Olivine Capital Pte Ltd and another *v* Lee Chiew Leong and another [2013] SGHC 168

Case Number	: Suit No 762 of 2012/W (Registrar's Appeal No 125 of 2013)
Decision Date	: 06 September 2013
Tribunal/Court	: High Court
Coram	: Lai Siu Chiu J
Counsel Name(s)	: Vincent Yeoh (Malkin & Maxwell LLP) for the first and second plaintiffs; Daniel Chia and Ms Loh Jien Li (Stamford Law Corporation) for the second defendant.
Parties	: Olivine Capital Pte Ltd and another — Lee Chiew Leong and another

Civil Procedure – Summary judgment

Contract – Interpretation

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 86 of 2013 was allowed by the Court of Appeal on 16 January 2014. See [2014] SGCA 19.]

6 September 2013

Lai Siu Chiu J:

Introduction

1 This was an appeal by Olivine Capital Pte Ltd ("the first plaintiff") and Ong Puay Guan @ Steven Ong ("the second plaintiff") in Registrar's Appeal No 125 of 2013 ("the Appeal"). The Appeal was against the decision of the Assistant Registrar ("the AR") in granting an application made by Chia Chin Yan ("the second defendant") in Summons No 608 of 2013 ("the Application") pursuant to O 14 r 12 of the Rules of Court (Cap 332, R 5, 2006 Rev Ed). The AR had decided that a letter sent by the second defendant to the plaintiffs effectively compromised all claims between the parties with regard to the plaintiffs' construction project. Accordingly, the AR ordered that the plaintiffs' action against the second defendant in this suit be struck out.

2 The Appeal came on for hearing before me on 3 July 2013. After hearing arguments from counsel for both parties, I dismissed the Appeal. As the plaintiffs have appealed against my decision (in Civil Appeal No. 86 of 2013), I now set out the reasons for my dismissal of the Appeal.

The background

3 The first plaintiff is a developer and the owner of a construction project ("the Project") at Lot TS18-1727P, 180–188 Rangoon Road Singapore ("the Site"). The second plaintiff is a director and chief executive officer ("CEO") of the first plaintiff. Sometime in May 2006, the first plaintiff engaged Lee Chiew Leong ("the first defendant") and the second defendant as architect and professional engineer of the Project respectively.

4 The relevant statutory approvals for the Project were obtained in November 2006. Work on the project began in late 2007. In September 2007, an underground sewer pipe was damaged while piling work was being carried out at the Site. The plaintiffs alleged that the damage was caused by the

negligence of the first and second defendants. The first and second defendants in turn blamed each other. They also blamed the plaintiffs for commencing the piling work without their knowledge, authorisation or consent.

5 The Public Utilities Board ("the PUB") became aware of the damaged sewer in late October or early November 2007. On 24 December 2007, the PUB gave notice to the first plaintiff and the second defendant to restore the damaged sewer to its original condition within seven days. On 31 December 2007, the plaintiffs informed the PUB that it would not do the repair work and requested that PUB carry out the same. The plaintiffs agreed to bear the costs and expenses incurred by the PUB in doing the work.

6 On 16 January 2008, the PUB informed the plaintiffs that the estimated cost of the repair work was $600,000. On 17 January 2008, the plaintiffs informed the two defendants and the piling contractor that they were holding the three parties liable for the repair costs.

7 In the meantime, PUB had commenced repair work on the sewer. According to the second defendant, he oversaw the works from December 2007 to February 2008. On 28 April 2008, the PUB invoiced the first plaintiff $512,939.18 for the cost and expenses it had incurred in repairing the sewer. The first plaintiff did not make payment and has not done so to date.

8 Sometime in June 2009, the plaintiff appointed another builder, *viz*, HPC Builders Pte Ltd ("HPC"), for the Project. At or around the same time, the second defendant took on the roles of architect and project coordination of the Project, in addition to his initial role as the professional engineer. According to the plaintiffs, the second defendant was to look to HPC for payment of his fees under this new arrangement.

9 On 16 July 2009, the second defendant was charged with an offence under s 14(1) of the Sewerage and Drainage Act (Cap 294, 2001 Rev Ed) ("the SDA"). This followed an inquiry initiated by the PUB on 6 February 2008 into the second defendant's role in the damage of the sewer. No charges were preferred against the second plaintiff or the first defendant at this time.

