the approach in *Yong Vui Kong* for the application because of the presence of factual disputes. For example, in relation to the comments allegedly made at the 16 June 2010 Meeting (see above at [16]), Loh had deposed that he could not confirm if Leung's recounting of the comments was verbatim. Another example of a factual dispute was the alleged involvement of Keppel Singmarine (which denied any involvement in JTC's decision – see above at [9]). JTC had also disputed the plaintiff's evidence on the details of the leases of its neighbours, Cosco and Asia-Pacific Shipyard (see above at [22]). In the light of such factual disputes, it was not appropriate for this court to go beyond the *Colin Chan* Test.

32 It is, however, appropriate to consider whether the decision of JTC was even susceptible to judicial review at the leave stage. The Court of Appeal in *Linda Lai* opined that it was appropriate for the court to consider such an issue because the susceptibility of a decision to judicial review is a jurisdictional issue (*Linda Lai* at [24]; also see *Singapore Civil Procedure 2007* at para 53/8/22).

The issues

33 In arriving at the decision to dismiss the application, I considered the following issues:

(a) whether this application was made out of time ("Issue 1");

(b) if not, whether JTC's decision to reject the Renewal Application, or to refuse to grant a new lease, was susceptible to judicial review ("Issue 2"); and

(c) if so, whether the material before this court disclosed a *prima facie* case of reasonable suspicion that the plaintiff would obtain the remedies that it had sought ("Issue 3").

The decision

34 I dismissed the application for the reason that JTC's decision to reject the Renewal Application, or to refuse to grant a new lease was not susceptible to judicial review. For completeness, I will also set out my views on Issue 1 and Issue 3.

Issue 1: whether the application was made out of time

The law

35 Order 53, r 1(6) of the Rules provides, *inter alia*, that leave will not be granted to apply for a quashing order unless the application for leave is made within three months after the date of the proceedings, or such other period prescribed by written law, unless the delay is accounted for to the satisfaction of the judge hearing the application for leave. The three month period runs from the time when the right to seek relief arises (see *Teng Fuh Holdings Pte Ltd v Collector of Land Revenue* [2007] 2 SLR(R) 568 ("*Teng Fuh Holdings*") at [17]).

36 Order 53, r 1(6) of the Rules only refers to applications for leave to apply for quashing orders. JTC, however, submitted that an application for leave to apply for a mandatory order could also be precluded on the ground of delay. In support of this submission, JTC cited a passage from *O'Reilly v Mackman* [1983] 2 AC 237 in which Lord Diplock stated the following (at 280-281):

> … The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of its decision-making powers for any longer than is absolutely in fairness to the person affected by the decision. …

The AG took a similar view. The AG referred to *Teng Fuh Holdings*. In *Teng Fuh Holdings*, the Court of Appeal affirmed a dismissal of an application for leave to apply for a quashing order and a mandatory order on the ground that the application was made out of time (*Teng Fuh Holdings* at [23] and [42]).

37 My view was that the Court of Appeal in *Teng Fuh Holdings* accepted, at least impliedly, that a leave application for a mandatory order should also be made without undue delay. The leave application for a mandatory order in *Teng Fuh Holdings* should have been allowed if the court considered that such applications could be made regardless of any delay, given that the court commented that a serious argument could have been made for leave to be granted if the application had been made in time (*Teng Fuh Holdings* at [42]). I should add, however, that the three month period prescribed for quashing orders is not necessarily indicative of whether a leave application for a mandatory order was made with undue delay since O 53, r 1(6) does not apply to mandatory orders.

The decision

38 The application, so far as it concerned the quashing order, was certainly made after the three month period prescribed under O 53 r 1(6) of the Rules. As I noted above (at [35]), the three month period under O 53 r 1(6) runs from the time when the right to seek relief arises. The application was

filed on 2 November 2010. In my view, the plaintiff's right to seek relief only arose at the time of the Second Rejection Letter which was dated 19 May 2010 and *not* the time of the First Rejection Letter. Although JTC indicated in the First Rejection Letter that its decision was final, its conduct after that letter suggested that it was open to reconsidering its decision. A clear indication of JTC's willingness to reconsider its decision may be found in its letter dated 29 April 2010 in which JTC informed the plaintiff that EDB and JTC would jointly review the plaintiff's business plans and give their joint assessment in due course. If the plaintiff's right to seek relief only arose at the time of the Second Rejection Letter, the application would have been delayed by two and a half months.

