

Sentosa Development Corp v Sentosa Tiger Island Pte Ltd
[2011] SGHC 168

Case Number : Suit No 68 of 2010/Z (Registrar's Appeal No 394 of 2010/S & Registrar's Appeal No 395 of 2010/X)
Decision Date : 13 July 2011
Tribunal/Court : High Court
Coram : Kan Ting Chiu J
Counsel Name(s) : Woo Yin Loong Christopher (Lawrence Quahe & Woo LLC) for the plaintiff; Ong Su Aun Jeffrey and Sim Chong (JLC Advisors LLP) for the defendant.
Parties : Sentosa Development Corp — Sentosa Tiger Island Pte Ltd

Civil Procedure – Summary judgment

Contract – Contractual terms – Implied terms

13 July 2011

Kan Ting Chiu J:

1 This matter came before me as two appeals against the orders made by an Assistant Registrar ("AR") in an application for summary judgment by Sentosa Development Corporation ("the plaintiff") against Sentosa Tiger Island Pte Ltd ("the defendant"). The AR allowed the application in part and ordered, *inter alia*, that:

- (a) the defendant delivers up possession of 11, Siloso Road, Singapore ("the property") to the plaintiff;
- (b) the defendant has unconditional leave to defend the plaintiff's claims for:
 - (i) \$146,487.95 being Guaranteed Annual Payment ("GAP");
 - (ii) \$771,000 being liquidated damages;
 - (iii) double rent at \$1,415.75 per day from 22 January 2010 to the day the defendant hand over possession of the property to the plaintiff; and
 - (iv) the defendant to pay and settle all property tax liabilities due and owing to the Inland Revenue Authority of Singapore ("IRAS") in respect of the property.

2 Both parties appealed against the AR's orders. The defendant appealed against the order for the delivery up of the property and the plaintiff appealed against the order which gave the defendant unconditional leave to defend.

3 After hearing the appeals, I dismissed the defendant's appeal and I allowed the plaintiff's appeal by varying the order for the unconditional leave to defend the claims for \$771,000 and \$146,487.95 to one for leave to defend the claims conditional on the defendant providing security in the sum of \$900,000 by a banker's guarantee within 21 days. The defendant has now appealed against my order.

Background

4 The plaintiff, as its name suggests, is a corporation entrusted with the development of Sentosa. On 11 December 1991, the plaintiff entered into a Building Agreement ("the Building Agreement") with Sentosa Adventure Golf Pte Ltd ("SAG") whereby SAG was to build upon and develop the property on Sentosa, but SAG failed to fulfill its obligations. Consequently, on 26 February 2007, the plaintiff, SAG and the defendant entered into a Deed of Novation which released and discharged SAG from further performance of its obligations under the Building Agreement, and the defendant agreed to perform the outstanding obligations as well as other obligations set out in the Deed of Novation. At the same time, the plaintiff and the defendant also entered into a Supplemental Agreement in which they agreed to vary the terms of the Building Agreement. (All references to the clauses of the Building Agreement hereafter refer to the clauses as amended by the Supplemental Agreement.)

5 However, the defendant also did not perform its obligations under the Supplemental Agreement and the Building Agreement, and this led to the plaintiff filing the present action against it on 29 January 2010. In the plaintiff's action, eight breaches of the Building Agreement and the Supplemental Agreement are alleged. In support of the application for summary judgment, the plaintiff filed three affidavits by Goh Lye Whatt, a director of its Property Division, and the defendant filed three affidavits by its director and shareholder, Chiang Sing Jeong in response. I shall set out in brief the plaintiff's allegations, the defendant's responses, and my observations and comments.

