Taytonn Pte Ltd and another *v* Tay Joe Boy and others and another appeal

[2021] SGHC(A) 15

Case Number	: Civil Appeals Nos 47 and 49 of 2021
Decision Date	: 25 October 2021
Tribunal/Court	: Appellate Division of the High Court
Coram	: Belinda Ang Saw Ean JAD; Woo Bih Li JAD; See Kee Oon J
Counsel Name(s)	: Probin Stephan Dass, Hoang Linh Trang and Poh Yee Shing (Shook Lin & Bok LLP) for the appellants in AD/CA 47/2021 and the respondents in AD/CA 49/2021. Chang Qi-Yang and Ephraim Tan (WongPartnership LLP) for the respondents in AD/CA 47/2021 and the appellants in AD/CA 49/2021.
Parties	: Taytonn Pte Ltd — ASCC Enterprises Pte Ltd — Tay Joe Boy — See Teow Kheng — Loo Ah Phaik @ Loo Phaik Tin — Tay Liang Boon — Hoh Heen Hiang — Alan See Keat Hin — Tay Lee Lean — Lim Soo Bean — Brian Eugene Kressin — Tay Joe Boy appointed by order dated 24 July 2019 to represent the estate of Seow Yeow Hin deceased — Chong Khian Sim (Zhang Jianxin) — Goh Wee Sze Susanna (Wu Weishi Susanna) — Lim Wen Dee

Contract – Contractual terms – Admissibility of evidence

Contract – Contractual terms – Interpretation

Equity – Fiduciary relationships – Duties

25 October 2021

See Kee Oon J (delivering the judgment of the court *ex tempore*):

Introduction

1 ASCC Enterprises Pte Ltd ("ASCC") acquired Taytonn Pte Ltd ("Taytonn") by purchasing the shares of its shareholders ("Vendors") under a sale and purchase share agreement dated 20 June 2018 ("the Agreement"). Mr Tay Joe Boy ("Mr Tay") was the managing director and the largest shareholder of Taytonn, holding 38.9% of its shares before its acquisition by ASCC.

2 Mr Tay and nine other Vendors (collectively, "the Lead Respondents") brought a claim against Taytonn and ASCC as well as three other Vendors who did not enter appearance and appear to be nominal defendants. The Lead Respondents claimed that pursuant to cl 7.2(a) of the Agreement ("cl 7.2(a)"), they were entitled to a cash sum of US$2,586,056.55 which was left in Taytonn's accounts post-acquisition ("the Disputed Cash Sum"). They further claimed that the Disputed Cash Sum was subsequently lent to Taytonn pursuant to an oral agreement ("the Alleged Advance Agreement"). The Lead Respondents claimed the Disputed Cash Sum on the grounds of: (a) their contractual entitlement under cl 7.2(a); (b) repayment of the loan under the Alleged Advance Agreement; and (c) unjust enrichment.

3 ASCC counterclaimed that if it was held liable to pay the Disputed Cash Sum to the Lead Respondents, the Lead Respondents would have breached their warranties under the Agreement and were hence bound to indemnify ASCC from any resulting loss ("the Indemnity Issue"). Taytonn and ASCC (collectively, "the Lead Appellants") also counterclaimed that Mr Tay had breached his fiduciary duties and contractual obligations to Taytonn by wrongfully procuring the sale of Taytonn's assets to himself at an undervalue ("the Undervalue Issue").

4 The trial judge ("the Judge") held that the Lead Respondents were entitled to the Disputed Cash Sum from Taytonn under cl 7.2(a). However, he found that the Alleged Advance Agreement was a fabrication by Mr Tay. The Judge also dismissed the Lead Respondents' claim in unjust enrichment. As for the Lead Appellants' counterclaims, the Judge found that the Indemnity Issue was moot as ASCC was not liable to the Lead Respondents for the Disputed Cash Sum. Finally, the Judge held that Mr Tay had breached his fiduciary duties to Taytonn and was liable for the resulting loss of $413,189.75 that Taytonn had suffered.

5 AD/CA 47/2021 ("AD 47") is the Lead Appellants' appeal against the Judge's findings on: (a) the Lead Respondents' entitlement to the Disputed Cash Sum under cl 7.2(a) ("the Contractual Entitlement Issue"); and (b) the Indemnity Issue. AD/CA 49/2021 ("AD 49") is the Lead Respondents' appeal against the Judge's findings on: (a) the Alleged Advance Agreement; (b) their claim in unjust enrichment ("the Unjust Enrichment Issue"); and (c) the Undervalue Issue.

