

Spanners International Pte Ltd v Laredo Pte Ltd
[2008] SGHC 129

Case Number : OS 1048/2007
Decision Date : 08 August 2008
Tribunal/Court : High Court
Coram : Tay Yong Kwang J
Counsel Name(s) : J Balachandran and Siti Hajar (Ramdas & Wong) for the plaintiff; Chin Li Yuen Marina (Tan Kok Quan Partnership) for the defendant
Parties : Spanners International Pte Ltd — Laredo Pte Ltd

Contract

Land

8 August 2008

Tay Yong Kwang J:

1 In this Originating Summons, the plaintiff seeks an order that the defendant remove the caveat lodged on 13 November 2006 against the plaintiff's property called Spanners Building located at 6 Changi North Street 1, Singapore ("the property"). Initially, there was also a prayer for an inquiry as to damages sustained by the plaintiff as a result of the defendant's caveat remaining on the register. However, as the plaintiff had not received any offer or inquiry in respect of any sale (with or without a lease back) of the property, that prayer was abandoned at the hearing of the Originating Summons.

The facts

2 The property is held by the plaintiff under a lease from Jurong Town Corporation ("JTC"). The lease is for 30 years (and renewable for another 30 years) with effect from 1 January 1997. The property was constructed by the plaintiff specifically for its business of manufacturing electrical transmission and distribution equipment. Its land area was some 3205 sq m while its gross floor area was about 4566 sq m.

3 In early 2006, the plaintiff contemplated the possibility of raising finance for its business by a sale and lease back of the property. The lease back was required by the plaintiff as it wished to remain on the property and continue its business for a period of time after any sale thereof. The plaintiff initially wanted a lease back for 3 years as it had plans to relocate its manufacturing operations to Malaysia. For this purpose, the plaintiff appointed a property broker to look for prospective buyers interested in such a deal.

4 The defendant was one such interested buyer. However, the defendant wanted to lease back the property for a 7-year term. The plaintiff denied the defendant's contention that the plaintiff then counter-proposed a lease back of 3 years with an option for another 3 years. Instead, it asserted that it counter-proposed a period of 5 years, unaware at that time of JTC's policy of granting subletting approval for not more than 3 years at one time. During negotiations, the defendant proposed a lease back term of 5 years and 2 months so as to include the last 2 months of the year 2006. This proposal was accepted by the plaintiff.

5 On 24 July 2006, the plaintiff sent a letter to the defendant setting out the terms of the sale and lease back of the property. This letter was accepted by the defendant on 4 August 2006 ("the Letter of Agreement"). The salient terms were:

1 Purchase Price:

S\$4,423,050 (excluding GST).

2 Option Fee:

1% of the Purchase Price.

3 Option Period

4 weeks to exercise option-to-purchase ("Option"). Exercise of Option shall be accompanied by a payment of 4% of the Purchase Price, which shall be stakeheld pending completion. ...

4 Completion of Sale & Purchase:

1st November 2006

5 Leaseback by Vendor

On completion of the sale and purchase of the Property, the Vendor shall lease back the Property from the Purchaser for a lease term of 5 years and 2 months commencing from the date of completion of the sale and purchase of the property as set out in paragraph 4 above at a monthly rental as tabulated below.

Period/Year	Monthly Rent
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...	...
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6 Security Deposit for Leaseback

The Vendor shall provide the Purchaser a sum equivalent to 5 months' rental in the form of a banker's guarantee acceptable to the Purchaser ...

...

11 Conditions of Sale

The sale and purchase of the Property shall inter alia be subject to:

(a) ...

(b) approvals from JTC and other relevant authorities being granted on the sale and purchase and lease back of the Property. In the event JTC and/or any relevant authority impose any condition, the Vendor is obliged to comply at its costs and expense to the satisfaction of JTC and/or any relevant authority.

...

The above sets out the principal terms of the sale and purchase and lease back of the Property. If the parties are in agreement with the terms as set out above, please signify your acceptance by signing in the space below.