The alleged breaches

6 The plaintiff alleges that:

(a) *Breach 1.* The defendant failed to develop or commence construction or renovation work on the property and has breached Cl 8.1(b) of the Building Agreement by failing to obtain a Temporary Occupation Permit for the development by 25 August 2008. [\[note: 1\]](#)

(b) *Breach 2.* The defendant breached Cl 13(i) of the Building Agreement by failing to commence business on the development by 25 August 2008. [\[note: 2\]](#)

(c) *Breach 3.* The defendant breached Cl 4(iii) of the Building Agreement by failing to make full payment of the GAP for the period April 2009 to March 2010. [\[note: 3\]](#)

(d) *Breach 4.* Under Cl 13 of the Building Agreement, the defendant was to commence business on the development by 25 August 2008 or pay the plaintiff liquidated damages of \$1,500 a day. The defendant has failed to commence business on time and is liable for liquidated damages of \$771,000 over the period 26 August 2008 to 21 January 2010. [\[note: 4\]](#)

(e) *Breach 5.* The defendant breached Cl 4(xv)(c) of the Building Agreement by failing to furnish a fresh banker's guarantee in the sum of \$250,000. [\[note: 5\]](#)

(f) *Breach 6.* The defendant breached Cl 4 of the Supplemental Agreement which required that either Chiang Sing Jeong and/or Cafe Aquarium owns at least 51% of the issued shares in the defendant in that 310,000 of the 1,050,000 shares of the defendant held by Chiang Sing Jeong are held in trust for one Lim Chong Poon with effect from 8 January 2009, such that Chiang Sing Jeong owns only 740,000 shares, or 37% of the issued shares of the defendant beneficially. [\[note: 6\]](#)

(g) *Breach 7.* The defendant breached Cl 15 of the Building Agreement by altering the constitution of the board of directors and allotting new shares without the consent of the plaintiff. It issued 350,000 shares to Almega Investments Pte Ltd and 150,000 shares to one Tan Tee Seng and made changes to its board of directors without the consent of the plaintiff. [\[note: 7\]](#)

(h) *Breach 8.* The defendant breached Cl 19 of the Building Agreement by failing to settle its property tax liabilities in respect of the property for the years 2009 and 2010. [\[note: 8\]](#)

7 In addition to setting out the defendant's obligations, the Supplemental Agreement and the Building Agreement also gave the plaintiff the right to take possession of the property under certain circumstances. Clause 5 of the Supplemental Agreement provides that:

5. ADDITIONAL RIGHTS OF THE LESSOR

The Lessee agrees that in the event that the Lessee breaches any or all of the provisions of ... Clause 4 above ... the Lessor shall be entitled to treat the Building Agreement and this Supplemental Agreement as having been repudiated by the Lessee and the Lessor shall be entitled to enter upon and take possession of the said Land or any part thereof (including the Development) and thereupon this Agreement shall cease and determine but without prejudice to any rights or remedies the Lessor shall have against the Lessee with respect to any antecedent breach.

8 Clause 17 of the Building Agreement provides that:

17. EVENTS OF DEFAULT

If any of the following events shall happen:

...

(e) if the Lessee shall fail to observe or perform or commits a breach of any of the terms herein and on its part to be observed or performed and the same has not been remedied by the Lessee after notice thereof has been given to the lessee by the Lessor, or cannot be remedied by the Lessee,

Then the Lessor shall be entitled to treat this Agreement as having been repudiated by the Lessee and the Lessor shall be entitled to enter upon and take possession of the said Land or any part thereof (including the Development) ...

(In both clauses the Lessee is the defendant and the Lessor is the plaintiff.)

9 In its defence, the defendant addresses each of the alleged breaches as follows:

(a) *Breach 1.* The defendant admits that it has not commenced construction work and has not obtained any Temporary Occupation Permit by 25 August 2008, but it contends that there is an implied term in the Supplemental Agreement ("the Implied Term") that the plaintiff would not do anything that would "unreasonably prevent the Defendant from fulfilling its contractual obligations under the Building Agreement and the Supplemental Agreement", and that the plaintiff has breached the Implied Term by having prevented the defendant from fulfilling its obligations.

