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Yihan GOH
Singapore Management University, yihangoh@smu.edu.sg

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22 April 2015

SINGAPORELAWBLOG

Does the Obligation to Obtain the Consent of a Third Party Extend to Taking Further Steps After Rejection?

The question posed in the Court of Appeal case of *The One Suites Pte Ltd v Pacific Motor Credit (Pte) Ltd*[2015] SGCA 21 ("*The One Suites*") was whether an obligation to use all reasonable endeavours to obtain the consent of a third party extends to taking further steps after the third party had refused to give such consent. To this, the Court, with Andrew Phang Boon Leong JA writing its grounds of decision, answered, "it depends but largely no". More precisely, the Court said that while there almost invariably will be an implied obligation to use all reasonable endeavours to obtain the consent of a third party, it is less likely that such an obligation extends beyond rejection, particularly so when there is an express term providing that the contract is at an end following such rejection. In reaching this conclusion, the Court also discussed aspects of implied terms, as well as the doctrine of good faith in contract.

Facts

The One Suites concerned the sale and purchase of the remainder of the lease over a property. The appellant was the purchaser, and the respondent was the vendor. On 27 July 2012, the appellant exercised the option to purchase ("OTP"), having already paid a total sum of $1.68m to the respondent as deposit. However, the property could not change hands just yet as it was sold subject to the "existing approved use". Moreover, its sale was also subject to the written approval of the Housing and Development Board ("HDB"). In the event that HDB refused to approve the sale of the property, then according to an express term of the OTP, "the sale … shall be rescinded and all moneys paid to account of the purchase price herein shall be refunded free of interest compensation".

After the OPT was exercised, the appellant sought HDB's approval for the sale. In addition, it also sought the approvals of other relevant authorities, such as the National Environment Agency ("NEA"). After an exchange of correspondence, the NEA replied on 21 August 2012 that it was unable to support the appellant's proposed sale as its proposed use did not conform with the long-term land use plan for the site on which the property sat. On 24 September 2012, HDB also replied to say that it was "unable to grant in-principle approval" because the "NEA's consent has not been obtained".

The appellant then wrote to the respondent, saying that, following HDB's rejection, the sale of the property had been "rescinded" and claimed for the refund of its $1.68m deposit. The respondent rejected this notice of rescission, saying that the appellant

should appeal against NEA's decision after revising its proposed use to address NEA's concerns. When the appellant refused to do this, the respondent unilaterally wrote to the NEA asking it to reverse its earlier decision on the basis that there would be no change to the "existing use" of the property. The NEA approved the sale after this. However, when the appellant heard about this, it of course rejected the respondent's unilateral appeal on its behalf and asserted its right to the refund of $1.68m on the basis that the transaction had been cancelled following HDB's rejection earlier on.

The legal issue was thus whether the appellant owed (and subsequently breached) a contractual duty to use all reasonable endeavours to secure HDB's approval *after* HDB's initial rejection. The respondent argued that the appellant should have appealed against NEA's rejection and then reapplied to HDB for approval. In the High Court, the judge found that the HDB had not clearly and unequivocally rejected the appellant's application on 24 September 2012. Thus, in his view, the issue was whether the appellant had taken all reasonable steps to secure the NEA's approval, which could then be used to obtain HDB's approval. He found that the appellant had not taken all reasonable steps. In fact, he thought that the appellant had lost interest in the transaction and was seeking to get out of its agreement with the respondent. While he found on behalf of the respondent in this regard, he refused to grant specific performance or award damages due to lack of proof of loss. Nonetheless, he allowed the respondent to keep the $1.68m deposit as security for the appellant's performance of its obligations under the OTP.

Decision and discussion

Express term trumping any implied term of further obligation

The appellant succeeded on appeal to the Court of Appeal. The Court adopted a fact-centric approach to the question, which must surely be right given the highly factual character of non-absolute obligations (see Yip Man and Goh Yihan, "Default Standards for Non-absolute Obligation Clauses" [2014] *Lloyd's Maritime and Commercial Law Quarter* 32). The Court first found that the HDB had in fact refused to approve the sale of the property on 24 September 2012. Thus, the question then became whether, following the HDB's rejection, the appellant was under any further obligation to take further steps to obtain HDB's approval, such as by lodging an appeal against HDB's decision, or that of related entities (in this case, the NEA).

While the Court had no issue with there *generally* being an implied obligation to use reasonable endeavours to obtain the requisite approvals of relevant authorities when the sale of land is subject to such approvals, it did not think that this obligation should invariably extend to taking further steps after any approval had been refused. This is especially true where there is an express term ending the contract following the initial rejection. This was the case in *The One Suites*, where the OTP provided that the sale shall be rescinded in the event the HDB refuses to approve the sale. Thus, once HDB refused to approve the sale, the OTP came to an end and the appellant came under no further obligation to use reasonable endeavours in any matter such as appealing against the HDB's (or the NEA's) rejection.

It is of course trite law that implied terms are subservient to express terms in a contract. Thus, the express term providing for the end of the OTP upon the HDB's rejection would trump any purported implied term imposing on the appellant a further obligation to use all reasonable endeavours to secure HDB's approval. Indeed, this is a result aptly reached by the application of the Court of Appeal's three-step test for the implication of terms in fact laid down in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193. Applying the first step would show that there was no gap in the

contract to be filled since the parties had provided for when the contract was to come to an end. The second step would also be negative as it was clearly not necessary in the business sense to imply a term as the parties had already provided for when the contract is to end by way of an express term.

No general legal duty to do more after initial rejection

More broadly, the Court also held that there is no general proposition of law that a party had to take further steps after an initial rejection in order to rescind the contract concerned. The Court did not think that such a proposition was laid down in the High Court case of *Tan Soo Leng David v Wee, Satku & Kumar Pte Ltd*[1997] 3 SLR(R) 257. Instead, it thought that the court in that case was simply saying that whether there was a duty to use reasonable endeavours after consent had been refused depended on the precise facts of each case. It may well be appropriate for a court to consider the steps taken after initial refusal where very little was done before the refusal. This may also be appropriate when it may be implied that parties have stipulated for such an obligation after rejection. However, even then this must yield to an express term where one existed: where parties have expressly provided for rescission upon the refusal of the requisite consent, the implied obligation to use reasonable endeavours could not extend beyond the point of refusal. With respect, this must be correct and is the application of trite contractual principles that the parties' clearly expressed intentions must be given effect to. The practical point may be that where parties want this outcome, they should provide for it expressly.

Implied duty of parties to cooperate?

Given the Court's decision as outlined above, there was no further need to consider the respondent's argument that there ought to be an implied duty of cooperation in the OTP. The Court declined to express any view on the permissibility of such an implied duty because it saw the potential relationship between such a duty and the doctrine of good faith. It regarded the doctrine of good faith to be a rather uncertain doctrine even though the position in Singapore, following *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518, is that there is no implied duty of good faith based on an implied term in law, although it might be possible for such a duty to be implied in fact. As such, whether there is an implied duty to cooperate in law remains to be decided on another day, although it is clear that any argument on its permissibility would also have to address the permissibility of a wider doctrine of good faith than that which is currently accepted under Singapore contract law.

Goh Yihan (Associate Professor, Singapore Management University)

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