Ground & Sharp Precision Engineering Pte Ltd v Midview Realty Pte Ltd [2008] SGHC 160

Case Number : Suit 33/2008, RA 214/2008

Decision Date : 22 September 2008

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Justin Phua (Justin Phua Tan & Partners) for the plaintiff; Lawrence Tan Shien-Loon and Sandra Tan Pei May (Drew & Napier LLC) for the defendant

Parties : Ground & Sharp Precision Engineering Pte Ltd — Midview Realty Pte Ltd

Civil Procedure

Contract

22 September 2008

Judith Prakash J:

1 This was an appeal by the plaintiff against the decision of the Assistant Registrar to grant the defendant's application to strike out the plaintiff's writ of summons and statement of claim. I dismissed the appeal and now give my reasons.

The plaintiff's claim

2 The plaintiff is in the business of mechanical engineering works and the defendant is in the business of real estate development and building construction. The defendant developed a factory building at 16 Boon Lay Way Tradehub 21 Singapore 609965 ("the Development") and is the registered proprietor of factory units #01-40, #01-41 and #01-42 in the Development ("the Units").

3 The plaintiff pleaded in its statement of claim that the defendant had agreed to lease the Units to it and had further granted it an option to purchase each of the three Units within 12 months of the date of commencement of the respective leases. This agreement was allegedly contained in or evidenced by three letters of intent drafted by the defendant's marketing agent REA RealtyNetwork Pte Ltd ("REA") dated 10 July 2006, which the plaintiff and defendant signed on 11 July 2006 and 13 July 2006 respectively (the "letters of intent").

4 On 8 August 2007 the plaintiff and defendant entered into three separate tenancy agreements in writing for the lease by the defendant to the plaintiff of the Units for a term of two years commencing 10 August 2007 (the "Tenancy Agreements"). By a letter dated 19 September 2007 from the plaintiff's former solicitors Messrs Tan Thian Chua & Co to the defendant, the plaintiff purported to exercise the option to purchase the Units in accordance with the terms and conditions in the options. When the defendant did not respond, the plaintiff completed and submitted to the defendant on 26 September 2007, three separate booking forms for the purchase of the Units together with three separate cheques representing the balance of the booking fee for each of the Units. Despite a reminder by the plaintiff's solicitors by letter dated 2 October 2007, the defendant did not reply to confirm the sale of the Units, nor did it accept the booking forms or the accompanying cheques.

5 The plaintiff lodged a caveat against each of the Units on 29 November 2007, asserting the

existence of binding options between itself and the defendant. Subsequently, pursuant to the defendant's application under s 127 of the Land Titles Act, the Registrar of Titles gave notice of its intention to cancel the three caveats. The plaintiff therefore claimed, *inter alia*, a declaration that there was a binding and enforceable option to purchase in respect each of the Units; an order allowing the caveats to remain or deferring their cancellation until after the trial; and specific performance of the options.

6 By its defence the defendant denied that there was any agreement in writing wherein it had granted the plaintiff any option to purchase the Units within 12 months of the commencement of the respective leases. It averred that the letters of intent were made subject to contract. By the defendant's account, around September 2006 the plaintiff requested that it be allowed an option to purchase the Units within 12 months of the commencement of the leases. The defendant was prepared to accede to the plaintiff's request provided the purchase price was pegged to the prevailing market rate to be mutually agreed upon, and was subject to contract. The defendant conveyed these terms to the plaintiff by letter dated 22 September 2006, but the plaintiff did not respond.

7 In its reply, the plaintiff averred that none of the options to purchase referred to in the letters of intent was subject to contract; it "was never the intention of the [parties] that the options granted to purchase the [Units] would be so subject to contract." It further asserted that one Angela Ang, a representative from REA, had assured the plaintiff's Ng Choon Beng that "no other document would be required to be executed or exchanged for the options to purchase to be valid and enforceable." The plaintiff also pleaded, for the first time in its reply, that on 4 August 2006, at the defendant's request, the plaintiff signed three letters of offer in respect of the lease of the Units (the "offer letters"). The offer letters were issued by the defendant itself rather than by REA and did not contain the option to purchase found in paragraph 18 of the letters of intent. Angela Ang explained to the plaintiff that this omission was because the defendant was "unwilling to put on record discounts [it had] given by way of renovation voucher [*sic*] and absorption of stamp fee". It was pleaded that Angela Ang again assured the [plaintiff] that paragraph 18 of the [letters of intent] did contain a validly issued and enforceable option to purchase, and that "no other document would be required to be executed or exchanged for the options to purchase to be valid and enforceable." (Reply at [5.3])

