Nomura Regionalisation Venture Fund Ltd v Ethical Investments Ltd
[2001] SGHC 121

Case Number : Suit 623/1998

Decision Date : 31 May 2001

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : K Shanmugam and Ang Cheng Hock (Allen & Gledhill) for the plaintiffs; Choi Yok Hung (as counsel) with Terence Teo (Chee & Teo) for the defendants

Parties : Nomura Regionalisation Venture Fund Ltd — Ethical Investments Ltd

JUDGMENT:

Grounds of Decision

The background

1. The defendants filed Registrar's Appeal no. 514 of 1999 (the appeal) against the decision of the learned Assistant Registrar in dismissing their summons in chambers entered no. 6490 of 1999 (the application). In the application, the defendants had prayed for relief against forfeiture of their shares (valued at US$5m) in the plaintiffs' fund and, that the plaintiffs expedite assessment of their damages. I allowed the appeal and the plaintiffs have now appealed against my decision (in Civil Appeal No. 600028 of 2001). Incidentally, this is the second occasion that the plaintiffs have appealed against my decision. In Civil Appeal No. 12 of 2000 (see *Nomura Regionalisation Venture Fund Ltd v Ethical Investments Ltd* [2000] 2 SLR 686) the plaintiffs had appealed against my previous order allowing the defendants an extension of time in which to serve notice of the appeal on them and, adjourning hearing of the appeal in the interval. Civil Appeal No. 12 of 2000 was heard and dismissed on 27 July 2000 (see *Nomura Regionalisation Venture Fund Ltd v Ethical Investments Ltd* [2000] 4 SLR 46).

The facts

2. The plaintiffs are a venture company incorporated in Singapore; their business is to operate and manage venture funds for investors. The defendants are a company incorporated in the Cayman Islands and was one of the investors who subscribed to the plaintiffs' fund, which has a charter life of 10 years expiring on 13 March 2006. Institutional investors were required to subscribe for a minimum of 50 units in the fund while individual investors were required to subscribe for a minimum of 10 units. The defendants applied to the plaintiffs on 25 October 1996 to purchase the minimum number of 50 units at US$100,000 per unit for a total consideration of US$5m. Each unit comprised 10 ordinary shares of US$1.00 per ordinary share and 90 redeemable preference shares at US$1,111 each share.

3. Under the terms of the agreement (the agreement) for subscription to the fund, subscribers were obliged to pay a first instalment of US$50,000 for each unit on application and the second instalment payment of US$50,000 per unit had to be paid on or prior to, the date falling six months after closing of the fund.

4. On 12 December 1996, the defendants were allotted the 50 shares (the shares) for which they paid the first instalment of US$2.5m. The plaintiffs gave written notice to the defendants on 30 April 1997 to pay the second instalment by 2 June 1997; the defendants did not pay. The plaintiffs made a second request for payment on 17 June 1997 following which the defendants made partial payment of US$500,000 in September 1997.

5. On 10 November 1997, the plaintiffs' solicitors wrote to the defendants demanding payment of the balance of US$2m and giving notice that failure to pay could result in forfeiture of the shares; the defendants again did not pay. On 5 December 1997 however, the defendants wrote to the plaintiffs to ask for more time to make payment. When the plaintiffs' solicitors replied on

16 December 1997 to inquire when payment would be made, the defendants did not respond.

6. Consequently, the plaintiffs commenced these proceedings on 27 April 1998 claiming specific performance of the agreement and damages. Summary judgment was granted to the plaintiffs on 4 December 1998 and specific performance of the agreement was ordered. However, the defendants did not comply with the order for specific performance and their appeal against the summary judgment was dismissed on 9 February 1999.

7. On the plaintiffs' application, the order for specific performance was discharged on 12 March 1999 (without prejudice to the plaintiffs' rights and remedies against the defendants under the agreement) and the parties were ordered to proceed with the assessment for damages. The plaintiffs wrote to the defendants on 1 April 1999 giving a deadline of 22 April 1999 for payment of the outstanding sum of US$2m plus legal costs incurred; the defendants failed to pay. The plaintiffs then exercised their rights under article 39 of the plaintiffs' articles of association and the defendants' shares (together with 2 other members') were forfeited and cancelled, by a resolution of the fund members passed on 3 May 1999. This was followed by a filing of Form 11 with the Registry of Companies on 20 May 1999 relating to the cancellation of the defendants' shares. The Economic Development Board (the Board) was also informed on 19 May 1999 as, the fund had been granted approved venture company status by the Board (under s13H of the Income Tax Act) with attendant tax exemption on gains and dividend income from approved investments, for a period not exceeding ten (10) years.