[\[note: 9\]](#)

(b) *Breach 2.* The defendant admits that it has not commenced business operations, but asserts that it could not do so because it could not commence construction and renovation work because of the plaintiff's breach of the Implied Term. [\[note: 10\]](#)

(c) *Breach 3.* The defendant does not admit this breach. [\[note: 11\]](#)

(d) *Breach 4.* The defendant relies on the Implied Term and denies that liquidated damages are payable. [\[note: 12\]](#)

(e) *Breach 5.* The defendant does not admit this breach. [\[note: 13\]](#)

(f) *Breach 6.* The defendant contends that Cl 4 of the Supplemental Agreement does not prohibit Chiang Sing Jeong from entering into a trust arrangement in respect of his shares. [\[note: 14\]](#)

(g) *Breach 7.* The defendant does not admit the breach and contends that the plaintiff has given a conditional consent on 2 November 2008 to one Jessica Soh becoming a shareholder and director of the defendant and that the plaintiff was "prepared to consider approving to Mr Tan Tee Seng and Mr Kek Chai Seng's shares in the Defendant to the new investor" [*sic*]. [\[note: 15\]](#)

(h) *Breach 8* is not admitted by the defendant. [\[note: 16\]](#)

10 My observations and comments on the alleged breaches and defences are:

(a) *Breach 1.* The defendant's defence is not that it has fulfilled the terms of the Building Agreement, but rather that the terms are varied by the Implied Term which provided that the plaintiff would not do anything that would unreasonably prevent the defendant from fulfilling its obligations. In its Reply, the plaintiff disputed that there was such an Implied Term. In the affidavits of Chiang Sing Jeong filed in response to the plaintiff's application for summary judgment, there is no reference to any implied term or understanding. One would expect that when the defendant takes the position that the plaintiff has breached the Implied Term by unreasonably preventing the defendant from completing the development and commencing operations, it will make a counter-claim for the loss and damage it incurred. However, no such counter-claim is made.

(b) *Breach 2.* My observations are the same as for *Breach 1*.

(c) *Breach 3.* The pleaded defence is not that the defendant does not admit failing to make full payment of the GAP. Rather, in the affidavit of Chiang Sing Jeong filed on behalf of the defendant on 3 August 2010 he accepts that GAP was payable with effect from 25 August 2007, but he deposed at para 42 that:

I would suggest that [the defendant] is not liable to continue making payment of the GAP even after 25 August 2008 when the delay in development was caused by [the plaintiff].

without identifying the conduct of the plaintiff that caused the delay, and without stating how the conduct entitles the defendant to discontinue payment of GAP.

(d) *Breach 4.* The defendant denies liability to pay liquidated damages by relying on the Implied Term without elaboration.

(e) *Breach 5.* The defendant's pleaded defence is a bare non-admission. In Chiang Sing Jeong's affidavit of 3 August 2010 he argues (at para 44) that while it was intended that the defendant would commence operations by 25 August 2008, the defendant was unable to do that because of the conduct of the plaintiff.

(f) *Breach 6.* The defendant's defence fails to take into account Cl 15 of the Supplemental Agreement –

15. AMALGAMATION, TRANSFER AND DISPOSAL OF SHARES

- (i) The Lessee shall, on or before the execution of this Agreement, forward to the Lessor for its approval full particulars of its directors and all persons having *legal or beneficial interest* in any of the shares of the Lessee, the description and amount of such shares held by each such person, such particulars to be certified by a director of the Lessee to be true and correct.
- (ii) The Lessee shall not, without the prior written consent of the Lessor, amalgamate or merge with any corporation, firm or any other party or go into voluntary liquidation or reconstruction of its company or commit or do any act or things so as to cause compulsory winding up proceedings to be taken against it or alter the constitution of its board of directors or its shareholders or sell, transfer, assign, exchange, allot or issue or *pledge or in any manner dispose* of any of its shares to any person, corporation, firm or party ...