AD 47

The Contractual Entitlement Issue

Interpretation of cl 7.2(a)

6 In our assessment, the Judge did not err in finding the Lead Appellants' interpretation of cl 7.2(a) to be untenable. He adopted the Lead Respondents' interpretation which points towards their entitlement to the Disputed Cash Sum as the excess "Cash and Cash Equivalents" standing to the credit of Taytonn's accounts as at Completion Date 1, *ie*, 28 June 2018. The working capital sum of US$5m stated in cl 7.2(a) was agreed to be sufficient to sustain Taytonn as a going concern.

7 The Judge was justified in accepting the Lead Respondents' primary argument that the "debt-free and cash-free" basis for the acquisition of Taytonn was consistent with the interpretation of cl 7.2(a) as setting a "cut-off point" or "target" of US$5m to enable the identification of the "Cash and Cash Equivalents" which the Vendors would be entitled to post-acquisition. We note that the definition of "Cash and Cash Equivalents" in cl 1.1.6 of the Agreement expressly excludes "items included in Working Capital such as accounts receivable". The corresponding definition of "Debt" in cl 1.1.11 expressly excludes "items included in Working Capital such as accounts payable". There is nothing in the Agreement to suggest that the Disputed Cash Sum had been earmarked for payment of Taytonn's June 2018 accounts payable ("June 2018 APs").

8 It also does not follow from the mere fact that Taytonn would have faced cash flow difficulties without the Disputed Cash Sum that the parties had agreed that Taytonn would retain the Disputed Cash Sum, *on top of* US$5m in working capital, to pay the June 2018 APs. On the contrary, since cl 1.1.29 of the Agreement defines "Working Capital" as excluding debt, thereby including accounts payable, an ordinary reading of cl 7.2(a) indicates that the June 2018 APs had already been accounted for in the working capital sum of US$5m. If the Lead Appellants are correct in their interpretation of cl 7.2(a), then Taytonn would have retained working capital of more than US$7m as at Completion Date 1. This was never contemplated by the parties.

9 The commercial purpose of cl 7.2(a) also supports the Lead Respondents' construction. As the Judge observed, cl 7.2(a) was intended to prescribe the Vendors' entitlement to the "Cash and Cash Equivalents" remaining in Taytonn on Completion Date 1. However, if the sum of US$5m was only a "floor", as the Lead Appellants contend, there would be no upper limit that would enable the Vendors to determine their entitlement to the excess "Cash and Cash Equivalents". This difficulty cannot be resolved by reference to what was needed to comfortably sustain Taytonn as a going concern, not

least because the Agreement does not prescribe any mechanism for making such a determination. In contrast, the Vendors' entitlement to the excess "Cash and Cash Equivalents" would be readily ascertainable on the Lead Respondents' construction of cl 7.2(a). The Vendors would simply be entitled to any cash that remained once Taytonn had reached US$5,000,000 in working capital – in this case, the Disputed Cash Sum. Hence, even though the Judge noted that the words "at least" in cl 7.2(a), when viewed in isolation, might support the Lead Appellants' construction, he rightly found that the Lead Respondents' interpretation better comports with the commercial purpose of cl 7.2(a) and the "cash-free" aspect of Taytonn's acquisition. An objective and contextual interpretation of cl 7.2(a) reveals that the words "at least" serve no real purpose.

10 The Judge further observed in *obiter* that Mr Tay had left the Disputed Cash Sum in Taytonn on Completion Date 1 as a calculated move to blindside ASCC. We express no view on the correctness of this observation. It does not affect his finding that the Lead Respondents are clearly entitled to the Disputed Cash Sum based on the language of cl 7.2(a).

Admissibility of extrinsic evidence

11 The Lead Appellants' main arguments in AD 47 centre on the extrinsic evidence that would allegedly support their interpretation of cl 7.2(a). In this regard, the Lead Appellants contend that the Judge had erred in disregarding the extrinsic evidence of: (a) key correspondence evidencing assurances given to ASCC's representatives that Taytonn would have sufficient cash for its June 2018 APs ("Key Correspondence"); (b) the Vendors' deliberate omission to extract the Disputed Cash Sum before or at Completion Date 1; and (c) the earmarking of the Disputed Cash Sum on Mr Tay's instructions for Taytonn's June 2018 APs.