39 However, the mere fact that the application was delayed was not determinative. I had to consider whether the plaintiff's explanation had adequately accounted for the delay (see O 53, r 1(6) of the Rules and above at [35]).

40 The plaintiff argued that it should not be denied leave because of the delay for two reasons. First, the delay was only for a short period that was not comparable to the delay in other cases. Second, it had a good reason for the delay. The plaintiff explained that it only found out during the 16 June 2010 Meeting that its business plan fell short of JTC's criterion that applicants for waterfront leases must commit to a fixed asset investment of at least a certain minimum amount. JTC did not state the minimum amount that it required. Accordingly, the plaintiff did not, at that time, have sufficient information to determine if JTC's decision was irrational. The plaintiff further submitted that it only found out in early October 2010 that other tenants had obtained renewals of their leases even though their investments were lower than the amount that the plaintiff had proposed. The plaintiff subsequently found out, through the LYP Injunction Affidavit on 15 October 2010, that JTC's required minimum amount of fixed asset investment was $100m. The plaintiff submitted that it was only apparent to the plaintiff at that point that it had grounds for impugning JTC's decision.

41 Both JTC and the AG argued that the plaintiff's reasons were not satisfactory. JTC argued that the plaintiff could not rely on information about other companies' leases because it must have been apparent to the plaintiff that each transaction was assessed on a case-by-case basis. JTC also submitted that the plaintiff's ignorance of its right to seek relief was not an excuse if it had the means to acquire the necessary information. The AG asserted that if the plaintiff's reasons were accepted, it should only be applying for judicial review on the basis of differential treatment. It should not also be raising procedural impropriety and the alleged representations made by EDB. Those matters were known to the plaintiff within the three month limit.

42 I was of the view that the plaintiff had satisfactorily accounted for the two and a half months' delay in making the application. As a preliminary point, I disagreed with JTC's submission that the plaintiff's ignorance of its right to seek relief was entirely irrelevant. O 53 r 1(6) of the Rules to my mind was sufficiently broad to admit an explanation based on ignorance. The question to ask is whether the explanation was satisfactory to the judge hearing the application. The authority that JTC cited in support of its argument, *Teng Fuh Holdings*, did not stand for the proposition that ignorance is never an acceptable excuse.

43 In *Teng Fuh Holdings*, the applicant had sought a quashing order and a mandatory order in relation to the respondent's declaration that the applicant's land was to be acquired for "a public purpose, viz: General Redevelopment" (*Teng Fuh Holdings* at [2]). The applicant's complaint was that the land was not redeveloped and was rezoned from industrial use to residential use (*Teng Fuh Holdings* at [4]). The applicant's excuse for its extended delay in applying for judicial review was that it did not know that its land was rezoned until September 2004 (*Teng Fuh Holdings* at [8]). The Court of Appeal rejected this explanation because the information on rezoning was in the public domain, "accessible to everyone who wanted it", since 1993 (*Teng Fuh Holdings* at [21]-[22]). In any case,

the applicant's explanation did not account for the delay in relation to the failure to redevelop the land. In relation to that complaint, the applicant had actual knowledge of the failure because it remained in occupation of the land as a licensee (*Teng Fuh Holdings* at [20]). The Court of Appeal in *Teng Fuh Holdings* did not go so far as to hold that ignorance could *never* be a satisfactory explanation. My view was that the appellate court simply held that the applicant's excuse was not satisfactory because it could easily have found out about the rezoning as that information was in the public domain since 1993. Arguably, the court might have reached a different conclusion if the information was not generally available to the public at large.