Upon acceptance of this letter of agreement, the Vendor shall proceed to issue the Option to the Purchaser within three weeks from the date hereof. The Vendor hereby acknowledges receipt of the 1% Option Fee (). The Purchaser shall issue the tenancy terms to the Vendor within three weeks from the date hereof.

After this Letter of Agreement was entered into, the plaintiff decided to postpone its plans to relocate its operations to Malaysia and ran its business thenceforth on the basis that it would remain on the property for 5 years and 2 months after the completion of the sale and purchase.

6 On 16 August 2006, the plaintiff's solicitors sent to the defendant's solicitors a draft Option and a draft Lease. Clause 7.1 of the draft Option reads:

7. CONDITIONS PRECEDENT

7.1 Jurong Town Corporation Approvals: The sale and purchase for the Property is subject to Jurong Town Corporation ("JTC") granting its written approval ("JTC Approvals"), on or before the Completion Date, for:

- (a) the sale and purchase of the Property;
- (b) a lease of the Property for a term of five (5) years and two (2) months by the Purchaser to the Vendor upon completion;
- (c) the Vendor's sub-lease of part of the Property to Hernis Scan Systems Asia Pte Ltd for two (2) terms of twenty-four (24) months each commencing from 1st January 2005 and 1st January 2007; and
- (d) the Purchaser's proposed usage of the Property for light industry use.

7 Negotiations on the draft Option and the draft Lease then took place between the parties' solicitors by correspondence. On 30 August 2006, the defendant's solicitors reverted with proposed amendments to the draft Option. While clause 7.1(c) was deleted, the defendant's solicitors left intact the rest of clause 7.1.

8 However, on 19 September 2006, the defendant's solicitors emailed the plaintiff's solicitors in the following terms:

Our comments to the latest amended option are as follows:

...

- (d) Cl 7.1(b): pls add to the clause to clarify that parties are aware that JTC currently grants subletting consent on 3-yearly basis and parties are to apply for further subletting consent subsequently to see through the lease term of 5 years 2 mths.

The email also stated that clause 7.1(c) was not acceptable to the defendant as it was doubtful that JTC would grant consent for the plaintiff to further sublet. It also proposed the deletion of

clause 7.1(d) as being unnecessary in the circumstances.

9 On 13 October 2006, the defendant's solicitors sent to the plaintiff's solicitors a copy of the draft Option with various amendments made, including the deletion of clauses 7.1(b) and (c), with an annotation that the defendant's position in respect of these two clauses remained unchanged and "thus these are not acceptable for the reasons mentioned at the meeting".

10 On 13 November 2006, the defendant lodged a caveat against the property stating that it was "claiming an estate or interest in the land as purchaser". On 6 December 2006, JTC confirmed by email that it would only approve a maximum period of 3 years for subletting. The plaintiff negotiated further with the defendant on the *impasse* relating to the draft Option but no resolution was reached.

11 On 8 February 2007, the plaintiff's solicitors forwarded to the defendant's solicitors an amended copy of the draft Option in which the said clause 7.1(b) was reinstated. On 8 March 2007, the defendant's solicitors replied, stating:

If the Vendor is able to procure JTC approval on a leaseback of 5 years and 2 months, we will have no objection for the Vendor to subject the sale to the same, otherwise, a provision should be added to express that the Vendor is fully aware of JTC's prevailing policies on subletting and approval will only be granted on a three-yearly basis.

12 Where the draft Lease prepared by the plaintiff's solicitors was concerned, the defendant's solicitors made various amendments, including the insertion of a clause 18 (b) in the following terms:

If for whatever reasons, [JTC] grants approval to the lease of the Property on a shorter tenure (hereinafter referred to as "the Approved Lease Tenure") than the Term, the parties agree that it shall not in anyway affect or prejudice the lease of the Property or any of the terms and conditions governing the lease of the Property for the Term as set out in this Agreement and the Tenant hereby agrees with the Landlord to proceed with making a subsequent application at least six (6) months prior to the expiry of the Approved Lease Term for further [JTC] Approval and where necessary make such further application(s) of the same at the appropriate time so as to fulfil the lease duration in accordance with the Term such that there will be no break in the lease of the Property by the Tenant at any time during the Term.

