Group Exklusiv Pte Ltd v Diethelm Singapore Pte Ltd
[2003] SGHC 247

Case Number : OS 1517/2002

Decision Date : 21 October 2003

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : R. Chandra Mohan and Edric Pan (Rajah & Tann) for plaintiffs; Chan Hian Young and Ginny Chew (Allen & Gledhill) for defendants

Parties : Group Exklusiv Pte Ltd — Diethelm Singapore Pte Ltd

Land – Sale of land – Agreement subject to purchaser obtaining approval from authorities – Whether authorities finally and conclusively rejected application for approval

Land – Sale of land – Clause requiring purchaser to use best endeavours to apply for approval – Scope of purchaser's obligation to use best endeavours

1 The defendants were the lessees of a piece of property known as 303 Alexandra Road. The property was leased from the Housing and Development Board ('HDB'). By a sale and purchase agreement dated 19 June 2002 the defendants contracted to sell the remainder of their lease to the plaintiffs for $20,000,000. The plaintiffs paid a deposit of $1,000,000 to the defendants' solicitors (then Drew & Napier). The sale and purchase agreement was subject to some special conditions and the Law Society's Conditions of Sale 1999. The completion date was agreed to be 31 March 2003. Clause 7 of the special conditions provided that:

> 'The property is sold subject to the approval of all relevant government authorities for:
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> a) the sale of the property to the purchaser;
>
> b) the change of use of the property to motor vehicle showroom and workshop
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> The purchaser shall apply for such approval in accordance with cl 15.'

Clause 15 provided that the sale was subject to the 'approval of HDB, Urban Redevelopment Authority and other relevant authorities for the change of use of the property. It also provided that the parties shall apply for consent and change of use of the property within five weeks of the execution of the sale agreement.

2 The plaintiffs submitted an application to the National Environment Agency for their approval for the change of use of the property. The form was a standard issue of the NEA known as Form IA and it was completed by the plaintiffs' architect, Heng Twa Kiat and submitted to the NEA by the plaintiffs' then solicitors Chong Chia & Lim on 31 July 2002. Copies of the forms were given to the defendants' solicitors at the same time.

3 Sometime at end August 2002, the NEA called a meeting with the plaintiffs. Heng and the plaintiffs' divisional manager, Lim Chung Chay attended the meeting with K. Suresh and Wong Hin Mun of the NEA. The meeting lasted about 30 minutes. Heng and Lim were called as witnesses for the plaintiffs at the trial but Suresh was not summoned by either party. Heng and Lim testified that Suresh informed them that spray-painting would not be allowed, and they tried in vain to persuade Suresh to reconsider. Lim testified under cross-examination that Suresh was 'determined' that spray-painting would not be approved. Lim further testified that he showed Suresh some brochures of new technology for spray-painting to illustrate the point that pollution from the equipment would be

minimised, but Suresh was unconvinced. Mr Chan, counsel for the defendants strongly challenged Lim's evidence but I am of the view that Lim was a forthright witness whose testimony I accept. Realising and finally accepting that Suresh was unmoved, Lim asked if Suresh would give his decision in writing so that Lim can refer it to his employer.

4 The NEA subsequently wrote a letter dated 19 September 2002, stating the position it took in the meeting with Heng and Lim on 6 September 2002. Two relevant paragraphs of that letter are now reproduced:

> ' …
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> 2 The premises at No. 303 Alexandra Road is located near to HDB housing flats at Jalan Rumah Tinggi. The current activities conducted at No 303 Alexandra Road include metal fabrication and spray painting activities. Despite installation of pollutive control equipment, there would still be residual pollution from such activities. Residents in the nearby HDB flats had complained against noise, smell and paint nuisance from these activities.
>
> 3 The proposed use of the above site as a vehicle showroom and parts storage is acceptable. However, pollutive uses such as vehicle repair and spray painting should not be conducted at the above premises as it would aggravate the existing nuisance problems. We have met the company, M/s Group Exklusiv on 6 Sept 02 to explain the above to them.
>
> …'

