Candid Water Cooler Pte Ltd v United Overseas Bank Ltd
[2006] SGHC 80

Case Number : OS 187/2006

Decision Date : 16 May 2006

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Lim Chor Pee and Tan Yin Tze (Chor Pee & Partners) for the plaintiffs; Hri Kumar and Tham Feei Sy (Drew & Napier LLC) for the defendants

Parties : Candid Water Cooler Pte Ltd — United Overseas Bank Ltd

Civil Procedure – Appeals – Leave – Application for leave to appeal – Whether trial judge's substantive decision containing prima facie case of error of law or case concerning issue of importance upon which determination of Court of Appeal would be to public's advantage – Section 34(2)(a) Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed)

16 May 2006

Woo Bih Li J:

1 In this action the plaintiff, Candid Water Cooler Pte Ltd ("Candid"), sought a declaration that it had completed the purchase of a leasehold property at 13 Woodlands Walk, Singapore 738813 ("the Property") within the time stipulated in a contract of sale and purchase of the Property between the defendant, United Overseas Bank Limited ("UOB"), and Candid. The rest of the reliefs sought were consequential ones.

2 The background to the action was straightforward. UOB was a mortgagee in possession of the Property. By an option dated 12 April 2005 ("the Option"), UOB granted Candid an option to purchase the Property on the terms stated therein at a purchase price of $3.83m.

3 On 26 April 2005, Candid exercised the Option resulting in a binding contract for the sale and purchase of the Property. The contract was subject to the written approval of the Jurong Town Corporation ("JTC"), the head lessor.

4 On 18 May 2005, JTC wrote to UOB to state that it had in principle no objection to the assignment of the lease of the Property to Candid, subject to various conditions being complied with. I will refer to this letter as "the Consent Letter". The material condition for the purpose of the dispute was JTC's condition that an environmental baseline study ("EBS") be obtained. Paragraph 2.3(c) of the Consent Letter stated:

> (c) Environmental Baseline Study (EBS)
>
> (c1) You as the assignor shall at your own cost engage a reputable independent consultant to conduct an Environment Baseline Study ("**assignor's EBS**") to determine the level of minerals, hydrocarbons and chemicals on and beneath the property. Please refer to Annex C for the minimum requirements for the assignor's EBS.
>
> (c2) A written copy of the results of the assignor's EBS shall be submitted to us within four (4) months from the date of this letter and at least 3 weeks before legal completion of the assignment.
>
> (c3) If the results of the assignor's EBS indicate that the level of minerals,

hydrocarbons or chemicals present at the time of the assignor's EBS exceeds –

> (c3.1) that shown in a previous Environment Baseline Study, if any, submitted to us at or about the time of the commencement of the (original) lease term ("**the First Baseline Study**"); or
>
> (c3.2) that permitted by the laws, bye-laws, orders, rules and regulations prevailing at the time of the assignor's EBS ("**such laws**"), or in the absence of such laws, the prevailing Dutch standards regulating intervention levels ("**the prevailing Dutch Standard**")

("**contamination**") then **before legal completion of the assignment**, unless we permit the assignee to take over the assignor's obligation in accordance with sub-paragraph c4 below, the assignor shall, at his own cost, properly carry out all works necessary to decontaminate the Property …

[Emphasis in original in bold and in underline]

5 Clause 2 of the "Special Conditions" of the Option ("the Special Conditions") stipulated the formula for determination of the completion date of the sale and purchase as follows:

> The balance of the Purchase Price shall be paid and this sale and purchase shall be completed at the office of **DREW & NAPIER LLC** at 20 Raffles Place #09-01 Ocean Towers Singapore 048620 or such other venue as may be directed by the Vendor's Solicitors on the expiry of twelve (12) weeks from the date of exercise of this Option or three (3) weeks from the date of the written approval of Jurong Town Corporation ("**JTC**"), all relevant authorities and/or the lessor of the Property ("the necessary approval"), whichever is the later …
>
> [Emphasis in original in bold]

6 If the Consent Letter constituted JTC's written approval, the contractual completion date would have been 19 July 2005, being more than three weeks from the date of the Consent Letter and being 12 weeks from the date of the exercise of the Option on 26 April 2005.

7 Candid's solicitors, Chor Pee & Partners ("Chor Pee"), must have considered the Consent Letter as constituting JTC's written approval because by a letter dated 1 June 2005 Chor Pee wrote to UOB's solicitors, Drew & Napier LLC ("D&N"), to ask them to confirm that completion "is now scheduled to take place on 19th July 2005".

8 By another letter dated 7 June 2005, Chor Pee wrote to D&N to refer to the EBS condition and to seek D&N's confirmation that UOB was taking steps to obtain the EBS.