10 On 15 October 2009, the second defendant resigned from his roles as professional engineer, architect and project coordinator of the project. When doing so, he gave the second plaintiff a letter to sign ("the Compromise Letter"). The material parts of the Compromise Letter read as follows:

> BP NO: A0707-00009-2006
>
> PROPOSED AMENDMENT WITH ADDITION OF AN ATTIC TO THE APPROVED ADDITIONS/ALTERATION TO EXISTING 2 BLOCKS OF 5-STOREY FLATS (TOTAL 28 UNITS) WITH 1st STOREY FOR COMMERCIAL USE AND 2nd TO 5TH STOREY FOR SERVICED APARTMENTS WITH ATTIC TS 18 ON LOT 01727P AT 180 RANGOON ROAD
>
> (KALLANG PLANNING AREA)
>
> With regards to the captioned project, we agree to amicably terminate my role as Qualified Person (Architectural and Structural) and project coordinator with effect from 15 October 2009 **with no claim from either party**.
>
> [emphasis added]

The second plaintiff signed the Compromise Letter as CEO of the first plaintiff. The Compromise Letter

was later lodged with the Building and Construction Authority.

11 On 9 March 2012, the PUB charged the second plaintiff and the first defendant with offences under ss 14 and 20 of the SDA. The second defendant was also charged with an additional offence under s 20 of the SDA.

12 On 11 September 2012, the plaintiffs instituted this suit against the first and second defendants for breach of duty and negligence, claiming, *inter alia*, an indemnity for the compensation payable to the PUB and for losses suffered as a result of the damage to the sewer.

13 On 1 February 2013, the second defendant filed the Application, seeking a determination under O 14 r 12 of the Rules of Court. The determination sought was whether the Compromise Letter was effective to release the second defendant from his liability to the plaintiffs for the damaged sewer. The AR held that the Compromise Letter was so effective and ordered that the plaintiffs' action against the second defendant in this suit be struck out. The plaintiffs filed the Appeal against the decision of the AR.

The submissions

14 The second defendant's case was that the Compromise Letter effectively compromised all claims between the plaintiffs and the second defendant as regards the second defendant's roles as architect, professional engineer and project coordinator of the Project. This included any claim which the plaintiffs may have had against the second defendant for his role in the damage caused to the sewer. The second defendant also said that the construction of the Compromise Letter was a question suitable for summary determination under O 14 r 12. Accordingly, the second defendant prayed for an order that the plaintiffs' action against him be struck out.

15 Conversely, the plaintiffs contended that the matter was not suitable for summary determination under O 14 r 12 as the factual matrix surrounding the Compromise Letter was both highly relevant and disputed. The plaintiffs further contended that the Compromise Letter did not release the second defendant from liability for the damaged sewer. They argued that the Compromise Letter only compromised claims in respect of the period where the second defendant held the roles of architect, professional engineer and project coordinator, *ie*, between June and October 2009. This did not include liability in respect of the damaged sewer.

16 For the avoidance of doubt, I would add that it was not the plaintiffs' case that the Compromise Letter was signed by mistake or that it was not supported by consideration.

The issues

17 The issues to be decided in the Appeal were:

(a) Was the Application suitable for summary determination under O 14 r 12?

(b) Was the Compromise Letter effective in releasing the second defendant from liability to the plaintiffs in respect of the damaged sewer?

Was the Application suitable for determination under O 14 r 12?

18 A preliminary question that arose in these proceedings was whether the construction of the Compromise Letter was suitable for summary determination under O 14 r 12, without the need for a

full trial.

19 The plaintiffs contended that recourse to O 14 r 12 was inappropriate in the present case as the factual matrix surrounding the Compromise Letter was not only highly relevant to the issue of its construction, but also disputed by the parties.

20 The plaintiffs' contentions in this regard were premised on the seminal decision by the Court of Appeal in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design and Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*"). In *Zurich Insurance* at [114], the Court held that subject to the requirement of relevance, extrinsic evidence or evidence of the external factual context of a contract was admissible in aid of contractual interpretation. This was so even if the contract was unambiguous on its face.