8 The plaintiff further pleaded in its reply that Angela Ang had agreed that the defendant "would confirm in writing that the [plaintiff had] an option to purchase the [Units] from the date of commencement of the lease." It was in these circumstances that the defendant wrote to the plaintiff on 22 September 2006 to confirm this. The plaintiff pleaded at [5.6] of its reply:

> It was wrong for the [defendant] to have introduced terms such as "subject to contract" or pegging the price "at the prevailing market rate to be mutually agreed upon" into their letter of 22 September 2006, as such terms were not contractually agreed upon in the [options to purchase in the letters of intent]. Owing to ignorance and oversight, the [plaintiff] did not object to the inclusion of such terms.

9 The plaintiff averred that the clause "12 months from date of agreement" in paragraph 18 of the letters of intent meant 12 months from the date of commencement of the lease, and the options to purchase the Units had therefore not expired when it exercised them through their solicitors by letter of 19 September 2007. Finally, the plaintiff alleged that it had informed REA as early as June 2007 of its decision to exercise the options to purchase, pressing REA to process the exercise of the options on numerous occasions thereafter. Angela Ang having left the employ of REA, one Winston Woon was assigned to attend to the plaintiff; he completed the booking forms on the plaintiff's behalf and represented that the plaintiff was required to sign and hand over the forms and cheques in order to exercise the options to purchase. It was in these circumstances that the plaintiff's Ng Choon Beng

signed and handed over the forms and the cheques to Winston Woon, for him to hand them over to the defendant.

10 On the appeal, the plaintiff submitted that the claim should not have been struck out as the matter should go to trial for, *inter alia*, the following issues to be decided:

(a) whether the options to purchase the Units were indeed subject to contract and hence not enforceable as no formal options were later granted to the defendant;

(b) whether the defendant was estopped from asserting that the options to purchase the Units were subject to contract because of certain representations made by the defendant's marketing agent, REA, that no other document would be required to be executed for the options to be valid and enforceable.

The law on striking out

11 O 18 r 19 provides:

(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground that –

(a) it discloses no reasonable cause of action or defence, as the case may be;

(b) it is scandalous, frivolous, or vexatious;

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court,

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph 1(*a*).

(3) This Rule shall, as far as applicable, apply to an originating summons as if it were a pleading.

12 The defendant's application was made pursuant to O 18 r 19(1)(*a*)-(*d*). O 18 r 19(2) did not apply in relation to the second to fourth grounds, and I considered the parties' affidavit evidence as well as the documents themselves.

13 An application under O 18 r 19(1)(*a*) requires that the cause of action be shown to have no chance of success when only the allegations in the pleading are considered (*Drummond-Jackson v British Medical Association* [1970] 1 All ER 1094). While O 18 r 19(2) precludes the admissibility of evidence on an application solely under O 18 r 19(1)(*a*), the court has the inherent jurisdiction to dismiss an action on the ground that it is obviously frivolous or vexatious. When application is made pursuant to this inherent jurisdiction, all the facts can be gone into (*Singapore Civil Procedure 2007* at 18/19/17). Here, a perusal of the statement of claim alone did not immediately reveal a case so hopeless that no cause of action could be discerned.

14 However, a claim that is obviously unsustainable or wrong, even if not made merely to annoy or

embarrass an opponent, is also frivolous or vexatious under ground (b): *The "Osprey"* [2000] 1 SLR 281 at [8]. Upon examining the pleadings and evidence, I concluded that the plaintiff's claim was frivolous in this sense and should be struck out.

Letters of intent "subject to contract"

15 As the plaintiff observed, whether the letters of intent were enforceable without more was the "primary issue at hand". It was undisputed that no formal contract was executed which contained an option to purchase. On the plaintiff's own case, the only evidence of any option to purchase was clause 18 of REA's letter of 10 July 2006 for 16 Boon Lay Way #01-40 Tradehub – in other words, the letters of intent themselves.