44 I felt that the plaintiff had adequately accounted for the delay. As counsel for the plaintiff (Thio Shen Yi SC) argued, the alleged discrepancy between the $100m investment commitment that JTC required and the amounts that Cosco and Asia-Pacific Shipyard had committed ("the Alleged Discrepancy") was the "main catalyst" for the application. The plaintiff only found out about those facts in October 2010. The information on the amounts that Cosco and Asia-Pacific Shipyard had committed was not generally available to the public at large. The plaintiff only found out the amount that Cosco had allegedly committed in the course of a discussion with Cosco about possible business cooperation. As for the amount that Asia-Pacific Shipyard had apparently committed, the plaintiff only found out the same by making market inquiries. I accepted that before the plaintiff discovered, by chance, the amount that Cosco had committed, it had no reason to suspect that other tenants had committed to investing less than what the plaintiff had proposed to commit.

45 Admittedly, as the AG pointed out, the plaintiff relied on not just the Alleged Discrepancy but also on facts that it alleged gave rise to a legitimate expectation and breaches of the rules of natural justice. The plaintiff also relied on the conversation that Leung had with Keppel Singmarine's Hoe (see above at [8]) as support for its allegation that JTC exercised its discretionary power to extend or grant leases irrationally, unreasonably and/or in bad faith. Those facts were known to the plaintiff within the three month time limit from the date of the Second Rejection Letter.

46 I accepted, however, that the Alleged Discrepancy was, as the plaintiff's counsel had submitted, the main catalyst for the application (see above at [44]). I took this to mean that the plaintiff considered the Alleged Discrepancy to be its strongest basis for judicial review. I inferred that the plaintiff probably decided that it had a good chance of succeeding on the application only after its discovery of the Alleged Discrepancy.

47 Accordingly, I was of the view that the application, both in relation to the mandatory order and the quashing order, could not be dismissed on the basis of delay.

Issue 2: whether JTC's decision to reject the Renewal Application, or to refuse to grant a new lease, was susceptible to judicial review

The law

48 The leading authority in Singapore on determining whether a decision is susceptible to judicial review is *Linda Lai*. *Linda Lai* involved an application by a former civil servant for leave to apply for a quashing order to quash various decisions by the Public Service Commission ("PSC"), and other public officials and authorities, that led to the termination of her employment and for a mandatory order to reinstate her employment (*Linda Lai* at [1]). The Court of Appeal allowed the PSC's appeal and dismissed Linda Lai's application on the ground that the decisions were not susceptible to judicial review for two reasons. First, the applicant's complaints concerned PSC's actions as an employer and not its performance of "public duties or the exercise of its powers as an authority" (*Linda Lai* at [40]). In other words, the applicant's complaints involved breaches of contract, for which the applicant had

her remedies in private law (*Linda Lai* at [40]). Second, the source of PSC's power in making the decisions that the applicant had challenged was the contract of employment (*Linda Lai* at [44]). The source of power of the decision sought to be impugned is one of the tests for determining whether the decision is susceptible to judicial review ("the Source Test") (*Linda Lai* at [41]). If the source of power lies in a statute, or subsidiary legislation, the decision will be susceptible to judicial review (*Linda Lai* at [41]).

49 The Court of Appeal did not suggest that the Source Test is the only test for determining whether a decision is susceptible to judicial review. This is evident from the appellate court's recognition that the Source Test was "one of the tests" and its citation of *Regina v Panel on Take-overs and Mergers, Ex Parte Datafin plc And Another* [1987] QB 815 ("*Datafin*") which considered that the Source Test was not the sole test (*Linda Lai* at [41]). Another test that may be employed is to determine the nature of the power or function performed by the body in question ("the Nature Test") (*Datafin* at 847):

> But in between these extremes there is an area in which it is helpful to look not just at the source of the power but at the nature of the power. *If the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then that may, as Mr. Lever submitted, be sufficient to bring the body within the reach of judicial review*. It may be said that to refer to "public law" in this context is to beg the question. But I do not think it does. The essential distinction, which runs through all the cases to which we referred, is between a domestic or private tribunal on the one hand and a body of persons who are under some public duty on the other. …
>
> [emphasis added]

The Nature Test requires the court to consider whether the decision sought to be impugned involved an exercise of "public law functions". In fact, the first reason for rejecting the application in *Linda Lai* seemed to be based on an application of the Nature Test. The Court of Appeal appeared to have considered that PSC's decisions were private in nature because the PSC made those decisions in a "pure master and servant context" and not in the exercise of its "public duties or the exercise of its powers as an authority" (*Linda Lai* at [40]).