5 By letter of 23 September 2002, Chong, Chia & Lim LLC, the former solicitors of the plaintiffs gave notice of rescission of the sale and purchase agreement. The defendants did not accept the rescission and therefore did not refund the deposit of $1m paid by the plaintiffs. The plaintiffs thus commenced this action for the recovery of their deposit. The defendants counterclaimed for breach of contract and prayed for a forfeiture order against the $1m, as well as for an award of damages. The defendants' first allegation was that the plaintiffs were in breach because they did not make a proper application to the NEA. It will be recalled that the application to the NEA was made through the HDB by a submission of the NEA's standard Form IA. In the sections marked "Air Pollution Control" and "Noise Pollution Control" the plaintiffs stated "N.A." to indicate that there was nothing relevant to set out. The defendants asserted that the plaintiffs ought to have set out details explaining why there would be no air or noise pollution.

6 The defendants further alleged that the plaintiffs were in breach because they did not make any effort to appeal against the NEA's rejection, or to persuade the latter to review its decision. The defendants argued that the plaintiffs were entitled to rescind the contract pursuant to cl 15(e) only if 'the relevant authority clearly indicated finally and conclusively that approval would not be granted under any circumstances and not even with the imposition of terms and conditions'. I think that this is too strict an interpretation although I accept that the plaintiffs would only be entitled to rescind after it had received a clear and conclusive rejection of their application. For convenience, cl 15(e) is set out:

> ' …
>
> (e) If the consent of HDB, LTA and other relevant authorities in respect of the sale and purchase and the change of use and the erection of the private access road is not obtained or refused by the date falling one (1) month before the date fixed for completion, the sale and purchase may, at either party's option, be rescinded, whereupon all monies (including but not

limited to the deposit and goods and services tax, if any) paid by the Purchaser herein shall be refunded to the Purchaser without any interest or compensation.

...'

7 From the pleadings, the critical issues that I have to determine are first, whether a proper application was made to the relevant authorities for a change of use; secondly, whether there was a clear and conclusive rejection of that application; and thirdly, were the plaintiffs obliged to appeal or take steps to persuade the authorities to review its decision. The plaintiffs' application to the NEA was made on 31 July 2002. A number of different statutory approvals were required from the relevant authorities at that time and most of the applications for them were channelled through the HDB. The application to the NEA was one of them. It was also the only relevant approval for the purposes of this trial. The application was submitted by the plaintiffs' then solicitors on the requisite Form IA, signed by the plaintiffs on 22 July 2002. The proposed change of use was described in the form as -

'MOTOR VEHICLE SHOWROOM AND WORKSHOP WITH VEHICLE SERVICING, MAINTENANCE AND REPAIR, SPRAY-PAINTING AND PARTS STORE'.

It is appropriate to deal with a late attempt by Mr Chan to launch a new and different attack against the plaintiffs' case. This took place shortly before the defendants' last witness had left the stand. It occurred to counsel at that time that the relevant 'subject to approval' clause in the contract merely stated the change of use of the property to motor vehicle showroom and workshop. Mr Chan therefore argued that since the letter of 19 September 2002 from NEA actually allowed the change of use for a 'vehicle showroom and parts storage' there was, in effect, an approval by NEA. He argued that the words 'vehicle servicing and spray-painting' which the NEA objected to were inserted by the plaintiffs in a way that was unfaithful to the wording in the contract. This argument had two glaring flaws. First, the letter of 19 September also expressly rejected 'vehicle repair' which is an obvious activity of a vehicle workshop. Likewise, spray-painting is an integral part of vehicle repair, or in other words, another necessary and common activity of a vehicle workshop. Secondly, the defendants had been given copies of the application form when it was being submitted to NEA. They had no objection because they and their solicitors knew then, as they did at the start of this trial, that a vehicle workshop naturally encompasses all that was described in the Form IA that the plaintiffs had submitted for approval. The defendants cannot now complain that the wording was less than precise. Given the circumstances, and the ordinary and reasonable use of a motor vehicle workshop, I find that the wording was sufficiently precise and no one concerned had any doubt as to whether 'workshop' would entail spray-painting work.