21 As regards the issue of relevance, the plaintiffs stressed that the Compromise Letter was not a standard form document. Rather, it was consciously prepared by the second defendant and signed after a discussion between the second plaintiff and the second defendant. In the circumstances, I accepted that the factual context surrounding the signing of the Compromise Letter was relevant to the issue of its construction.

22 I agreed that the factual context surrounding the signing of the Compromise Letter was in dispute between the parties. According to the second defendant, his resignation flowed from a dispute with the plaintiffs over the payment of his fees. The second defendant also said that the plaintiffs were urging him to undertake tasks outside the scope of his appointment and he was unwilling to do so. As his working relationship with the plaintiffs had deteriorated, it was amicably agreed that the second defendant should resign on the condition that – (a) he did not make a claim on his fees; and (b) he would assist the newly appointed architect and professional engineer. Finally, on 15 October 2009, the second plaintiff signed the Compromise Letter which the second defendant had drafted.

23 In contrast, the second plaintiff's version of the events leading up to the signing of the Compromise Letter was as follows. The second plaintiff said that sometime in October 2009, the second defendant wanted to resign from the Project. This was due to a falling out between the second defendant and HPC. Since the second defendant was engaged by HPC as the architect, professional engineer and project coordinator of the Project at that time, the second plaintiff wanted to confirm that he would make no claim against the first plaintiff for the work the he had done from June to October 2009. In return, the second defendant wanted assurance that no claim would be brought against him by the first plaintiff arising from what he had done or omitted to do from June to October 2009. In this regard, the second plaintiff said that the second defendant knew that the plaintiffs were holding him liable for the damaged sewer.

24 The issue then was whether this dispute as to the facts made the present case unsuitable for summary determination under O 14 r 12. In my view, it did not. In this regard, I was mindful that ordinarily, summary determination under O 14 r 12 is not appropriate where there are factual disputes affecting the point of construction: see generally *ANB v ANF* [2011] 2 SLR 1 at [32]; *Re CEP Instruments Pte Ltd (in liquidation)* [2004] SGHC 206 at [39]. However, this proposition was subject to the following two caveats.

25 First, there must be a genuine dispute of fact. The court will not decline to make a determination under O 14 r 12 where the position taken by one party is so incredible that it is a sham: *Goh Chok Tong v Chee Soon Juan* [2003] 3 SLR(R) 32 ("*Goh Chok Tong*") at [25]; *Republic Airconditioning (S) Pte Ltd v Shinsung Eng Co Ltd (Singapore Branch)* [2012] 2 SLR 601 at [10]–[11].

In this respect, I found the following passage in *Goh Chok Tong* at [25] to be instructive:

> It is well settled principle of law that in an application for summary judgment, the defendant will not be given leave to defend based on mere assertions alone…The *court must be convinced that there is a reasonable probability that the defendant has a real or bona fide defence in relation to the issues*. In this regard, the standard to be applied was well-articulated by Laddie J in *Microsoft Corporation v Electro-Wide Limited* [1997] FSR 580, where he said at 593 to 594 that:
>
> > [I]t is not sufficient just to look at each factual issue one by one and to consider whether it is possible that the defendant's story in relation to the issue is credible. *The court must look at the complete account of events put forward by both the plaintiff and the defendants and…look at the whole situation.* The mere fact that the defendants support their defence by sworn evidence does not mean that the court is obliged to suspend its critical faculties and accept that evidence as if it was probably accurate. If, having regard to inconsistency with contemporaneous documents, inherent implausibility and other compelling evidence, the defence is not credible, the court must say so. *It should not let the filing of evidence which surpasses belief deprive a plaintiff of its entitlement to relief*.
>
> [emphasis added]

26 Second, the contract must be capable of bearing the meaning the resisting party asserts. In this respect, it is apposite to note that in *Zurich Insurance* at [122], the Court of Appeal cautioned that while extrinsic evidence is admissible as an aid in contractual interpretation, the meaning to be imputed to the words of the contract must be one which those words are capable of bearing. Put simply, extrinsic evidence is meant to illuminate the words of the contract and not to vary or contradict them. If this were otherwise, the court would not be interpreting contractual terms but making a contract for the parties.