50 To summarise, two tests may be applied in order to determine whether a decision is susceptible to judicial review. The Source Test requires the court to consider the source of the respondent's power in making the decision that the applicant seeks to impugn. If the source of power is in a statute or subsidiary legislation, the decision is susceptible to judicial review. The Nature Test requires the court to consider whether the respondent's decision involved an exercise of public law functions. If so, the decision is susceptible to judicial review.

The parties' arguments and the AG's arguments

51 The plaintiff argued that JTC's decision was susceptible to judicial review for three reasons. First, applying the Source Test, JTC was exercising a statutory power in rejecting the Renewal Application. Second, JTC's decision-making process in relation to applications for leases or the renewal of leases is important to businesses and the public at large and should be closely scrutinised by the court. Third, JTC's assertion that it was no different from any private landlord contradicted what Loh deposed in the LYP Injunction Affidavit. The LYP Injunction Affidavit also raised considerations that a private landlord would not be concerned with. The plaintiff also relied on Tang's statement during the 16 June 2010 Meeting that JTC, as a statutory authority, would help the marine industry during poor economic conditions.

52 JTC submitted that its decision to reject the Renewal Application was not justiciable for three reasons. First, the JTC Act does not limit JTC's discretion in deciding whether to grant or renew a lease. Second, judicial review is not the plaintiff's only means of recourse against JTC. Third, the subject matter of JTC's decision to reject the Renewal Application was purely commercial and contractual.

53 The AG submitted that the plaintiff's dispute with JTC was not a matter of public law and that only disputes concerning public law matters were susceptible to judicial review. The AG relied on both the Source Test and the Nature Test. The AG also referred to Hong Kong case law on disputes involving leases of state-owned land.

The decision

54 In relation to the Source Test, I noted that the JTC Act conferred JTC with the power to lease land under s 12(2)(d) which states:

> (2) The Corporation shall have power to do anything for the purpose of the discharge of its functions under this Act or which is incidental or conducive to the discharge of those functions and, in particular, may —
>
> …
>
> (d) sell or lease land and premises for the purpose of the discharge of its functions under this Act upon such terms as the Corporation may determine;
>
> …

However, neither the JTC Act, nor any subsidiary legislation made pursuant to that Act, prescribes the terms on which JTC may lease land and the considerations that JTC should take into account in exercising its powers. In fact, s 12(2)(d) of the JTC Act expressly states that JTC may sell or lease land on such terms as it may determine. It should be noted too that s 12(2)(d) also provides that the sale or lease of land must be for the purpose of the discharge of its functions under the JTC Act. JTC's functions are spelt out in s 12(1) of the JTC Act:

> Functions and powers of Corporation
>
> 12. —(1) The functions of the Corporation are —
>
> (a) to develop and manage sites, parks, estates, townships and other premises for industries and businesses in Singapore or elsewhere;
>
> (b) to provide facilities to enhance the operations of industries and businesses including social amenities for the advancement and the well-being of persons living and working in such sites, parks, estates and townships or otherwise; and
>
> (c) to participate in overseas ventures and developments which the Corporation has the expertise to engage or undertake in.
>
> …

55 I decided that the source of JTC's power in declining to grant a new lease or rejecting the

Renewal Application did not lie completely in a statute or subsidiary legislation. JTC's power to lease was ultimately derived from the JTC Act. Therefore, JTC's decision had statutory underpinnings. However, this did not necessarily mean that JTC's decision was susceptible to judicial review. As the Court of Appeal in *Linda Lai* pointed out, it is not necessarily the case that statutory bodies exercise statutory powers when they make decisions (*Linda Lai* at [44]). Every action of a statutory body must, ultimately, have some basis in the relevant statute. The question is whether, in the circumstances, the body was exercising statutory powers when it made the decisions sought to be challenged (see *Linda Lai* at [44]).