[emphasis added]

The effect of Cl 15 is discussed in [\[12\]](#) *infra*.

(g) *Breach 7.* The defence that the defendant had received the plaintiff's "conditional consent" and that the plaintiff "was prepared to consider giving its approval" falls short of stating that the plaintiff has given its consent.

(h) *Breach 8.* The defence is a bare non-admission. In Chiang Sing Jeong's affidavit of 3 August 2010, he alleges (at para 47) that IRAS had agreed to the payment of the property tax by instalments, but no evidence of the agreement was exhibited.

11 I affirmed the AR's order that the defendant deliver possession of the property to the plaintiff. The plaintiff is entitled to recover possession under Cl 5 of the Supplemental Agreement and Cl 17 of the Building Agreement (set out at [\[7\]](#) and [\[8\]](#) above respectively). Clause 5 of the Supplemental Agreement refers to Cl 4 of the Building Agreement, which states:

4. ADDITIONAL OBLIGATIONS OF LESSEE

The Lessee shall ensure that within 1 month from the Effective Date [26 February 2007], Chiang Sing Jeong and/or Cafe Aquarium Pte Ltd (ACRA No. 200411468H) shall hold at least 51% of the issued shares of the Lessee. In the event of a breach of this subclause, the Lessor shall be entitled to exercise its rights under Clause 5 below.

12 There are two provisions of the Supplemental Agreement and the Building Agreement which refer to the holding of the shares of the defendant: Cl 4 (set out above) and Cl 15 of the Building Agreement. The latter provides that:

15. AMALGAMATION, TRANSFER AND DISPOSAL OF SHARES

- (i) The Lessee shall, on or before the execution of this Agreement, forward to the Lessor for its approval full particulars of its directors and all persons having *legal or beneficial interest* in any of the shares of the Lessee, the description and amount of such shares held by each such person, such particulars to be certified by a director of the Lessee to be true and correct.
- (ii) The Lessee shall not, without the prior written consent of the Lessor, amalgamate or merge with any corporation, firm or any other party or go into voluntary liquidation or reconstruction of its company or commit or do any act or things so as to cause compulsory winding up proceedings to be taken against it or alter the constitution of its board of directors or its shareholders or sell, transfer, assign, exchange, allot or issue or *pledge or in any manner dispose* of any of its shares to any person, corporation, firm or party ...

[emphasis added]

13 The defendant's obligations with regard to the holding of the shares of the defendant are laid down in Cl 4 and Cl 15 of the Building Agreement. The defendant is obliged under Cl 15(i) to seek the plaintiff's approval of the persons having *legal or beneficial interest* in the shares of the defendant. The parties recognise that whether the shares of the defendant are owned legally or beneficially by a person, that ownership must be approved by the plaintiff. Consequently, Lim Chong Poon's beneficial ownership of the 310,000 of the shares in the defendant under the trust of 8 January 2010 without the approval of the plaintiff, is in breach of Cl 15(ii). The defence that Cl 4 of the Supplemental Agreement does not prohibit Chiang Sing Jeong from entering into a trust arrangement in respect of his shares does not address the plaintiff's complaint that the defendant did not obtain the plaintiff's written consent. (I should point out that the failure to obtain the plaintiff's consent for the variation of Chiang Sing Jeong's shareholding is not a breach of Cl 4 of the Supplemental Agreement, which strictly relates to the state of ownership of the shares one month from the Effective Date of 26 February 2007.)

14 The plaintiff also complains of another two breaches of Cl 15(ii) of the Building Agreement, namely that the defendant had without the consent of the plaintiff:

- (a) issued 350,000 shares to Almega Investments Pte Ltd and 150,000 shares to Tan Tee Seng, and
- (b) changed the defendant's board of directors with the appointment of one Soh Kee Hoon as a director of the defendant on 27 February 2008.