12 In our view, the Judge correctly held that the extrinsic evidence that the Lead Appellants had sought to rely on was inadmissible. The pleading requirements governing the admissibility of extrinsic evidence have been clearly spelt out by the Court of Appeal in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 and *Tuitiongenius Pte Ltd v Toh Yew Keat and another* [2021] 1 SLR 231 ("*Tuitiongenius*"). The Lead Appellants did not properly plead the extrinsic evidence they seek to rely on and the effect thereof on the construction of cl 7.2(a). These must be pleaded with specificity and it is inadequate for the Lead Appellants to merely plead their construction of cl 7.2(a). Furthermore, the extrinsic evidence was raised by the Lead Appellants for the purpose of varying cl 7.2(a) and *Tuitiongenius* makes it clear (at [43]) that this should not be allowed. It is also pertinent to note that the Lead Appellants had themselves denied the relevance of the Key Correspondence in their Defence and Counterclaim (Amendment No 2). This is a key factor that distinguishes the present case from *Tuitiongenius*. Although the respondents in *Tuitiongenius* did not plead the effect of certain extrinsic evidence on the interpretation of the contract in question, the Court of Appeal admitted the evidence because it was not seriously challenged on appeal and the respondents had relied on that evidence from the outset.

13 Even if we were to overlook the deficiencies in the Lead Appellants' pleadings, most of the extrinsic evidence that they seek to rely on would not satisfy the requirements for admissibility as set out in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [125] and [128]–[129]. We add that we have serious doubts as to whether Mr Tay had indeed instructed Taytonn's finance manager on 10 May 2018 to earmark the Disputed Cash Sum for Taytonn's June 2018 APs, given the paucity of evidence on the same.

14 We find cl 15.10 of the Agreement to be helpful as it serves to remind the parties that the language used in the Agreement was the product of joint negotiation and drafting. Hence if a question of interpretation were to arise, as it has in the present case, the *contra proferentem* rule does not

apply. Arguably, cl 15.10 would have a bearing on whether it is permissible to rely on extrinsic evidence as an aid to construction.

15 As we have decided the Contractual Entitlement Issue in the Lead Respondents' favour, it is unnecessary for us to consider the extrinsic evidence which they seek to rely on. In any event, we agree with the Judge that it is largely unproductive to trawl through the parties' pre-contractual negotiations. There is no benefit to interpreting the Key Correspondence as if they contained contractual terms when the object of interpretation is not the Key Correspondence but cl 7.2(a). The Key Correspondence, which both sides rely on to establish what was purportedly agreed between them in the lead-up to the execution of the Agreement, is also of little relevance because cl 15.3 of the Agreement contains a "whole agreement" clause. Clause 15.3 has the effect of excluding any agreements that might have been made in prior negotiations or discussions, thereby reinforcing the fact that the court should not stray beyond the confines of the Agreement in interpreting cl 7.2(a).

The Indemnity Issue

16 The Indemnity Issue is moot. As we have explained earlier in this judgment, we accept the Judge's interpretation of cl 7.2(a). As such, it would follow that the Vendors did not breach the relevant warranties in the Agreement to begin with. In any event, they were not obliged under cl 7.2(a) to ensure that Taytonn would be able to meet the June 2018 APs in cash. The Vendors have also not breached any warranty by asserting their entitlement to the Disputed Cash Sum.

AD 49

The Alleged Advance Agreement and the Unjust Enrichment Issue

17 As we accept the Judge's findings on the Contractual Entitlement Issue, the issue of the Alleged Advance Agreement and the Unjust Enrichment Issue do not arise for determination in these appeals.

18 We add that arguments relating to both the Alleged Advance Agreement and the Unjust Enrichment Issue ought to have been properly canvassed by the Lead Respondents in response to AD 47, in the eventuality that we are minded to allow the Lead Appellants' appeal on the Contractual Entitlement Issue. These arguments are not properly the subject-matter of a separate cross-appeal by the Lead Respondents.

The Undervalue Issue

19 The only issue arising in AD 49 is the Judge's determination that Mr Tay had breached his fiduciary duty to Taytonn and was liable for the resulting loss to Taytonn of $413,189.75 occasioned by the sale of two units of leasehold property at 32 Old Toh Tuck Road I.Biz Centre ("the Property") and the two vehicles registered under Taytonn (collectively, "the Assets"). Only Mr Tay should have been the appellant on this issue. The Judge based his finding on Mr Tay having arranged for Taytonn to enter into the Agreement to sell the Assets to himself when he was in a position of conflict of interest, and on Taytonn having allegedly sustained losses as a result of Mr Tay's breach.

