Tan Yeow Khoon and Another v Tan Yeow Tat and Others
[2003] SGHC 36

Case Number : OS 1733/2002; NAOS 58/2003

Decision Date : 24 February 2003

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Leslie Chew, SC and Chan Kia Pheng (Khattar Wong & Partners) for the Plaintiffs; Molly Lim, SC and Philip Ling (Wong Tan & Molly Lim) for the Defendants

Parties : Tan Yeow Khoon; Tan Yeow Lam — Tan Yeow Tat; Tan Guek Tin; Ong Yew Huat

Res Judicata – Issue estoppel – Whether plaintiffs estopped from raising issue in present case because issue was subject matter of previous litigation – Exercise of residual discretion to re-open issue in equity

1. This originating summons was taken out by the plaintiffs for an order of court to compel a review and revision of a valuation by Miss Lydia Sng of Knight Frank Pte Ltd on the property known as 31 Penjuru Lane. Neither Miss Sng nor Knight Frank are parties to these proceedings. The first and second defendants here are the plaintiffs' siblings and were themselves the plaintiffs in Originating Summons No. 406 of 2002 where the present plaintiffs were the defendants. The third defendant is a partner of Ernst & Young who was appointed as the expert for the purpose of the valuation of shares in the three family companies namely, Soon Hock Transportation Pte Ltd, Soon Hock Container & Warehousing Pte Ltd, and Cogent Container Services Pte Ltd. He was also the third defendant in Originating Summons No. 406 of 2002. The history of the animosity and litigation between the siblings are set out in my judgment of Originating Summons No. 406 of 2002 and need not be repeated at length here. I shall however have to trace the salient events briefly as well as to refer to other litigation that were not referred to me during the hearing of Originating Summons No. 406 of 2002. These other litigation are directly relevant to this originating summons but not Originating Summons No. 406 of 2002. I note Mr. Leslie Chew, SC's objection to the relevancy of those other litigation and I shall address those objections shortly. In this judgment references to the plaintiffs and defendants are to the plaintiffs and defendants in this originating summons unless otherwise stated.

2. The siblings found themselves divided into two factions fighting over the three companies. Eventually, a disputed letter dated 28 November 1995 from the defendants' then solicitors Bih Li & Lee became the subject matter of a court action that concluded with an order of court declaring that letter to be a binding contract between the parties. Pursuant to the terms of that letter, Ong Yew Huat, the third defendant here was appointed to value the assets of the three companies so that the purchase price of the defendants' 25% shareholding of the three companies could be ascertained. One of the assets that was to be valued was the property at 31 Penjuru Lane. The terms of reference to Ong Yew Huat were straightforward. He was to take the average of two valuations, one by Richard Ellis Pte Ltd (who were appointed by the plaintiffs) and the other by Knight Frank Pte Ltd (appointed by the defendants) dated 24 July 1996. It was not disputed that the valuation should be as at 31 October 1995. Richard Ellis valued the property at $10.77m and Knight Frank valued it at $16m.

3. The plaintiffs' first complaint is that Knight Frank's valuation was made on the assumption that the leasehold of the property which belonged to the Jurong Town Corporation ("JTC") had been extended by 13 years. Mr Chew submitted that at the time when Knight Frank produced their valuation the JTC had not yet extended the lease, and that it was only extended in 1999. He submitted that therefore the valuation was plainly wrong and in breach of the order of court as well as the terms of reference.

He submitted on the authority of *Baber v Kenwood* [1978] 1 Ll. Rep 175, 179 and *Dixons Group Plc v Jan-Andrew Murray Obyonski* (1997) 86 BLR 23, 29-30 that the court is entitled to intervene and redress the wrong. Miss Molly Lim, SC, counsel for the defendants submitted that the lease was formally extended in 1999 but in-principle extension had been given before that. Counsel's main objection was that the issue of wrong valuation by Knight Frank had already been the subject of litigation and the matter is *res judicata*, and alternatively, the plaintiffs are stymied by issue estoppel. The plaintiffs' second complaint against the Knight Frank valuation is that it was prepared on the mistaken assumption that the property was about 75% completed when in fact it was only 45% completed. Mr. Chew argued that the two erroneous assumptions were very significant. A lease for X number of years is vastly different from one that is X plus 13 years. Mr. Chew also emphasized that Knight Frank's wrong assumption was made by reason of wrong information given to them by the defendants