8 I now refer to the question as to whether the plaintiffs had submitted a proper application. The thrust of the defendants' case on this point was that the plaintiffs were contractually bound to do all things necessary and expedient towards the procurement of the approval. In this regard they said that the plaintiffs were remiss in failing to provide any or any adequate information to the NEA thus attracting the negative response from the latter. Specifically, the defendants made two main assertions. First, they maintained that details of noise and air pollution control were omitted from the Form IA that was submitted to the NEA. Secondly, they maintained that the plaintiffs ought to have engaged environmental experts to present a study of the effects of the proposed change of use so as to show that the fears of the NEA, or more accurately, the fears of the HDB residents nearby were misplaced. Furthermore, Mr Chan put to the plaintiffs' witnesses that the plaintiffs' proposed use would in fact cause less pollution than the defendants' current use. The plaintiffs' evidence was that the form was completed in the standard way. Evidence of similar applications by other motor dealers such as Regent Motor was adduced and the forms were also completed in like manner in respect of noise and air pollution control. The plaintiffs themselves had made similar applications in respect of

several other workshops belonging to them and again, the forms were completed and submitted in the same way. The applicants not unwarrantedly understood that should the NEA require clarification it would have asked for them. Thus, a meeting was convened on 6 September 2002 in which the plaintiffs' architect and their divisional manager (Heng and Lim respectively) were asked to elaborate on the purpose of the change of use. In the circumstances, in view of the evidence narrated by Heng as well as Lim, it would not be right to find that the plaintiffs had not submitted a proper application. An inadequate application as envisaged by the defendants must mean one that will inevitably result in rejection. But how can this be proved? Certainly not without the evidence from the NEA. It ought not to be forgotten that the application was copied to the defendants who raised no objection at that time. Furthermore, no matter how strenuously Mr Chan maintained that the application form was devoid of important details, he cannot overcome the plain fact that NEA met with the plaintiffs' representatives and it was clear that the material issues had been addressed. Heng and Lim cannot be faulted for failing to persuade Suresh of NEA. I find therefore that the application by the plaintiffs was properly made.

9 That brings us to the next issue. Was there a clear and unequivocal rejection of the plaintiffs' application? Mr Chandra Mohan, counsel for the plaintiffs, relied principally on the letter of 19 September 2002 from the NEA. The text has been set out above. In view of the nature of the application and the proposed change of use, I am of the opinion that the letter was a clear and unequivocal rejection of the plaintiffs' application for change of use. The application was to enable the plaintiffs to set up their vehicle showroom and workshop. The purchase of the property was conditional upon the dual objectives being achieved. Even if it appears from NEA's perspective that it was a part approval, from the plaintiffs' point of view - which is the relevant one - it was a total rejection. There was no question of setting up a showroom without the workshop. Mr Chan argued that the letter of 19 September was not a 'final and conclusive' rejection. What he meant, as he elaborated, was that with sufficient persuasion, the 'no' may yet become a 'yes'. If 'final and conclusive' is to be understood as 'irreversible' then Mr Chan might be right, although it would behove him to call NEA to tell us not only that, but also that all applicants were expected to realise that that was the NEA practice, namely, that their ‘no’ was only a ‘maybe no’. For commercial and legal purposes, a position is 'final and conclusive' if the stand is clear and unequivocal. NEA's letter of 19 September was clearly a rejection of the application. And the defendants understood it as such, which was why Peter Brodbeck (the defendants' Chief Financial officer) and Jeremy Lake (the defendants' real estate agent) went to see Suresh to find out if the NEA would reconsider. If the plaintiffs had made no attempt to appeal when there was a formal appeal process then they would not have discharged their duty to their best endeavours. There was no evidence of a procedure for appeal in this case although the defendants were relying on an email from Suresh dated 27 September 2002, in reply to an effort by the defendants to re-open the issue after the 19 September letter. The brief statement by email was that anyone could appeal. In reliance of that email their counsel suggested that there was therefore an appeal process.