However, the plaintiff could not agree with the insertion of this clause as the Letter of Agreement provided for a lease back of 5 years and 2 months. The defendant, in turn, was not agreeable to its deletion and another stalemate ensued.

13 On 11 April 2007, the plaintiff decided that negotiations had gone on long enough and informed the defendant that if the parties could not agree on the terms and conditions for the option to purchase and the lease agreement, the plaintiff was amenable to call off the deal. It added that if the defendant wished to proceed with the sale and purchase, the plaintiff would issue the option to purchase in accordance with the Letter of Agreement and the terms and conditions agreed thus far.

14 Despite having been granted an extension of time to respond, the defendant's solicitors did not reply by the due date. On 24 April 2007, the plaintiff's solicitors issued to the defendant an option to purchase which was in accordance with the terms and conditions of the Letter of Agreement. That same day, the defendant's newly appointed solicitors (the present solicitors on record) replied to the plaintiff's solicitors' earlier letter of 11 April 2007 stating that they had only been instructed recently and requesting an extension of time to respond. This reply was seen by the plaintiff's solicitors only after the option to purchase was issued.

15 Later that day, the defendant's solicitors (i.e. the present solicitors from here on) replied to say that it was a breach on the plaintiff's part to issue an option to purchase which did not properly reflect the agreement of the parties. The plaintiff's solicitors naturally asserted that the option to purchase was in compliance with the parties' agreement. The defendant's solicitors retorted that at no time was the defendant unable to comply with the lease back term of 5 years and 2 months, reiterating the proposal that JTC's approval would be sought in two stages to make up the agreed term. This was rejected again by the plaintiff which was then accused by the defendant of imposing unilaterally a condition precedent (that JTC approval be obtained for a 5 year 2 month lease) where none had been agreed upon. The defendant's solicitors asked whether it was the plaintiff's position that it would seek to abort the deal if JTC granted approval for 3 years initially. This pointed question was not answered. The defendant's solicitors also wrote to reiterate its commitment to the 5 year 2 month lease back and to state that prior to completion of the sale and purchase of the property, it could not apply to JTC for approval for the lease back anyway.

16 The option to purchase had to be exercised within 4 weeks from 24 April 2007 (i.e. by 22 May 2007). Since it was not exercised by the deadline, the plaintiff's solicitors wrote to the defendant's solicitors on 23 May 2007 requesting that the defendant's caveat on the property be withdrawn by 29 May 2007 as the defendant had no caveatable interest. The defendant has not done so, thus necessitating the issue of this Originating Summons.

17 At the first hearing of this Originating Summons, I directed the parties to seek clarification from JTC on its policy on approving subletting in situations such as the present case. On 21 November 2007, the plaintiff's solicitors wrote to JTC to enquire the following:

- (1) Whether an application for your approval for the lease back of the property can be made by the parties prior to completion;
- (2) Whether you will grant approval for the lease back of the property for the term of 5 years and 2 months on completion; and
- (3) If approval for the lease back of the property will be granted for a term of only 3 years, when can the parties seek approval for the balance of 2 years 2 months.

18 On 13 December 2007, JTC replied:

...

2 The permitted predominant usage for the property, like the majority of properties leased by us, is industrial. Therefore, all owners/lessees of industrial properties have to engage in industrial activities. Other than the approved REIT (Real Estate Investment Trust) companies, there shall not be any form of sales and leaseback arrangement between individual companies.

3 Generally, under our subletting policies, subject to our prior written consent, our lessees are permitted to sublet their properties. Our subletting policies and procedures may be viewed at our website at 'www.jtc.gov.sg' under the following links - 'Policies - Lease management - Subletting - Subletting handbook'.

It is not in dispute that the defendant, a limited exempt private company, is not a REIT.