20 The Judge had correctly applied his mind to the "no conflict" rule outlined in *Nordic International Ltd v Morten Innhaug* [2017] 3 SLR 957 at [53]. With respect, however, we do not agree with the Judge's reasoning and conclusion that Mr Tay had breached his fiduciary duty. Mr Tay's act of buying the Assets *simpliciter* does not lead to this conclusion. Mr Tay would have had to observe the "no conflict" rule because of potential personal profit from the sale of the Assets. But

more fundamentally on the present facts, the pivotal question is whether Mr Tay had bought the Assets with Taytonn's approval.

21 The disposal of Taytonn's assets by Mr Tay was contemplated by the shareholders' agreement dated 10 September 2015, although that agreement does not go as far as to suggest that the *sale of the Assets to Mr Tay* was contemplated and/or disclosed then, contrary to what the Lead Respondents submit. Nevertheless, closer scrutiny of the objective evidence in the round would indicate that Mr Tay *did* obtain informed consent and approval for the sale of the Property from Taytonn's shareholders at the extraordinary general meeting ("EGM") of 12 June 2018. It is clear that by that EGM, Taytonn's shareholders had known of and approved the sale of the Property to Mr Tay at the agreed price of $1,205,000. We note that the Lead Appellants have never questioned the validity of the EGM and have not shown credible grounds to impugn the shareholders' resolution that was passed.

22 Further, the EGM minutes expressly referred to the transfer of the Property to Mr Tay as a condition precedent to the completion of the sale of shares under the Agreement, a draft copy of which was annexed to those minutes. This condition precedent was contained in cl 4A.1(a) of the Agreement, which was eventually entered into on 20 June 2018, requiring the completion of the sale of the Assets to Mr Tay and/or his nominees before Completion Date 1. Given that the Agreement was signed by all the shareholders, it was insufficient for the Judge to focus solely on Mr Tay having been in a position of conflict, or the fact that his actions may not have appeared to be *bona fide* or in Taytonn's interests. The key consideration is whether there was lack of informed consent on the part of the shareholders in relation to the sale of the Property. The weight of the evidence does not point towards this conclusion.

23 As for the sale of the two vehicles, it was not necessary for shareholders' approval to be obtained, having regard to Art 75 of Taytonn's articles of association. We accept that it was sufficient that a directors' resolution was validly passed on 11 June 2018 to approve the sale of the vehicles to Mr Tay. As the sale of the vehicles was entirely proper, there was simply no breach of fiduciary duty by Mr Tay to complain of.

24 It is important to bear in mind the undisputed fact that the shareholders have not objected at any time to Mr Tay's purchase of the Assets or to the sale values. The third to fifth defendants to the action are Taytonn's managerial employees who were also shareholders. They have not entered appearance and are taking a neutral stance. In short, none of the shareholders/Vendors has expressed any reservations or concerns to date. For present purposes, we infer that they knew of and consented to Mr Tay's purchase of the Assets at the respective values.

25 It is also significant that the proceeds of the sale of the Assets were earmarked for the shareholders under cl 7.2(a). The shareholders, not Taytonn or ASCC, were eventually entitled to the sale proceeds under the Agreement. The Agreement itself contains a de-consolidation of assets clause in cl 7.1. The Assets were specifically excluded from the acquisition and the value of Taytonn's shares was adjusted accordingly to accommodate these excluded assets. Hence, even if the Assets were sold at an undervalue as alleged, it would not have led to loss suffered by Taytonn or ASCC.

26 There is of course no doubt that Mr Tay did owe a fiduciary duty to Taytonn. However, for the reasons we have stated above, we do not agree with the Judge's finding that he had breached this duty. Furthermore, we accept the Lead Respondents' submission that the Lead Appellants were not the proper parties to bring a counterclaim premised on Mr Tay's alleged breach of fiduciary duty. AD 49 should therefore be allowed in part in respect of the Undervalue Issue.

Conclusion

Conclusion

27 In the circumstances, we dismiss AD 47 and allow AD 49 in part on the Undervalue Issue.

28 The Lead Respondents are entitled to their costs in successfully defending AD 47 and for succeeding on the Undervalue Issue in AD 49. Costs of SUM 2684 of 2021 (the Lead Appellants' application for a stay of execution pending appeal) were reserved to their appeal. In AD 47, the Lead Respondents also seek a variation of the Judge's refusal to allow their expert's fees to the full extent of $80,000. In our view, the Judge rightly disallowed the Lead Respondents' expert's fees to the full extent as the expert's evidence was of little assistance both at trial and on appeal.

29 The Lead Respondents seek $60,000 in costs and reasonable disbursements. We order costs of $50,000 (all-in) for the Lead Respondents.

30 The usual consequential orders apply.