9 D&N replied on 9 June 2005. They referred to cl 26(a) of the Special Conditions and stated that pursuant to that provision, Candid was required to obtain the EBS. The last sentence of their reply confirmed that completion was scheduled for 19 July 2005.

10 There was an impasse between UOB and Candid as to who was to obtain the EBS. Eventually Chor Pee sent a telefax on 18 July 2005 to say that Candid would instruct them (Chor Pee) to appoint a consultant to obtain the EBS and also to undertake steps of decontamination, without prejudice to Candid's rights. The telefax also stated that it might take one month to obtain the EBS, suggested

that no interest be charged by either party for delay in completion and proposed a new completion date of 30 August 2005.

11 D&N replied on 19 July 2005 stating that as the EBS had not been carried out "it is premature for parties to agree to a date for completion". D&N also stated that it was premature to consider Candid's request to waive late completion interest. D&N's response was slightly inaccurate in so far as Chor Pee had not suggested that only UOB waive interest for late completion but that both sides waive such interest.

12 The EBS was eventually obtained by Candid and forwarded to JTC. JTC replied on 6 September 2005 stating that it would accept the results of the EBS. On 12 September 2005, Chor Pee forwarded to D&N a copy of the EBS dated 18 August 2005 and JTC's letter dated 6 September 2005 and asked when UOB would be ready to complete.

13 On 14 September 2005, D&N replied to say that UOB was ready, able and willing to complete and asked when Candid wished to complete to enable D&N to render the completion account. D&N also stated that UOB would be charging interest for late completion from 20 July 2005.

14 Chor Pee responded on 15 September 2005 stating that as D&N had only given notice to complete on 14 September 2005, UOB was not entitled to charge interest. Chor Pee also asked for the completion account.

15 By a letter dated 15 September 2005, JTC stated to D&N that it had no objection to the execution and registration of the Deed of Assignment to assign the leasehold interest to Candid.

16 Completion was effected on 5 October 2003 with Candid paying $128,499.69 to be held by D&N as stakeholders pending resolution of the dispute as to whether 19 July 2005 was the contractual completion date. That sum was made up of the following components:

(a)	$72,717.26	being interest for late completion from 20 July to 4 October 2005, at $944.83 per day for 77 days
(b)	$36,722.06	being Candid's share of property tax from 20 July to 31 December 2005 (5 months and 12 days) at $6,816.67 per month, as UOB had paid such tax up to 31 December 2005
(c)	$19,060.37	being Candid's share of licence fee from 20 July to 30 September 2005 (2 months and 12 days) at $7,984.75 per month inclusive of GST, as UOB had paid the licence fee up to 30 September 2005

17 Although Chor Pee had previously taken the position that it was for UOB, and not Candid, to obtain the EBS, they did not pursue this point before me. Indeed, in view of cl 26(a) of the Special Conditions, it was clear that although JTC had imposed that obligation on UOB, Candid had, by virtue of that provision, agreed to comply with the same.

18 It was also clear that had Candid proceeded immediately to obtain the EBS after the Consent Letter, it would have been able to obtain the EBS by 19 July 2005.

19 In the action before me, Candid was taking the position that JTC's approval was given by its letter of 15 September 2005 when JTC said it had no objection to the execution and registration of the Deed of Assignment. Candid disputed that the Consent Letter constituted JTC's approval. If Candid was correct, the contractual completion date would be 6 October 2005, being three weeks after 15 September 2005. It would then not be liable for the interest claims of UOB for late completion and the other items stated in [16] above would have to be adjusted based on the actual completion date of 5 October 2005. In that scenario, Candid was claiming reimbursement from UOB for the licence fee it had paid for the period 1 October to 5 October 2005 amounting to $1,287.76.

20 However, if the Consent Letter constituted JTC's approval, then the contractual completion date would be 19 July 2005. In that event, UOB would be entitled to the $128,499.69.

21 Before I go on, I should mention that Chor Pee had sought confirmation from JTC that its letter of 15 September 2003 constituted its "official approval". Unfortunately for Candid, JTC's responses dated 28 September, 24 October and 5 December 2005 suggested that in its view the Consent Letter constituted its approval, although the condition about the EBS had to be satisfied prior to completion. Notwithstanding this, Candid sought to argue in correspondence and in the supporting affidavit of Lim Chiaw Chang, its managing director, that unless the EBS condition was complied with, JTC would not have given its approval. I will come back to this argument later.

22 For the time being, I would say that Chor Pee had sought JTC's view to bolster Candid's position that the Consent Letter did not constitute JTC's approval. In my view, JTC's responses militated against Candid's position. Nevertheless, I was mindful that JTC's view was not binding on Candid or UOB or the court.

23 In so far as Candid had raised the point that UOB had not given a notice to complete prior to 15 September 2005, I was of the view that this point was misplaced. The right to contractual interest was not dependent on the issue of a notice to complete.