4. It is necessary now to refer to the litigation that preceded the present originating summons. On 14 June 2000 the plaintiffs took out a summons-in-chambers No. 602637 under Originating Summons No. 739 of 1996 asking for a declaration that the same Knight Frank valuation "be declared wrong" and, secondly, that the defendants withdraw the Knight Frank report from Ong Yew Huat, and thirdly, that Knight Frank be directed to prepare a revised report. The summons came up for hearing before Justice Rubin who recorded a consent order on 24 July 2000 in the following terms:

> "By consent it is ordered that the plaintiffs be given leave to withdraw the said application with no order as to costs." And that "it is further directed by consent that –
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> 1. Solicitors for the plaintiffs and the defendants are to forward the affidavit of Tan Yeow Khoon filed on 7 June 2000 to Knight Frank *and to convey to them the proposal approved by the Court that Knight Frank be invited to review the valuation report on 31 Penjuru Lane dated 24 July 1996 and if they deem fit to vary or adjust the valuation* for the reasons set out in the affidavit of Tan Yeow Khoon filed on 7 June 2000.
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> 2. Knight Frank's further costs be borne equally by the parties." (my emphasis)

5. Knight Frank subsequently wrote two letters to the plaintiffs' then solicitors. The letters were dated 9 October 2000 and 28 January 2002. It is not necessary to set out the letters. It is clear from the contents of those letters (and also one from the plaintiffs' solicitors to the dated 12 October 2000) that Knight Frank were fully aware as to what the plaintiffs' complaints were. However, they (Knight Frank) were not satisfied that they had sufficient material or reason to effect any revision. In the end, no revision was made.

6. On 16 May 2001 the plaintiffs took out another summons-in-chambers No. 601099 of 2001 before Justice Rubin asking for essentially the same prayers as that found in their previous summons that resulted in the consent order of 24 July 2000. This summons (601099) was withdrawn when Justice Rubin ruled that he was *functus officio*. No appeal was lodged in respect of that order.

7. In the interim, the plaintiffs sued the defendants and Miss Lydia Sng of Knight Frank in DC Suit 3675 of 1999 for, inter alia, conspiracy and fraud in producing the Knight Frank report with the two errors, namely an overvaluation of about $5m (due to having wrongly taken the 13 year extension of lease into account), and the assumption that the renovation was about 75% completed. The trial did

not proceed but the plaintiffs consented to its dismissal with costs against all three defendants. On the same day that this suit was instituted, the plaintiffs sued the defendants and their accountant Chee Yoh Chuang in DC Suit 3676 of 1999 for conspiracy in respect of some accounting issues relating to the same subject matter of the valuation of the companies' assets. The suit was dismissed after a 10-day trial.

8. On 13 July 1999 the plaintiffs sued the defendants and their solicitor from Bih Li & Lee, namely Mr Anthony Lee, for conspiracy and concealment in respect of the Knight Frank valuation. The claim against the second defendant and Mr Lee was struck out and withdrawn as against the first defendant. The plaintiffs then lodged a report against Mr Lee to the Law Society. When the Law Society dismissed the complaint the plaintiffs applied to the High Court to set that decision aside. When their application was dismissed the plaintiffs appealed to the Court of Appeal but their appeal was dismissed.

9. Mr Chew submitted that the historical background is of no relevance and ought not to be considered. It is true that no matter how close and similar the issues are to the present proceedings, unless they concern the same parties the defence of *res judicata* and issue estoppel cannot arise. In the present case, the third defendant was not a party to previous action brought by the plaintiffs against the two defendants. Thus, as against him neither *res judicata* nor estoppel applies. This fact does not appear to me to be of any importance because Mr Ong is only a nominal defendant, not just because he has taken a neutral position and is prepared to abide by any decision of the court, but there is also no definable cause of action or ground of complaint against him in respect of any breach of obligation on his part. His obligation in the context of this action was to take the average of the two valuations put before him. He has no duty to ensure that the valuation experts perform their tasks in any particular way. But, against the first and second defendants, however, the questions of *res judicata* and estoppel are relevant. The plaintiffs have taken legal action not only in the District Court but also in the High Court with the express prayer for judicial coercion on Knight Frank, so that their valuation that had taken 13 years extension of lease into account, is set aside and reviewed. The action commenced in the District Court was dismissed. That which was commenced by way of a summons-in-chambers in the High Court resulted in a consent order. The courts, of course, recognise consent judgments as well as default judgments as properly binding on the parties. See, for example, *Re South American & Mexico Co* [1895] 1 CH 37. A party intending to re-open issues after having such judgments made against them must first apply to set aside the default or consent judgment as the case may be. In the case of a suit that was determined after trial, the only recourse is by appeal to a superior court. As Wigram V-C said in *Henderson v Henderson* [1843-1860] All E R 378,381:

> "where a given matter becomes the subject of litigationin, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence, might have brought forward at the time".