27 In my view, the questions of fact and construction in these proceedings were inextricably linked. Each affected the other. If the plaintiffs' version of the facts were to be accepted, the Compromise Letter may have borne the interpretation which the plaintiffs contended. Equally, it may have been that the words of the Compromise Letter, when read with all the objective evidence in the case, were so clear that they made the plaintiffs' version of the facts and interpretation of the Compromise Letter untenable. The third possibility was that after considering all the evidence, I could come to the view that the factual disputes in these proceedings could only be resolved after cross-examination at trial.

28 In these circumstances, I was of the view that the question of whether the present case was suitable for determination under O 14 r 12 could not be considered *in vacuo*. Rather it had to be considered in the light of the construction of the Compromise Letter.

Was the Compromise Letter effective to release the second defendant from liability to the plaintiffs in respect of the damaged sewer?

29 The principles to be applied in contractual interpretation are to be found in *Zurich Insurance* at [131]. In interpreting a contract, the court purports to give effect to the intention of the contracting parties. Intention however, means the expressed intentions of the contracting parties; the court's inquiry is therefore an objective one. In this regard, the court looks at the contract holistically, without placing excessive emphasis on particular words or phrases. Furthermore, the interpretation of a contract may be informed by its external context, or the factual matrix under which the contract was made.

30 The plaintiffs contended that by reading the phrase "no claim from either party" in the context of the Compromise Letter, "no claim" referred to claims arising during the period between June and October 2009. This was so as the opening words of the Compromise Letter recorded the second defendant's resignation as architect, professional engineer and project coordinator of the Project. As the second defendant only held those three roles between June and October 2009, the plaintiffs said that it was clear that under the Compromise Letter, there would be no claim for things done or omitted to be done during that period.

31 Conversely, the second defendant contended that the phrases "no claim from either party" and "amicably terminate" were clear on the face of the Compromise Letter. They were not limited in time. Rather, the only and correct interpretation of the Compromise Letter was that it compromised all claims between the plaintiffs and the second defendant in respect of the second defendant's role in the Project. This was from the period of May 2006 to October 2009.

32 Between the two opposing views, I preferred the second defendant's interpretation. In my view, the plaintiffs' contentions were untenable. Far from reading the Compromise Letter in a holistic way, the plaintiffs had purported to take the opening words of the Compromise Letter out of their proper context in an attempt to qualify the phrase "no claim from either party". Save for the reference to the Project, it was plain on the face of the Compromise Letter that the phrase "no claim from either party" was not limited in time.

33 However, it did not follow that just because the Compromise Letter was clear on its face, the *only* interpretation of the Compromise Letter was that it compromised all claims between the plaintiffs and the second defendant in respect of the Project. Based on *Zurich Insurance*, patent ambiguity is not a prerequisite to the admissibility of extrinsic evidence. Rather, regard may be had to extrinsic material to show that a contractual provision was ambiguous. It was also my view that the same principles applied to the interpretation of a contract of compromise.

34 This brings me to the plaintiffs' contentions based on the factual matrix or the external context of the Compromise Letter. The plaintiffs' version of the factual matrix was that around October 2009 the second defendant went to see the second plaintiff as the former wanted to resign. At this meeting, the second defendant wanted to confirm that he would make no claim against the first plaintiff for the work he had done from June to October 2009. In exchange, the second defendant wanted assurance that no claim would be brought against him by the first plaintiff for what he had done or omitted to do from June to October 2009. In this regard, the second plaintiff also said that the second defendant knew that the plaintiffs were holding him liable for the damaged sewer. Therefore, the plaintiffs contended that "no claim" in the Compromise Letter meant no claim arising during the period of June to October 2009.

35 In support of their contentions, the plaintiffs submitted that there was no objective reason for them to voluntarily and gratuitously release the second defendant from his liability for the damaged sewer. This was so as – (a) the first plaintiff had given written notice to the second defendant holding him liable for the sewer damage; (b) the PUB was holding the first plaintiff liable for the cost and expenses it had incurred in repairing the sewer; and (c) the first plaintiff's liability to PUB was substantial ($512,939.18).

36 The plaintiffs also said that in contrast, the sum claimed by the second defendant as unpaid fees were only $6,000. In the circumstances, it would not make any commercial sense for the plaintiffs to have released the second defendant from his liability to compensate them for the damaged sewer.