The plaintiff's arguments

19 The plaintiff relied on s 127 of the Land Titles Act ("LTA") (Cap 157) which provides:

At any time after the lodgement of a caveat, the caveatee may summon the caveator to attend before the court to show cause why the caveat should not be withdrawn or otherwise removed, and the court may make such order, either *ex parte* or otherwise, as seems just.

20 The plaintiff submitted that clause 5 of the Letter of Agreement plainly provided for a lease back of 5 years and 2 months on completion with the monthly rental for each of the years agreed upon. Even the defendant acknowledged that the lease period was critical as it would affect its yield from the property after the sale. The lease back term was therefore a principal term of the Letter of Agreement.

21 Both parties were apparently unaware of JTC's policy on subletting when they signed the Letter of Agreement. What they would have agreed upon if they had known of such policy at the time of signing the Letter of Agreement was irrelevant for present purposes.

22 The defendant was not able to provide a lease back for the stipulated period on completion. This was obvious from its attempts at deleting clause 7.1(b) in the draft Option. The defendant was not entitled to rewrite the terms by demanding that the plaintiff accept a lease back of 3 years first and await future approval for the remaining 2 years and 2 months. JTC has not given any assurance that approval for the remaining term was a certainty and neither has the defendant attempted to procure such assurance. JTC's handbook setting out its subletting policy stipulated that lessees (such as the defendant if the sale of the property is completed) would not be able to sublet should they be served with any letter of demand or be sued by JTC. There was therefore always a risk that the approval for the remaining term may be jeopardized by the defendant.

23 Clause 7.1(b) of the option to purchase issued by the plaintiff was in compliance with the Letter of Agreement, contrary to the defendant's assertion that it imposed a condition precedent where none had been agreed upon. As the defendant had failed to exercise the option to purchase by 22 May 2007, it no longer had any caveatable interest in the property (see *Eng Bee Properties Pte Ltd v Lee Foong Fatt* [1993] 3 SLR 837) and should therefore remove the caveat.

24 In any event, JTC would not be giving approval for the lease back for the agreed term and the defendant would therefore be unable to fulfil one of the conditions for the sale of the property. Specific performance was not available until the conditions for the sale were satisfied. The defendant would not be entitled to claim specific performance of the agreement to sell the property and consequently could not claim to be the beneficial owner thereof (see *Chi Liung Holdings Sdn Bhd v AG* [1994] 2 SLR 355).

25 Further, JTC's reply in response to the query sent by the plaintiff's solicitors showed that its approval would not be given as the defendant was not a REIT. There was no evidence that the defendant would become a REIT before completion. As the condition precedent in clause 11 of the Letter of Agreement could not have been fulfilled by the defendant, the plaintiff was released from the performance of its obligations thereunder.

26 The plaintiff submitted that the defendant had not raised any serious question to be tried. Even if it had, it had not shown that, on the balance of convenience, it would be better to maintain the status quo until trial as it had not even brought any proceedings to claim specific performance of the Letter of Agreement. More than 16 months had passed since the agreed original completion date and some 19 months had passed since the signing of Letter of Agreement.

The defendant's arguments

27 Given the plaintiff's insistence that JTC's approval for the complete lease back period be obtained, it would appear that the period of the lease back was critical to the plaintiff. However, it was the defendant to whom the lease back period was critical as it would affect the yield on its investment in the property. It was the defendant which wanted a lease back term of 7 years but the plaintiff was prepared to take only 3 years at the start of negotiations, with an option to renew the lease subsequently.

28 As a matter of practice, JTC grants approval for sub-leases for a maximum of 3 years at one time. Many companies (particularly multi-national ones which are much larger than the plaintiff) entered into sub-leases of more than 10 years, with approval from JTC sought in tranches of 3 years each time. So long as the plaintiff as sub-lessee did not commit any breach of JTC's terms, there would be no reason for JTC not to approve further applications for subletting. Such applications are done on-line.