56 My view was that when JTC decided not to grant a new lease and not to allow the Renewal Application, it was exercising its private contractual rights under the Head Lease and the Lease respectively. As mentioned above (see [54]), the JTC Act did not prescribe any detailed criteria to guide JTC's exercise of its power apart from the general requirement that the exercise had to be "for the purpose of the discharge of its functions" under the JTC Act. Instead, JTC, just like any private landlord, came up with its own criteria for determining whether to grant a new lease. As Loh deposed, JTC used "a range of qualitative and quantitative factors" to reach its decision. Loh further deposed that these criteria were not prescribed by any statute or subsidiary legislation. Indeed, neither party directed me to any statute or subsidiary legislation that further detailed the criteria that JTC was to take into account. The source of JTC's power to stipulate the factors, and its application of those factors to reach its decisions, must lie in the Head Lease and the Lease.

57 The Nature Test also led me to conclude that JTC's decisions were not susceptible to judicial review. I did not think that JTC was performing "public law" functions when it decided not to grant a new lease or to reject the Renewal Application. JTC was not doing something that a private individual would not be capable of doing. JTC purchased a lease of land from the State and entered into leases of shorter terms with tenants like the plaintiff. JTC set its own criteria in deciding whether to grant new leases or to extend existing leases. Admittedly, as the plaintiff had argued, JTC's criteria included non-commercial considerations. However, I did not think that the mere fact that JTC took into account factors such as the "quality of jobs generated" and the "value add to the GDP [Gross Domestic Product] of Singapore" meant that it was exercising a public law function. Private landowners may also take into account such non-commercial considerations in deciding whether to lease their land.

58 I found support for my application of the Nature Test in a Hong Kong authority cited by the AG. In *Anderson Asphalt Ltd v The Secretary for Justice* [2009] 3 HKLRD 215 ("*Anderson Asphalt*"), the Hong Kong Court of First Instance was faced with an application for judicial review of a public authority's decision to grant a short-term waiver of the land use restrictions on certain plots of land. The court had to consider a preliminary issue of whether the authority's decisions were amenable to judicial review. The court proceeded to extensively review the relevant Hong Kong case law on the subject (at [38]-[56]). Of particular relevance was the court's astute observation that the mere fact that a public authority took into account public interest considerations does not necessarily mean that the authority's decision is susceptible to judicial review (at [78]). The observation was made in the context of an argument that assumed that the mere fact that the public authority took into account planning considerations meant that its decision was amenable to judicial review (at [73]). The court's observation (at [78]) is worth reproducing here:

> Free from authority, again, the fallacy of the argument lies in assuming that whenever some element of public interest or benefit or some published public policy is involved, the decision in question must be a public law one. *No, the true question is whether some public element(s) of sufficient weight is/are present in a particular case so as to render the function performed a public one, and the decision made a public law decision amenable to judicial review*.

[emphasis added]

The court's conclusion (at [79]) was that the public authority's decision was not amenable to judicial review. *Anderson Asphalt* was affirmed on appeal to the Hong Kong Court of Appeal (see *Anderson Asphalt and others v The Secretary for Justice* [2010] HKCA 185 at [61] ("*Anderson Asphalt (HKCA)*")).

59 I should mention that a line of cases in Hong Kong has held that the Hong Kong government's refusal to renew "special purpose leases" was amenable to judicial review (see *Anderson Asphalt* at [49]-[50] citing *Hong Kong and China Gas Co Ltd v Director of Lands* [1997] HKC 502 and *Kam Lan Koon v Secretary for Justice* [1999] 3 HKC 591; also see *Anderson Asphalt (HKCA)* at [42]-[51]). I did not think that those cases were relevant because they turned on rather unique facts. Those cases involved an express policy statement by the Hong Kong government on how the extension of such special purpose leases would be dealt with upon the transfer of sovereignty in 1997 (see *Anderson Asphalt (HKCA)* at [50]-[51]).