37 I gave the plaintiffs' submissions little weight. For one, although contracts are interpreted to give effect to the commercial expectations of the parties, the court does not re-write a contract for the parties in light of what is commercially sensible. In the interpretation of a contract, the inquiry is into what the parties had objectively agreed upon.

38 More pertinently, the plaintiffs' contentions ignored the wider factual context of these proceedings. First, as I had explained at [4] above, the plaintiffs and the defendants blamed one another for the damage done to the sewer. In these proceedings, the second defendant filed a counterclaim against the plaintiffs and the first defendant, claiming, *inter alia*, an indemnity for the compensation which may be payable to the PUB. To merely say that the second defendant was being released from a liability of $$512,939.18 in exchange for a waiver of $6,000 would be to present an incomplete and inaccurate account.

39 Secondly, the objective evidence showed that between October 2009 and September 2012, there was no hint of a claim by the plaintiffs against the second defendant, even though the PUB had invoiced the plaintiffs for the costs and expenses it had incurred in repairing the sewer. The plaintiffs only instituted this suit in September 2012. This was after the second plaintiff was himself charged under s 48 of the SDA.

40 According to the plaintiffs however, their conduct subsequent to the signing of the Compromise Letter showed that they had not released the second defendant from his liability for the damaged sewer. In this regard, the plaintiffs relied on an email dated 1 November 2009 sent by the second plaintiff to the second defendant. Having considered the email carefully, I disagreed.

41 In that email, the second plaintiff had expressed his dissatisfaction and unhappiness over the second defendant's delay in handing over the latter's duties to the newly appointed architect and professional engineer. The plaintiffs' reservation of rights at the end of that email was made in that context. The email did not relate to the second defendant's liability in respect of a past breach of duty. In any event, I was of the view that evidence of subsequent conduct was of marginal, if any, relevance to the interpretation of the Compromise Letter.

42 Based on the foregoing observations, the fact that the second plaintiff signed the Letter of Compromise without qualification was also significant in these proceedings. As I explained at [32] above, it was plain on the face of the Compromise Letter that the release was not limited in time but open-ended. Furthermore, it was the plaintiffs' own position that it made no commercial sense to release the second defendant from liability of $512,939.18 in exchange for a fee waiver of $6,000. It was also the plaintiffs' position that it understood "no claims" to mean no claim for the period of June to October 2009. In the circumstances, I found it incredible that the second plaintiff signed the Compromise Letter without qualification to the phrase "with no claim".

43 The plaintiffs contended that had the second defendant wanted to be released from his liability for the sewer damage, he would have made specific mention of it in the Compromise Letter. I disagreed. The Compromise Letter was a general release. Absent words of limitation, it referred to all claims. Therefore, the onus was on the plaintiffs to show that the Compromise Letter was limited to claims for the period of June to October 2009. This, the plaintiffs failed to do so.

44 Having considered all the evidence, I disbelieved the plaintiffs' version of the factual matrix surrounding the Compromise Letter. In my view, the plaintiffs' claims comprised bare assertions which did not resonate with the objective evidence of the case. It followed that the phrase "with no claim" in the Compromise Letter should be given its plain meaning, *viz*, *all claims* for the duration of the Project. In the circumstances, the Compromise Letter effectively compromised the plaintiffs' claim

against the second defendant in this suit. It followed that the plaintiffs' claim against the second defendant ought to be struck out.

45 For completeness I would add that I was also minded to dismiss the Appeal on another ground. In these proceedings, it was not the plaintiffs' case that the second defendant had told them that the phrase "no claim" in the Compromise Letter did not extend to his liability for the sewer damage. On the contrary, the plaintiffs' position, as found in the second plaintiff's affidavit and as informed to me by their counsel, was that during the discussions between the second plaintiff and the second defendant, there was *no mention* of releasing the second defendant from his liability for the sewer damage. At most, the plaintiffs' case was based on their unexpressed belief that the second defendant knew that the plaintiffs were not releasing him from such liability. However, the subjective and unexpressed intentions of the parties were irrelevant to the interpretation of the Compromise Letter.

Conclusion

46 For the above reasons, I dismissed the plaintiffs' appeal with costs to the second defendant fixed at $10,000 (excluding disbursements which are to be paid on a reimbursement basis).