10 Hence, the last major issue is whether the plaintiffs were obliged to launch an appeal or take further steps to persuade the NEA to change its stand. The defendants firmly believed so. They relied on the said email message of 27 September 2002 that I referred to above. In this email Jeremy Lake referred to a meeting earlier that day between himself, Peter Brodbeck, and Suresh. The relevant part of the message reads:

> 'In the meantime, [the defendants] have requested for you to drop us an email confirming that "the door is open" and that you can consider the case if further information about the proposed usage is supplied. In particular, on the operations relating to noise and spray-painting. The reason we want this email is because we fear that [the plaintiffs] are under the impression that the case is closed already and there is no way that you will reconsider. As a result of this they

may go and buy another property.'

The reply from Suresh was: 'Any company, including [the defendants] is free to appeal to our written directions.' A literal reading of this terse reply might suggest an unexhausted appeal process, but on the facts and in its true context, this reply must be read as 'our mind is made up, but we can't stop you from appealing'; which is altogether a different meaning. This is further borne out by the subsequent meeting that Peter Kwee had with Suresh on 5 November 2002. Suresh, made it plain that NEA's decision stood. On 30 September the solicitors of the defendants wrote to the plaintiffs' solicitors to suggest a list of information to be provided to the NEA which they (the defendants) believed would cause the NEA to reverse its decision. Save for the impressions of Lake, there was no evidence from the NEA to support Mr. Chan's contention that the application would be approved if these conditions were met.

11 Mr. Chan referred to a number of authorities in respect of his argument that the plaintiffs ought to have appealed. The authorities relied upon, namely, *Ong Kim Heng Daniel v Leonie Court Pte Ltd* [2001] 1 SLR 445 which in turn, relied on *IBM United Kingdom Ltd v Rockware Glass Ltd* [1980] FSR 335, and *Tan Soo Leng David v Wee Satku & Kumar Pte Ltd & Anor* [1998] 2 SLR 83 stressed that the proper construction of contractual clauses in which the purchaser was obliged to use his best endeavours to apply for planning approval, is that 'best' does not mean 'second best'. But these authorities do not stand for the proposition that the purchaser was required to make a heroic effort in order to comply with a 'best endeavours' clause. When a contract for the sale and purchase of property is made subject to approval from some authority, be it for planning approval or a change of use, the agreement must be viewed as a contract that both parties were happy with and desired its full performance and that the purchaser will, in Geoffrey L.J.'s words in the IBM case,

> 'take all those reasonable steps which a prudent and determined man, acting in his own interests and anxious to obtain planning permission, would have taken.' *Ibid*, page 345.

Whether all reasonable steps were taken or the best endeavours made is a question of fact in each case. The facts that are relevant in such cases must include the nature of the approval sought, the practice, if any, of those in the trade concerned, the availability of an appeal process, evidence of futility of further efforts and so on. The facts of the three cases cited above are distinguishable. Hence, in *Ong Kim Heng Daniel*, which followed *IBM United Kingdom Ltd* the courts found that the purchaser had not quite made the effort, but the court in *Tan Soo Leng David* found that reasonable efforts had been made.

12 In the present case, the defendants and their real estate agent expended some effort on their part to persuade the NEA to reconsider its decision in respect of the plaintiffs' application. They also pressed Peter Kwee, the managing director of the plaintiff company to make further efforts likewise. The evidence from Peter Kwee at trial was that as a result of the defendants persistence, he made an appointment to see Suresh. This was granted and a meeting took place at NEA on 5 November 2002. Peter Kwee brought along his secretary to take minutes of the meeting. At this meeting, according to Peter Kwee and his secretary Kong Lee Hua, Suresh maintained that the NEA's decision was final and the application would not be granted. I accept the evidence of Peter Kwee as well as Kong Lee Hua. Thus, in this case, the application was pursued twice, although on the first occasion the NEA made the call, but nonetheless, the NEA's stand was made very clear at that meeting (6 September). The witnesses at both meetings gave a clear account of what transpired at the meeting. As I have stated, I find all these witnesses reliable, and am most impressed by Lim. If there was any evidence that could have rebutted them, it would have to come from Suresh or Wong, but neither of these two men testified. I agree with Mr Chan that the onus of proving that the application had been rejected lay with the plaintiffs. But if the evidence that was produced required