10. What is the effect of the plaintiffs entering into a consent order before Justice Rubin whereby it was ordered that Knight Frank be invited to review their valuation and if they deem fit, vary or adjust it accordingly? I am of the humble view that the effect is simple and straightforward, and that it means that any question arising from or touching on the correctness of the Knight Frank valuation is put to rest once the latter has been given the opportunity of reviewing their valuation. Whether changes are made, and if so, in what manner or form, is by the consent of the parties, left to the discretion of Knight Frank and no one else. Knight Frank was in fact given that opportunity and have declined to make any adjustment to their valuation. The matter therefore ends. Furthermore, the plaintiffs had an opportunity to set aside the valuation when they sued the first and second defendants as well as Miss Lydia Sng (the expert from Knight Frank who was the one who made the valuation). But for reasons best known to themselves, they agreed to let the case be discontinued as against the first defendant (with costs); and struck out as against the second defendants (with costs), and dismissed as against Miss Sng (with costs). Unless those orders are set aside the plaintiffs shall not be permitted to breathe life into them in pursuit of the same defendants.

11. Lest it be argued, which was not done before me to Mr Chew's credit, that the issues were not framed in exactly the same terms in the present originating summons, I need only point out that in determining whether *res judicata* and estoppel the court looks at the substance of the matter. Only when the variances of word and phrase change the substance would they become significant. In this case, the substance in all the previous attempts to correct the valuation is identical and no distinction can meaningfully be drawn. So far as esoppel is concerned, Vaughn Williams J in *Re South American & Mexico Co* after stating that a judgment in default or by consent raises estoppel in the same way as a judgment after the court has heard the merits, proceeded to say that -

> "the basis of estoppel is that, when parties have once litigated a matter, it is in the interest of the estate that litigation should come to an end; and if they agree upon a result, or upon a verdict, or upon a judgment, or upon a verdict and judgment, as the case may be, an estoppel is raised as to all the matters in respect of which an estoppel would have been raised by judgment if the case had been fought out to the bitter end". *Ibid*, page 45.

12. *Jones v Sherwood Computer Services Plc* are *Baker and Kenwood* are inapplicable on the facts of the present case in the manner that Mr Chew so bravely put them forward. I do not disagree with the fundamental principle enunciated in these two cases, and which was in fact an affirmation of *Campbell v Edwards* [1976] 1 L1. Rep 522. In the latter case, the court was of the view that where the parties had agreed to accept a price that their nominated valuer had determined so that litigation can thereby be avoided, they are bound by that valuation even if the valuer was wrong. The only possible exception is where there is a manifest error that justly requires judicial intervention. There is no such error in the present case. The expert’s terms of reference pursuant to an order of court was to assess the value of the assets of the companies in question. In the case of the specific asset in question he was obliged to take the average of the valuations of Knight Frank and Richard Ellis. That he has done. In the circumstances, even if Knight Frank had made an error no order can be sought in the present proceedings to correct that error without Knight Frank being made a party and be given an opportunity to defend their position. No order can conceivably be made against any of the three defendants before me.

13. Finally, it must also be noted that a prayer such as that sought in the present proceedings is founded on the equitable jurisdiction of the court. In such a case, the party coming for relief must show itself deserving of the court's discretion. It is not necessary to set out a list of do's and don'ts

for that will not serve present purposes, but I can and must say, that the conduct of the plaintiffs here and in the previous litigation reveal an irrational and nasty propensity to reject orders of court even those that were obtained by consent. I would, therefore, decline to exercise any residual discretion that I may have in their favour. The only question remaining is whether the defendants' application to strike out this originating summons should be allowed or the plaintiffs' claim be dismissed. Counsel had at the outset wisely asked that the two applications be consolidated and heard together in view of the overlap of fact and law. Since I am of the view that the facts as presented show no cause of action, the proper order should be to allow the defendants' application to strike out the originating summons. I therefore order that the originating summons be struck out.