8. The defendants filed the application on 19 October 1999 praying for relief against forfeiture of the shares; the application was dismissed on 3 December 1999 giving rise to the appeal herein.

The arguments

(i) the defendants' submissions

9. Counsel for the defendants raised three (3) main grounds why the appeal should be allowed. Firstly, the notice of forfeiture was inadequate. There were two (2) errors in the letter of the plaintiffs dated 1 April 1999 giving notice of forfeiture:

> (i) the sum of S$2m should have been US$2m while the costs of S$4,700 should have been S$6,700. The plaintiffs' solicitors sought to correct the errors by their letter dated 14 April 1999. However, under the information memorandum dated 26 September 1996 issued by the plaintiffs regarding the fund, forfeiture of the shares could only be effected if 14 days' notice had been given; the plaintiffs purported to forfeit the shares on 26 April 1999. The law required strict compliance for notices of forfeiture. Hence, the first notice dated 1 April 1999 was not valid because of the errors in the 2 figures. Even if the plaintiffs' solicitors' letter dated 14 April 1999 could be considered a fresh notice, 14 days did not lapse thereafter before the plaintiffs forfeited the shares.
>
> (ii) the forfeiture provision was a penalty and not a genuine pre-estimate of damages. It was intended to terrorise/put pressure on the defendants to pay the second instalment. Indeed, the plaintiffs partly succeeded as the defendants did pay US$500,000 in response to the plaintiffs' demands. Several cases both English and local, were cited by counsel in support of this submission of which the closest parallel (she said) would be *Jobson v Johnson* [1989] 1 AER 621 (which I shall refer to later). In our case, forfeiture was clearly a penalty as, it allowed the plaintiffs not only to forfeit the shares but also to retain the US$3m which the defendants had already paid and the plaintiffs could make a further claim for damages;

(iii) by seeking specific performance and damages, the plaintiffs had made an election and should not be allowed to forfeit the shares and at the same time retain the defendants' US$3m as well as claim for damages.

10. Even if the provision for forfeiture of shares was not a penalty, counsel argued that the defendants should still be granted relief against forfeiture. This was because the object of the forfeiture clause was to secure the payment of money and the sum of US$3m forfeited was unduly harsh. In this regard the plaintiffs had filed a 4th affidavit (by their company secretary Kevin Tan dated 29 January 1999) in which (see para 10) it was deposed that the fund manager had preserved the investment funds of the plaintiffs and its shareholders by placing most of the funds in fixed deposits, because of the Asian economic crisis during the relevant period. Had the plaintiffs invested the funds during the crisis in Malaysia, Thailand, Indonesia, Hong Kong and the Philippines, the fund would have lost money. It was clear from this affidavit that the plaintiffs had no use for the funds other than to place them in fixed deposits. The defendants also suffered from the same crisis during the period and hence were unable to pay up the balance of US$2m. However, they had tendered the sum while the appeal was still pending (on 9 February 2001) together with the costs of S$6,700, through their solicitors to the plaintiffs' solicitors. (Apparently, even at the hearing of Civil Appeal No. 12 of 2000, the defendants had offered to pay the US$2m to the plaintiffs). The defendants were also willing to abide by any order which the court may make by way of damages for late payment in which regard, the defendants had calculated (based on 6.5% per annum) that the notional interest 'lost' on the sum of US$2m which they failed to pay approximated US$453,000 for the period May 1997 to February 2001; the defendants were willing to pay this notional interest amount to the plaintiffs, to be set-off and deducted from the US$3m.

(ii) the plaintiffs' submissions

11. Not unexpectedly, the plaintiffs argued that the appeal should not be allowed. Their counsel drew the court's attention to the fact that the defendants were tardy (by six [6] months) in making the application, well after the shares had already been forfeited and even then, they did not offer to pay the balance outstanding; he said the defendants were guilty of laches (referring to a passage from *Spry* [at p 230] on *The Principles of Equitable Remedies* 5th ed). Further, in the court below, the defendants' stand was that they only wanted to retain their US$3m worth of shares and not the full US$5m which had been issued to them. That argument was fallacious and was rightly rejected by the learned Assistant Registrar – they had been issued 50 units of the fund and as they had not paid up in full for any of the units, the defendants were not entitled to retain any of the shares. If the defendants were allowed to keep their US$3m, it would amount to re-writing the bargain between the parties as, the defendants would not have been allowed to participate in the fund in the first place if they had not agreed to subscribe for the minimum US$5m worth of units.