60 I agreed with the observation in *Anderson Asphalt* that the mere fact that a public authority took into account considerations that were public in nature did not necessarily mean that it was exercising public law functions. Whether the consideration of such factors would make the public authority's decision susceptible to judicial review is ultimately a matter of degree. For the reasons explained above (see [57]), I felt that JTC's decisions in the present case were not sufficiently of a public nature. JTC was acting as any private landlord would in granting and renewing leases.

61 In summary, my view was that JTC's decisions were not susceptible to judicial review on both the Source Test and the Nature Test.

Issue 3: whether the material before the court disclosed a prima facie case of reasonable suspicion that the plaintiff would obtain the remedies that it has sought

62 Given my conclusion that JTC's decisions in this matter were not susceptible to judicial review, it was not strictly necessary for me to consider Issue 3. I will however set out my views on Issue 3 for completeness.

The law

63 I have already described the threshold test that was applied in dealing with the application (see above at [29]). I will now elaborate on the law governing the grounds of the plaintiff's challenge. As explained later, the plaintiff had raised two broad grounds: (i) irrationality; and (ii) procedural impropriety. I pause here to note that the plaintiff's claim of procedural impropriety was essentially a claim that it was deprived of a legitimate expectation in two respects. First, the plaintiff claimed that it was deprived of a legitimate expectation that the Lease would be renewed. Second, the plaintiff alleged that it had a legitimate expectation that it would be able to make representations to JTC when the latter conducted a fresh evaluation of its business plans after the First Rejection Letter was issued. The plaintiff argued that this second legitimate expectation was also defeated.

(1) The law on irrationality

64 The test that is frequently applied to determine if a decision was irrational is found in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 ("the *Wednesbury* Test"). The following passage from the decision is helpful (at 229):

> It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. *He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider*. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." *Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority*. Warrington L.J. in *Short* v *. Poole Corporation* gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another. [emphasis added]

It is to be noted that the *Wednesbury* Test has been endorsed in numerous Singapore cases (see, for example, *Chan Hiang Leng Colin* at [39], *Chee Siok Chin and others v Minister for Home Affairs and another* [2006] 1 SLR(R) 582 at [94] and *Mir Hassan bin Abdul Rahman and another v Attorney-General* [2009] 1 SLR(R) 134 at [21]).

(2) *The law on legitimate expectations*

65 In broad terms, a legitimate expectation in administrative law refers to an expectation that one would be conferred with a benefit even though one might not have a legal right to that benefit (*Council of Civil Service Unions and others v Minister for the Civil Service* [1985] AC 274 at 401 (per Lord Fraser of Tullybelton)). The term "legitimate expectation" is actually used, at least in English law, in two contexts (see Lord Woolf *et al*, *De Smith's Judicial Review* (Sweet & Maxwell, 6th Edition, 2007) ("*De Smith's*") at para 12-002). The first context concerns procedural fairness. It would be a ground for judicial review if the applicant was deprived of a legitimate expectation without providing him with a fair hearing (see, generally, *De Smith's* at paras 12-003–12-010). In the second context, the protection of the legitimate expectation extends beyond according the applicant a fair hearing (see, generally, *De Smith's* at paras 12-011–12-014). The second context is controversial because of the presence of competing tensions. The need to check against inconsistent treatment must be balanced against the undesirable effects of excessively fettering administrative discretion (see *De Smith's* at para 12-012). The plaintiff seemed to me to be relying on both aspects of the concept of legitimate expectation (see above at [63]).

66 I entertain some doubt as to whether the second understanding of legitimate expectations is part of our law. For our purpose however it does not matter as neither JTC nor the AG submitted on the issue of legitimate expectations.