rebuttal, the burden of adducing rebuttal evidence lay with the defendants. In this case, the plaintiffs have called all the witnesses in their employ to testify as to the crucial meetings. Suresh and Wong were independent witnesses, but so far as the plaintiffs' case was concerned, they were not essential witnesses. So far as the oral accounts of events are concerned, there is no requirement that corroboration is mandatory. A single reliable witness may be sufficient. In the present case, there were four, all of whom were in my view, reliable. There were no material witnesses from the defendants because they did not attend the meetings in question. It was they who were in need of Suresh and Wong to provide the crucial rebuttal. It was strictly in the interest of the plaintiffs to obtain approval from NEA for spray-painting activities to be carried on in their workshop. It is thus not difficult to infer that they would proceed expeditiously and strenuously for their own sake. That they failed is not a reflection of lack of effort. Furthermore, there was no evidence that the plaintiffs obtained the approval for change of use in respect of the property they purchased subsequently. Hence it cannot be inferred that they had deliberately forsaken the defendants' property merely to secure approval for that other property.

13 The defendants' witnesses Jeremy Lake and Peter Brodbeck also met with Suresh. Their meeting was on 27 September, after that of Heng and Lim's meeting but before Peter Kwee's. Their testimonies relating to that meeting was that Suresh gave a list of suggested information that might help NEA decide whether to grant approval. One of the information sought concern 'details of the spray-painting process and fume extraction mechanism' as well as the 'location of the spray painting chambers' and 'details as to size and frequency of use of spray painting process'. Jeremy Lake testified that it was clear to him that the door was not closed. But that was only his impression of the meeting, genuinely formed as I think it was. The feeling that 'the door was not closed' in the specific circumstances of this case was at best an indication of an opportunity for a review. Suresh indeed responded with the email I set out above, saying that any company is free to appeal but I find that in context it was a polite way to end the discussion. If the defendants thought otherwise, Suresh and Wong must be called to support them. The plaintiffs' case did not depend on Suresh or Wong, although in a way - a strong way - Suresh had supported them. His letter of 19 September was unequivocal; and was inconsistent with the evidence of Lake and Brodbeck that suggested that if the information he (Suresh) asked for in their meeting of 27 September was forthcoming, the NEA might consider approving the application. The plaintiffs' witnesses testified otherwise and consistently over two separate meetings, and Suresh's letter of 19 September is more consonant with their evidence than it is with Lake and Brodbeck's. Peter Kwee's subsequent meeting with Suresh completed the picture. The letter sent by the defendants' solicitors (setting out Lake and Brodbeck's impression of additional information to be sent to NEA) was not copied to NEA.

14 Mr. Chan alluded to the purchase of a subsequent property by the plaintiffs and submitted that that act revealed the true intention of the plaintiffs. They wanted, he said, to breach the agreement for the sake of a cheaper showroom. The evidence is not sufficiently strong for me to make such a finding. In any event, it would not be material. It was plainly fortuitous that the events fell conveniently in favour of the plaintiffs - the drop in property prices after they signed the sale and purchase agreement with the defendants (with whom they had negotiated the purchase price over twelve long months), and the rejection by the NEA of their application for a change of use. These occurrences might have been heaven-sent to the plaintiffs; but just because they were heaven-sent does not mean that the plaintiffs were in breach of contract. Although largely incapable of precise or adequate explanation, reason has a name for such occurrences - it is called 'serendipity'. Events could just as easily have turned out the other way - the NEA could have approved the plaintiffs' application without qualification. In that case, the plaintiffs would have had to honour the contract. If they did not, they would have had to face the consequences of the breach. In either case, there was no reason why the plaintiffs could not proceed to purchase another property, or even ten properties had they so wished. But, once it is clear that the plaintiffs' application was rejected (or

not obtained by no fault of theirs) it would be irrelevant to consider the motives (or other intention) of the plaintiffs.

15 For the reasons above, there will be judgment for the plaintiffs. The defendants' counterclaim is accordingly, dismissed. Costs to follow the event.