12. The plaintiffs further argued that it would be grossly unfair to the other fund members if the defendants were granted relief against forfeiture. The shares had been cancelled, the ratio of the shareholding of other fund members had thereby been increased and consequently, the value of their shares. Granting relief against forfeiture after a lapse of almost six (6) months would dilute the shareholdings of the other fund members and adversely affect their interests.

13. Counsel submitted it is trite law that equity will not intervene once third party rights have set in or will be affected by the granting of relief. In this case, the other participants of the fund will be affected if relief is granted to the defendants:

i. each investor agreed to put in an agreed amount in exchange for shares in the fund in accordance with the memorandum and articles;

ii. they agreed as members of the fund inter se, that they would be bound by the memorandum and articles of the plaintiffs and by the terms set out in the information memorandum. This included payment obligations in default of which their shares could be forfeited by the managers of the fund;

iii. all of the shareholders put in money based on the memorandum and articles. All of them took the risk that the fund might

perform badly in the economic crisis. But the defendants chose not to take the commercial and investment risk and refused to pay the second instalment when it was due; and

iv. after two (2) years of giving indulgence to the defendants, the plaintiffs forfeited the shares because of their non-payment. As a result, all the other shareholders had a greater proprietary interest in the fund as, the defendants' share in the fund was re-distributed.

14. The defendants' offer of payment on 9 February 2001 came too late and was consequently rejected. By then (according to Kevin Tan's 7th affidavit), the plaintiffs had conducted a redemption exercise (in March 2000) and all the redeemable preference shares held by the fund members were redeemed from monies held by the fund. As a result, 99% of the capital had been returned to the members of the fund, in effect as a reward for sticking with the fund through thick and thin.

The decision

15. When I allowed the appeal (with costs), I had made the following additional orders:

> (i) the plaintiffs to proceed with their claim for damages which cut-off date shall be 9 February 2001 (date of defendants' tender of US$2m);
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> (ii) the defendants to re-tender to the plaintiffs the sum of US$2m within seven (7) days of the date of hearing;
>
> (iii) if the plaintiffs reject the re-tender, they are only entitled to forfeit the balance 20 units of shares deemed unpaid;
>
> (iv) costs of the assessment were reserved to the Registrar.

16. I deal first with the plaintiffs' argument that third party rights would be affected if the appeal was allowed. Counsel had referred to the following extract from *Spry* (at p 402) to support his argument:

> …the interests of the public and of third parties are relevant and have more or less weight according to the other material circumstances. So it has been said that courts of equity "upon principle will not ordinarily and without special necessity interfere by injunction, where the injunction will have the effect of very materially injuring the rights of third persons not before the courts". Regard must be had "not only to the dry strict rights of the plaintiff and defendant, but also to the surrounding circumstances, to the rights or interests of other persons which may be more or less involved". So it is that where the plaintiff has prima facie a right to specific relief, the court will, in accordance with these principles, weigh the disadvantage or hardship that he would suffer if relief were refused against any hardship or disadvantage that might be caused to third persons or to the public generally if relief were granted, even though these latter considerations are only rarely found to be decisive.

17. There is however, another passage from the same textbook which precedes the above extract and which reads as follows:

> Further, when the balance of hardship between the parties is being considered there is taken into account, not merely the prima facie entitlement of the plaintiff to have his rights enforced, but also the knowledge or ignorance of the

> defendant, as the case may be, at the material times that he has been acting in breach of the rights of the plaintiff. If, for example, the defendant has at the material times known himself to be acting unlawfully the court looks less favourably on his claims of hardship and accords them less weight, though they are not by any means irrelevant. So it was said by Jessel MR.; " Without laying down any absolute rule, in the first place it is of great importance to see if the defendant knew he was doing wrong, and was taking his chance about being disturbed in doing it".

I note that the plaintiffs filed their notice of appeal for Civil Appeal No. 12 of 2000 on 26 January 2000, at which time the appeal was pending. On 31 January 2000, when the appeal next came on for hearing (after I had adjourned it on 12 January 2000), it was again adjourned pending the outcome of Civil Appeal No. 12 of 2000. While Civil Appeal No. 12 of 2000 and the appeal were still pending, the plaintiffs chose to and did, hold the redemption exercise (in March 2000). The plaintiffs consciously returned monies to the fund members knowing full well that if the defendants should succeed in the appeal, they ran the risk of having to refund the defendants' monies. Yet, they wanted the court to relieve them from the consequences of their own act. Bearing in mind the above passage from *Spry,* I rejected the plaintiffs' argument as completely unmeritorious.