29 The plaintiff must have sought approval for subletting to Hernis Scan Systems Asia Pte Ltd ("Hernis")(see [6] above) and would therefore be familiar with JTC's process and practice. It had given no cogent reason why it was unable to accept an approval for 3 years to be followed by subsequent approval for the remaining duration of the lease back period.

30 The Letter of Agreement did not provide that approval for the complete term was a condition precedent. The Letter of Agreement only stated that the property was to be sublet by the defendant after the sale. Clause 11(b) stated that the sale and purchase was subject to JTC's approval for the sale and lease back and therefore both parties were equally bound by JTC's approval. If the first approval was for 3 years, then that was what both parties would have and it was not open to either of them to insist on a longer period. The grant of approval for 3 years at any one time did not mean that the intended lease back was prohibited or invalidated. The Letter of Agreement did not provide that JTC must approve the full term of the lease back at one go and neither has JTC stated that it would not grant approval for consecutive 3-year terms for subletting.

31 The approval could not be obtained by completion date in any event. This was because JTC required the defendant to be a new "owner" before it could make the application and that could only be after completion had taken place. Therefore it was disingenuous of the plaintiff to insist on an alleged condition precedent that it knew could not be fulfilled on two counts – JTC's policy of granting approval for 3 years at a time and the fact that the defendant could only make the application for approval upon completion

32 The plaintiff did not allege anticipatory breach even after confirming with JTC in December 2006 regarding its policy on subletting. Instead, it went about in purported fulfilment of the Letter of Agreement while aware of the fact that the alleged condition precedent could never be complied with. The defendant alleged that all that the plaintiff wanted was to abort the sale and purchase and forfeit the 1% of the purchase price paid by the defendant. The defendant proffered two reasons why the plaintiff would want to do this. First, the property market was experiencing an upturn and the plaintiff could potentially make much more profit by selling the property to another buyer. Second, the plaintiff could have realized that it had failed to take into account its sub-lease to Hernis which was not mentioned in the Letter of Agreement but which surfaced in the condition precedent that the plaintiff sought to impose in its first draft Option on 16 August 2006. The plaintiff had insisted on retaining Clause 7.1(c)(see [6] above) until February 2007 when it was finally deleted. After completion of the sale and purchase, the plaintiff would become the sub-lessee and JTC would not allow another level of sub-lease between the plaintiff and Hernis. The plaintiff would therefore breach

JTC's conditions and put its own lease back at risk, with the likely result of becoming liable to both the defendant and Hernis.

33 The defendant has always been committed to a lease back of the agreed period to the plaintiff and has never reneged on this position. It was therefore the plaintiff and not the defendant which was in breach of the Letter of Agreement. The 24 April 2007 Option to Purchase was not in compliance with the Letter of Agreement and it was incumbent on the plaintiff to issue an option which complied. In the meantime, the defendant, having paid the option fee of 1% of the purchase price, was legally entitled to have the caveat remain on the register.

34 Insofar as JTC's response on its policy in such a situation was concerned, the defendant argued that it was merely a policy and not something cast in stone. The plaintiff could not assume that the defendant would be unable to fulfil the requirement that only REITs would be allowed to do a sale and lease back (see [18] above) as the option was granted to the defendant "or nominees". The person involved in the defendant has interests in other companies which are interested in the REIT business and which have been involved in other properties belonging to JTC.

35 The defendant has not made a claim for specific performance because the same arguments made here would be canvassed in such a claim.

The decision of the court

36 I accept that both parties were unaware of JTC's subletting policy at the time the Letter of Agreement was signed. In my opinion, clauses 5 and 11 of the Letter of Agreement, given their plain meaning, support the plaintiff's position that a lease back for the agreed period of 5 years and 2 months must be granted by the defendant to the plaintiff upon completion. Although the defendant was committed to giving a lease back for the agreed duration, it was not entitled to insist on granting a partial lease for the time being subject to a second application to JTC for approval to be made in due course. It was understandable why certainty of duration was crucial to the plaintiff's future operations, in the same way that it was critical to the defendant's decision to invest in the property. Although I have no doubt that the defendant would make the second application to JTC when the first 3-year term was about to expire, there was always the risk that something could go awry in the years ahead and JTC might decline to grant further approval after the first 3 years. JTC might even change its policy on subletting in the course of that time. As acknowledged by counsel for the defendant, its present policy is not writ in stone. The plaintiff would not have the comfort of knowing for sure at the start of the lease back that it has the legal right to conduct its business on the property for the remaining 2 years and 2 months.