24 Coming back to Candid's argument that there was no approval until the EBS condition was complied with, I was of the view that this argument was fallacious in so far as it was an argument on general principles. A condition may be a condition precedent or a condition subsequent to the formation of a contract or the granting of an approval. If the former, it means that there is no contract or approval until the condition is met. If the latter, it means that there is a contract or an approval but the same is subject to the subsequent compliance with the condition, failing which the contract or the approval ceases or lapses. The mere fact that there is a condition to be complied with does not negate the existence of a contract or an approval.

25 As for the facts before me, Candid relied on the decision of the Court of Appeal in *See Hup Seng Tin Factory Pte Ltd v Mercury M-Power Industrial Pte Ltd* [1995] 3 SLR 676 ("*See Hup Seng Tin*"). It is unnecessary for me to elaborate on the facts and the judgment in that case because the point was not argued there. The Court of Appeal appeared to assume in that case that the date of JTC's approval for the purpose of calculating the contractual completion date was not the date of JTC's in-principle approval but a date when JTC's condition in question was met.

26 Conversely, in the subsequent case of *Ken Glass Design Associate Pte Ltd v Wind-Power*

Construction Pte Ltd [2003] 1 SLR 34, Lee Sieu Kin JC (as he then was) assumed that the in-principle approval of JTC was the date of approval for the purpose of calculating the contractual completion date.

27 On the facts before me, it was unnecessary for me to decide whether the Consent Letter constituted the approval of JTC for the purpose of calculating the contractual completion date. I reiterate that Chor Pee had asked D&N to confirm that the completion date was 19 July 2005 and such confirmation was given. Accordingly, I agreed with Mr Hri Kumar, counsel for UOB, that Candid was estopped from asserting otherwise. Indeed, I was also of the view that the parties had in fact agreed that 19 July 2005 was the completion date. Thus, even if Candid's current interpretation of cl 2 of the Special Conditions was correct in that the Consent Letter would not have constituted JTC's approval, Candid would have been bound by its subsequent agreement that 19 July 2005 was the contractual completion date.

28 Mr Lim Chor Pee, counsel for Candid, sought to argue that there was no estoppel as there was no agreement about 19 July 2005 being the contractual completion date. He relied on D&N's letter of 19 July 2005, referred to at [11] above, wherein D&N had said that it was premature for parties to agree to a date for completion. I was of the view that Mr Lim had clearly taken that letter out of context. Prior to 18 July 2005, the respective solicitors had already agreed that 19 July 2005 was the contractual completion date: see [7] and [9] above. On 18 July 2005, Chor Pee had said that Candid would obtain the EBS, although without prejudice to its rights, and it would take one month to do so. By then, it was obvious that the parties could not complete by 19 July 2005 and Chor Pee was asking about an extended completion date. Accordingly, when D&N replied on 19 July 2005 to say it was premature to agree to a date for completion, this was in the context of an extended completion date. The reply did not erase the fact that parties had agreed that 19 July 2005 was the contractual completion date.

29 It is true that both parties were unable to complete on 19 July 2005 because the EBS condition had not been complied with yet. However, that was due to Candid's default. Accordingly, it did not lie in Candid's mouth to suggest, as it did, that in any event, UOB was also unable to complete on 19 July 2005.

30 In the circumstances, I declared that UOB was entitled to the $128,499.69 and dismissed the reliefs sought by Candid.

31 I would also mention that it is common for a sale or completion of a sale of JTC property to be subject to JTC's approval. Also, it is not unusual for the contractual date of completion to be calculated from the date of JTC's approval, as in the present case. It is also not unusual that JTC's approval or consent will come with conditions. At times, the parties can meet all the conditions quite easily. At other times, not so easily. It is a pity that, at times, those who draft options for the sale of JTC property which require JTC's approval do not clarify what constitutes such approval. Is it the in-principle approval from JTC or the date when the last condition is met, however formal that condition might be? In some instances, the last condition to be met is to be met only when or after completion of the sale is effected. More thought should go into the drafting of the requirement about JTC's approval.

Application for leave to appeal

32 Subsequently, Candid applied in Originating Summons No 809 of 2006 for leave to appeal against my substantive decision to dismiss the reliefs sought by Candid as the amount of the subject

matter in issue was under $250,000. The application was made under s 34(2)(*a*) of the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) ("the SCJA").