18. As for delay, what is required to deny the defendants any relief is not delay per se but, <u>unreasonable delay</u>. In this regard, the following extracts from *Spry* (at pp 230-231 and 235) are helpful, with the appropriate substitution of the plaintiffs for the defendants where the parties are referred to:

> It is established by the course of authorities that proceedings for specific performance will not fail merely because the plaintiff has been guilty of unreasonable delay. In order that relief be refused, it is necessary that it should further appear that, as a consequence of that delay, it would be unjust that the plaintiff should obtain an order of specific performance……
>
> By the end of the nineteenth century it had become clear that a defendant must establish, in order to make out laches, that the delay of which he complains has caused him to be prejudiced and that for that or for some other reason it would be unjust that specific performance should be granted. Unreasonable delay alone is not enough……

Another relevant passage appears at p 235:

> Two further matters should be noted. First, unreasonable delay of the plaintiff may in some circumstances cause prejudice to third persons, rather than to the defendant, and in this event that prejudice is taken into account on similar principles mutatis mutandis to those that have already been set out here…..

Six (6) months cannot be said to be unreasonable delay and, the plaintiffs should not be allowed to take advantage of their own conduct in returning monies to the fund members to argue against the defendants being granted relief against forfeiture.

19. The defendants had also submitted (which submission I accepted) that the plaintiffs had made their election in their choice of remedies against the defendants. Having obtained judgment for specific performance and for damages to be assessed against the defendants, the plaintiffs should not have been allowed to do a volte face and thereafter apply for the order for specific performance to be discharged and for the shares to be forfeited. Bearing in mind the maxims that a plaintiff in equity must approach the court with clean hands and that he who seeks equity must do equity, such conduct on the part of the plaintiffs would be considered less than conscionable. Their conduct suggested that they had suffered no loss resulting from the defendants' breach and they would not have been able to prove any loss had they proceeded to assess their damages.

20. I turn my attention now to a case cited by the defendants namely *Jobson v Johnson* [1989] 1 All ER 621. The headnotes of the case read as follows:

> The defendant entered into an agreement with the vendors for the purchase of 62,566 shares in a football club for a total purchase price of 351,688 payable by an initial payment of 40,000 and six instalments of 51,948 payable half-yearly. The agreement contained a clause that if the defendant defaulted on the payment of the second or any subsequent instalment he was required to transfer the shares back to the vendors for the sum of 40,000. That sum was not a genuine pre-estimate of the vendors' loss in the event of the defendant's default and did not reflect the true value of the shares. The defendant paid 140,000 towards the purchase price and the shares were transferred to him. He then defaulted on payment of the instalments. The plaintiff, who was the assignee of the vendors, sought specific performance of the agreement for the retransfer of the shares. The defendant claimed that the retransfer agreement was a penalty and therefore unenforceable and counterclaimed for relief against forfeiture if the agreement was enforceable. At the trial the counterclaim was struck out because the defendant had not complied with and undertaking to disclose certain documents. The judge held that the retransfer agreement was a penalty but nevertheless enforceable unless the defendant was granted relief against forfeiture, which, because of the striking out of the defendant's counterclaim, was not possible. The judge accordingly ordered specific performance of the agreement for the retransfer of the shares for the sum of 40,000. The defendant appealed, contending that the agreement for the retransfer of the shares was unenforceable because it was a penalty.

21. The Court of Appeal accepted the defendant's contention, allowed his appeal and inter alia held that on its true construction, the retransfer agreement was intended to provide the plaintiff with security for the unpaid instalments, with repossession as an alternative remedy. In those circumstances (Kerr LJ dissenting), the court would make available to the plaintiff two alternative forms of relief, namely:

> (a) an order for the sale of the shares by the court and payment to the plaintiff of the unpaid instalments and interest out of the proceeds of the sale or
>
> (b) an inquiry as to the value of the shares.

If the value of the shares did not exceed the amount of the unpaid instalments and interest by 40,000, an order for specific performance of the agreement for the retransfer of the shares, with the choice of remedy bring left to the plaintiff. If the plaintiff declined to accept either form of relief, the order for specific performance would be discharged since otherwise the court would be enforcing a penalty and the plaintiff would be left to his remedy of suing to recover the amount of the unpaid instalments in a fresh action.