37 In my view, the Option to Purchase issued on 24 April 2007 accorded with the terms of the Letter of Agreement even if it (the Option to Purchase) was unacceptable to the defendant. The defendant could have better protected its position by inserting a rider to the terms of the Letter of Agreement. As matters stood, if it agreed to do something which turned out to be impossible to perform through no fault of the plaintiff, then it has only itself to blame. It was not entitled to attempt to reword the Letter of Agreement in its favour, in the same way as the plaintiff was prevented by the defendant from trying to augment its position by inserting the clause concerning the sublease to Hernis.

38 By not exercising the validly issued Option to Purchase within the agreed period of 4 weeks, the defendant has forfeited its right to buy the property and could no longer claim to have an interest in the property as purchaser.

39 In any event, even if the defendant had exercised the Option to Purchase, it was patent that it would not be able to comply with clause 11 read with clause 5 of the Letter of Agreement. As mentioned above, the JTC approval contemplated was for the complete term of 5 years and 2 months even if JTC decided to impose certain conditions as part of its approval. It was not meant to be an approval for part of the agreed term. What the parties agreed on was the certainty of a lease back, not the certainty of another application to be made to JTC for approval in due course.

40 JTC's reply to the plaintiff's solicitors' query posed a further impediment to the defendant's compliance with clause 11 read with clause 5 of the Letter of Agreement. The defendant is not a REIT. It has alluded to the possibility that it might be converted into a REIT in time for the completion of the sale and purchase but such a possibility was too remote without some concrete evidence that steps were already underway to accomplish this. The defendant has also not adduced any evidence that it would be able to nominate a purchaser capable of satisfying the requirement of being a REIT.

41 In *Eng Mee Yong v Letchumanan* [1979] 2 MLJ 212, the Judicial Committee of the Privy Council held:

In their Lordships' view a distinction must be drawn between cases where the applicant is the registered proprietor of the land (i.e. the caveatee) and cases where the applicant is some other person who claims a right to an interest in it. In the former case the caveatee can rely upon his registered title as *prima facie* evidence of his unfettered right to deal with the land as he pleases; it is for the caveator to satisfy the court that there are sufficient grounds in fact and in law for continuing in force a caveat which prevents him from doing so.

...

This is the nature of the onus that lies upon a caveator in an application by a caveatee under s 327 [of the Malaysian National Land Code] for the removal of a caveat: he must first satisfy the court that on the evidence presented to it his claim to an interest in the property does raise a serious question to be tried; and, having done so, he must go on to show that on the balance of convenience it would be better to maintain the *status quo* until the trial of the action, by preventing the caveatee from disposing of his land to some third party.

...

So too in an application by the caveator under s 327 for the removal of a caveat, once the caveatee has met the first requirement of satisfying the court that the claim on which his caveat is based does raise a serious question to be tried, the balance of convenience would in the normal way and in the absence of any special circumstances be in favour of leaving the caveat in existence until proceedings, brought and prosecuted timeously by the caveator, for specific performance of the contract of sale which he alleges had been tried.

42 In my opinion, the defendant has failed to show any factual or legal grounds for maintaining its caveat on the property. It has lost its right as purchaser and could have no right in the circumstances to seek specific performance of an agreement which it has not complied with while the plaintiff has done so.

43 Accordingly, I ordered that the caveat be removed by 31 March 2008 unless otherwise ordered. I also awarded costs of \$10,000 for the Originating Summons to the plaintiff. The defendant has appealed against my decision.