The parties' arguments

67 The plaintiff supported its claim of irrationality by pointing to four aspects of JTC's decision-making process. First, JTC acted inconsistently by extending the leases of Cosco and Asia-Pacific Shipyard even though they fell short of JTC's requirement that its tenants commit to investing at least $100m in fixed asset investment. Second, JTC took into account extraneous considerations in making its decision. The criteria that Loh deposed JTC applied in assessing lease renewal applications did not include a consideration of any arrears by the applicant or unauthorised subletting on the applicant's part. Yet, JTC claimed that it took into account the plaintiff's previous arrears and unauthorised subletting in making its decision. Third, Tang's comments at the 16 June 2010 Meeting

(see above at [16]) showed that JTC's decision-making process lacked rationality in that it took into account an irrelevant factor and/or unnecessarily fettered its discretion. Fourth, the alleged encounter that the plaintiff had with Keppel Singmarine (see above at [8]) gave the plaintiff a reasonable suspicion that JTC had acted in bad faith towards the plaintiff.

68 The plaintiff's arguments on procedural impropriety have already been summarised above at [63] and need not be repeated.

69 JTC's response was that the plaintiff's allegations of unfair treatment were illogical for two reasons. First, every case must be assessed on its own merits and so the plaintiff's comparison of its treatment with that of its neighbours was irrelevant. Second, the plaintiff had no basis for its allegation that JTC sent Keppel Singmarine, or collaborated with it, to threaten the plaintiff. Third, the plaintiff exaggerated the meaning of the comments made at the 16 June 2010 Meeting. JTC also argued that the plaintiff had an opportunity to be heard because the Renewal Application and the plaintiff's appeals against JTC's rejection were thoroughly considered.

70 The AG did not make any submissions on Issue 3.

The court's view

71 I was of the view that the plaintiff had satisfied the *Colin Chan* Test (see above at [29]) in relation to the ground of irrationality. I thought that the plaintiff's version of events gave rise to a *prima facie* case of reasonable suspicion that it would be entitled to the remedies it sought after a full hearing. The *Wednesbury* Test (see above at [64]) may well be satisfied for at least the following reason. JTC extended the leases of Cosco and Asia-Pacific Shipyard even though they did not meet JTC's apparent criteria on fixed asset investments. Arguably, no reasonable public authority would act so inconsistently. I should emphasise that I was assuming that the plaintiff would be able to establish its allegation that JTC had a definite criteria of requiring at least $100m in fixed asset investments (see above at [67]). The plaintiff's allegation in this respect was not entirely without basis. It was able to point to the LYP Injunction Affidavit to support its allegation (see above at [20]). I must add, however, that I was aware that Loh's affidavit in these proceedings explained that JTC actually considered a range of factors and not just the amount of fixed asset investments. Loh also gave an explanation of the context in which he made the LYP Injunction Affidavit (see above at [20]). His explanation might also be accepted after a full hearing.

72 As for the ground of judicial review based on legitimate expectations, I did not think that the plaintiff's claim that it was deprived of a legitimate expectation that it could make representations to JTC satisfied the *Colin Chan* Test. I accepted JTC's argument that the plaintiff made several representations to JTC, EDB and other entities. As I mentioned earlier (see above at [11]), the plaintiff wrote several letters to JTC and EDB between November 2009 and June 2010. The plaintiff's broader claim of a legitimate expectation (*i.e.* the second understanding of legitimate expectations set out at [65]), however, satisfied the *Colin Chan* Test. The plaintiff might be able to convince the court hearing the merits that the second understanding applied in Singapore. The plaintiff might also be able to prove that the various representations which it claimed JTC or EDB made were in fact made.

73 In summary, my view on Issue 3 was that the *Colin Chan* Test was satisfied in relation to the grounds of irrationality and deprivation of a legitimate expectation that the Lease would be renewed.

Conclusion

74 In the final analysis however, it did not matter that the plaintiff had adequately accounted for its delay or that it had placed sufficient material before me to raise a *prima facie* case of reasonable suspicion. I dismissed the application because JTC's decisions to reject the Renewal Application and not to grant a new lease over the Premises were not susceptible to judicial review.

75 Consequently, I awarded costs to JTC and the AG fixed at $3,500 each excluding disbursements which were to be paid by the plaintiff on a reimbursement basis.