22. Counsel for the defendants had urged the court to apply the principles in *Jobson v Johnson* because of the similarity in factual matrix. I accepted her submission because interestingly enough, Chao JA in dismissing the plaintiffs' appeal in Civil Appeal No. 12 of 2000 had this to say (para 33 at p 56 of [2000] 4 SLR 46):

> The modern law on relief against forfeiture was laid down in *Shiloh Spinners Ltd v Harding* [1973] AC 691 where the House of Lords held that the jurisdiction was not confined to the two traditional heads: (i) where it is possible to state that the object of the transaction and of the insertion of the right to forfeit is essentially to secure the payment of money, and (ii) when there is fraud,

accident, mistake or surprise. It affirmed (at p 723):

> '......the rights of courts of equity in appropriate and limited cases or conditions where the primary object of the bargain is to secure a stated result which can effectively be attained when the matter comes before the court and where the forfeiture provision is added by way of security for the production of that result. The word "appropriate" involves consideration of the conduct of the applicant for relief, in particular, whether this default was wilful, of the gravity of the breaches, and of the disparity between value of the property of which forfeiture is claimed as compared with the damage caused by the breach'......... [per Lord Wilberforce]

> It seems to us clear that the present case falls within the first of the two traditional heads where the court would have the jurisdiction to grant relief. At this stage, we need not and should not say more.....(emphasis mine).

Consequently, the principles in *Jobson v Johnson* would apply. Another case cited by the defendants *Else (1982) Ltd v Parkland Holdings Ltd* [1994] 1 BCLC 130 again touching on sale of shares in a football club, came to a different conclusion. I note however, that the Court of Appeal in this case found that that the plaintiff and the defendant had entered into a settlement agreement to compromise the disputes between them and the clause in question [cl 4(i)] was to be found in the settlement agreement, not in the original sale agreement. Clause 4(i) merely confirmed the plaintiff's right as a vendor to rescind the contract for breach by the defendant of an essential term and could not therefore amount to a penalty.

23. I should point out that counsel for the plaintiffs relied on *Shiloh Spinners Ltd v Harding* in his submissions (on a passage from p 725) to support his contention that the defendants should not be granted relief against forfeiture, relying on the following holding (No. 6) of the House of Lords:

> that wilful breaches should only in exceptional circumstances be relieved against and the present case, where there were substantial breaches and a continuing disregard of the plaintiff's rights over a period of time, was not one for relief.

I did not/do not disagree with their lordships' view but would point out that unlike the defendant in that case, there is no evidence that the defendants here wilfully disregarded their obligations to make payment; they did not pay the balance US$2m because they could not, due to the regional economic crisis. It bears mentioning at this juncture that although the defendants are a company registered in the Cayman Islands, the representatives who affirmed affidavits on the company's behalf are based in Kuala Lumpur, so presumably its shareholders are Malaysians.

24. Another argument raised by counsel for the plaintiffs was, that allowing the appeal would send a wrong signal to the investing community that a recalcitrant investor can get off. Further, it might encourage the other two fund members whose shares had also been forfeited to come forward to ask for similar relief. I did not find this argument meritorious either. If the shares should not have been forfeited in the first place, the plaintiffs cannot raise such extraneous arguments to say their action should not be reversed.

25. A far more important factor which prompted me to allow the appeal was the inadequacy of the notice given by the plaintiffs to the defendants. Counsel did not dispute that the plaintiffs failed to render the requisite 14 days' notice before exercising their rights to forfeit, due to the mistakes in the figures set out in the plaintiffs' letter dated 1 April 1999. However, he said the mistake was a mere technicality. Counsel for defendants disagreed, relying on authorities such as *Central Provident Fund v Ho Bock Kee* [1981] 2 MLJ 162 for her submission that strict compliance was called for in relation to notices of forfeiture; I accepted her

submission as the principle is well supported by case-law.

26. Contrary to the contention of counsel for the plaintiffs, the interest earned on fixed deposits was not due to shrewd investment. It was drawn to the court's attention by the defendants (based on the plaintiffs' accounts [as at 31 March 1997] exhibited in the affidavits filed by the defendants) that the plaintiffs had deposited sums in excess of US$21m and S$31m 'with a related company'. The plaintiffs then returned 99% of the fund's capital to members well before the fund's 10 year charter's expiry date; this was hardly a reflection of the fund's success as the plaintiffs attempted to suggest. Even so, the fund still had 1% of its fund left with which to refund the defendants their US$3m. The only loss that would be suffered by the fund members thereby would be a diminution in their share of the fund, reverting to their status before the defendants' shares were forfeited.

27. Taking all the relevant factors into consideration, it seemed to me that this was a case where the court should exercise its discretion and grant the defendants relief against forfeiture. Accordingly I directed the plaintiffs to proceed to assess their claim for damages be it for loss of interest arising from the defendants' failure to pay the outstanding sum or for any other loss.

Sgd:

Lai Siu Chiu
Judge

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