33 The grounds on which such leave may be granted have been set out in various cases with some variations which are not important for present purposes. It is sufficient for me to refer to the judgment of Kan Ting Chiu J in *Essar Steel Ltd v Bayerische Landesbank* [2004] 3 SLR 25 where he considered the various cases, expressed his view that the ground in respect of a *prima facie* case of error need not be confined to one of law and summarised succinctly the grounds at [27]:

> When I heard the application for leave, I examined it against the tests for granting leave:
>
> (a) Is there a *prima facie* error of law or fact? I think the assistant registrar did not make any error of law or fact. He was entitled to exercise his discretion in the way he did.
>
> (b) Does the decision touch on a general principle decided for the first time? It may be that this question is decided for the first time, but it does not involve any question of general principle. The issue is peculiar to the particular facts of the case and is not likely to arise in other cases.
>
> (c) Does it touch on a question of importance on which further argument and the decision of the Court of Appeal would be to the public advantage? I do not think that whether the plaintiff should pay standard or indemnity costs is a question of such importance.

34 Although the application before Kan J was based on s 34(2)(*b*) of the SCJA, the principles for granting leave to appeal to the Court of Appeal under s 34(2) of the SCJA are the same irrespective of which particular sub-clause is relied on. Accordingly, I adopted the grounds set out by Kan J as a useful guide. As an aside, I would mention that I agreed with Kan J's view that a *prima facie* case of error need not be confined to one of law. However, this is subject to the qualifications he mentioned which, for present purposes, are not relevant.

35 Candid's application for leave to appeal to the Court of Appeal was supported by one affidavit from Mr Lim Chor Pee, the senior partner of Chor Pee. Mr Lim's affidavit raised only two grounds, *ie*:

> (a) that my decision contained a *prima facie* case of error of law; and
>
> (b) that my decision concerned a question of importance upon which the determination of the Court of Appeal would be to the public advantage.

36 After referring to the factual background, Mr Lim's affidavit concluded as follows:

> 10. The Plaintiffs contention is that they have made no representation which the Defendants have acted upon to their detriment that completion would and must take place on 19 July 2005. Indeed, the Plaintiffs contend that the Defendants had themselves by letter dated 19 July 2005 stated that it would be premature even to complete by 30 August 2005. In any event, the Defendants were not ready, able and willing to complete the matter on 19 July 2005, having regard to the Court of Appeal judgement in [*See Hup Seng Tin*].
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> 11. It is respectfully submitted that there is an important conveyancing issue of law that should be decided by the Court of Appeal i.e. whether the parties in a sale and

purchase agreement can by a course of conduct agree to a date of completion or be bound to such date when both parties were not ready, able and willing to complete on the said date.

37 Whether Candid had made a representation which UOB had acted upon were questions of fact peculiar to the case and not questions of law. As for estoppel, I was referring to estoppel by convention which does not require either party to act upon a state of affairs to his detriment. The doctrine of estoppel by convention is not new. Its application to particular facts is not of such importance which would make it in the interest of the public to secure a ruling of the Court of Appeal thereon.

38 As regards D&N's letter dated 19 July 2005, that was a matter of interpretation based on the background facts. It was clearly not a case of a *prima facie* error of fact, let alone one of law. *A fortiori*, it was also not a decision on a question of importance upon which the determination of the Court of Appeal would be to the public advantage.

39 It was not in dispute that UOB was unable to complete on 19 July 2005 but that was because of Candid's failure to obtain the EBS before 13 July 2005. Again, I did not see how either of the two stated grounds could apply as the principle is clear that a defaulting party cannot take advantage of his own default.

40 As for the judgment in *See Hup Seng Tin*, I had not agreed or disagreed with the assumption of the Court of Appeal. I also did not decide whether the Consent Letter constituted JTC's approval as it was not necessary to do so in the light of the parties' subsequent agreement that 19 July 2005 was the contractual completion date.

41 Indeed, when Mr Lim appeared before me to present his submissions on the leave application, he couched his ground differently. He said that there was a serious question of law to be decided by the Court of Appeal, the question being, "Can the wrong interpretation give rise to estoppel if [UOB] has suffered no detriment". Yet, Mr Lim raised no specific argument in respect of the doctrine of estoppel by convention.

42 In so far as the subsequent agreement might also amount to a variation, Mr Lim submitted that there could be no variation if the parties were not consciously seeking to vary the contract.

43 I agreed with Mr Kumar's submission that the doctrine of estoppel by convention applied when both parties had proceeded on a certain interpretation of a contract although estoppel by convention is not confined to an interpretation of a contract. It did not matter whether the parties' interpretation was right or wrong or whether UOB had suffered any detriment. In any event, as I have said, the doctrine of estoppel by convention is not new and its application to particular facts did not justify my granting leave to appeal to the Court of Appeal.

44 As for the parties' agreement (through solicitors) on the contractual completion date, that was binding on both sides irrespective of whether it was an affirmation or variation of the original terms of the Option. It was not open to one side to resile from what it had agreed. Its intention outside of the clear words of its agreement was irrelevant. Again, there was nothing to justify my granting leave to appeal to the Court of Appeal.

45 In the circumstances, I dismissed the leave application.