15 The defendant's response to these complaints is that the plaintiff was "prepared to consider approving to Mr Tan Tee Seng and Mr Kek Chai Seng's shares in the Defendant to the new investor." On its pleaded defence, the defendant does not dispute that it has not obtained the plaintiff's consent for issuing the shares to Almega Investments Pte Ltd and Tan Tee Seng.

16 The defendant's defence to the complaint of the appointment of the director is that the plaintiff

had given “conditional consent” on 21 November 2008 to the appointment of one Jessica Soh (apparently the same person as Soh Kee Hoon) as a director. Quite aside from the fact that Cl 15(ii) of the Building Agreement refers to consent and not conditional consent, the pleaded defence does not deal with the defendant’s obligation to obtain the prior consent of the plaintiff *before* altering the composition of the defendant’s board of directors with the appointment of Soh Kee Hoon/Jessica Soh as a director on 27 February 2008.

17 As the defendant has breached Cl 15(ii) when it failed to seek the plaintiff’s consent for the trust arrangement over the 310,000 shares, the issuance of the shares to Almega Investments Pte Ltd and Tan Tee Seng, and the appointment of Soh Kee Hoon/Jessica Soh as a director of the defendant, the plaintiff is entitled under Cl 17 to recover possession of the property. For this reason, the order for the delivery of possession is affirmed.

18 I ordered the defendant to provide security of \$900,000 as a condition for being granted leave to defend the plaintiff’s claims for the unpaid GAP and liquidated damages which added up to \$917,487.95. The defendant’s defence to this claim is that there is an implied term that the plaintiff “would not do anything that would unreasonably prevent the Defendant from fulfilling its contractual obligations”. [\[note: 17\]](#) The defendant has not alleged in any of the correspondence with the plaintiff disclosed in the affidavits that there is such an implied term. The Implied Term was raised for the first time in the pleaded defence, without any counter-claim against the plaintiff for breaching it. Furthermore, the defendant has only pleaded that “the Plaintiff prevented the Defendant from fulfilling its contractual obligations” (see [\[8\]\(a\)](#) above). [\[note: 18\]](#) There is a point to be noted here, which is that there must be a difference between prevention and unreasonable prevention. The plaintiff, as the lessor, has the right to require the defendant to carry out the development in accordance to the terms of the Building Agreement and the Supplemental Agreement. Even assuming the existence of the Implied Term, the defendant cannot complain unless the plaintiff exercises its right unreasonably.

19 Against the backdrop of the late assertion of the existence of the alleged Implied Term (which the plaintiff disputes), the fact that the pleaded defence does not complain of *unreasonable* prevention and the absence of a counter-claim, the Implied Term defence is short of substance and consistency. For this reason, I ordered that the defendant should only be permitted to defend the two claims conditional upon the provision of security.

[\[note: 1\]](#) Statement of Claim, para 23

[\[note: 2\]](#) Statement of Claim, para 24

[\[note: 3\]](#) Statement of Claim, para 25

[\[note: 4\]](#) Statement of Claim, para 26

[\[note: 5\]](#) Statement of Claim, para 27

[\[note: 6\]](#) Statement of Claim, para 28 and affidavit of Goh Lye Whatt of 19 April 2010, pp104–105

[\[note: 7\]](#) Statement of Claim, para 29

[\[note: 8\]](#) Statement of Claim, para 30

[\[note: 9\]](#) Defence (Amendment No.1) para 13

[\[note: 10\]](#) Defence (Amendment No.1) para 16

[\[note: 11\]](#) Defence (Amendment No.1) para 18

[\[note: 12\]](#) Defence (Amendment No.1) para 19

[\[note: 13\]](#) Defence (Amendment No.1) para 21

[\[note: 14\]](#) Defence (Amendment No.1) para 22

[\[note: 15\]](#) Defence (Amendment No.1) para 23

[\[note: 16\]](#) Defence (Amendment No.1) para 24

[\[note: 17\]](#) Defence (Amendment No.1), para 13

[\[note: 18\]](#) Defence (Amendment No.1), para 13

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