16 The defendant argued that the plaintiff had no cause of action because the letters of intent were subject to contract and the final Tenancy Agreements did not provide for any option to purchase the Units. The alleged option to purchase was therefore not enforceable. The plaintiff admitted, as it had to, that the letters of intent were clearly labelled "subject to contract" (in underlined capital letters right above the subject line on the first page of the letters of intent), but asserted that neither the defendant nor its agent REA explained the meaning of "subject to contract" to it. Further, the plaintiff contended, Angela Ang confirmed that no other document would be required to be executed or exchanged for the options to purchase to be valid and enforceable.

17 This contention could not be accepted. As the defendant pointed out, Angela Ang's alleged oral assurances were brought up for the first time in the plaintiff's Reply, and had not been pleaded in the Statement of Claim. The defendant argued that this allegation was an afterthought and in any case could not amount to more than evidence of negotiations prior to the execution of any agreement between the parties. That aside, the letters of intent spoke loudly and clearly for themselves. The plaintiff's director Ng Choon Beng may have been educated only up to secondary four, but he was running a business of mechanical engineering works and this was an agreement entered into by two business parties at arm's length. Regardless of what Angela Ang might have said, the documents that the parties signed clearly indicated that they were subject to contract. The very first paragraph of the letters of intent read:

> We write to confirm that our prospect M/s Ground & Sharp Precision Engineering Pte Ltd of Blk 2 Bukit Batok St 24, #03-07 Skytech Building Singapore 659480, would like to lease the above-mentioned premises *subject to the Tenancy Agreement* and the following terms and conditions:- [emphasis added]

It is also worth noting the way in which the so-called option was phrased. It appeared as clause 18 of the letters of intent and this clause contained six sub-clauses, the most important of which in this context was the first:

> Special request by Tenant: 1. Within 12 months from date of agreement, tenant has an option to purchase at the following price: Contract price of S$791,820.00 with renovation voucher of S$39,591.00 and absorption of stamp fee of S$18,354.00. (equivalent to 10% +5%)

That clause makes plain that the plaintiff wanted a very specific option which would be legally enforceable as all main consideration terms would be agreed.

18 The meaning of "subject to contract" is clear. This expression simply means that "unless and until a formal written contract has been executed and exchanged by the parties there is no binding and enforceable contract between them. That is so even if the parties are in agreement as to all the

terms." (*Thomson Plaza (Pte) Ltd v Liquidators of Yaohan Department Store Singapore Pte Ltd* [2001] 3 SLR 437 at [27].) Applying that principle, the letters of intent were not themselves binding agreements.

19 As anticipated in the letters of intent, the parties subsequently entered into binding contracts to wit the offer letters which in effect operated as agreements to lease. When construction of the Units was completed and possession could be given to the plaintiff, the Tenancy Agreements were concluded in August 2007. The content of the Tenancy Agreements was previewed in the terms of the offer letters. It bears emphasising that the offer letters were not subject to contract but, on acceptance by the plaintiff of the offers made therein by the defendant, became enforceable contractual documents. They contained the main terms of the tenancy which would bind the parties until the formal Tenancy Agreements could be signed. In none of the offer letters was there any option provision. The plaintiff realised this and pressed Angela Ang on the matter. That resulted in the issue of the defendant's letter of 22 September 2006 in which the defendant indicated the extent to which it was prepared to give the plaintiff a purchase option: the furthest it was willing to go was to state that within 12 months of the commencement of the tenancies the plaintiff would have an option to purchase the units "subject to contract, at the prevailing market price to be mutually agreed upon". This was not a legally enforceable option but only an indication of a willingness to treat at the appropriate time. Quite plainly the defendant was not prepared to commit itself on the price in the manner that the plaintiff had requested.

20 When the Tenancy Agreements were issued about a year later they were signed by Ng on every page and, from their execution, embodied the entirety of any enforceable agreement between the parties. They did not contain any option provision whether in the specific terms required by the plaintiff or even the non-committal formulation used by the defendant in September 2006.

The Tenancy Agreements

21 The plaintiff could not seek to enforce a right that it omitted to bargain for and include in either the offer letters or the Tenancy Agreements by resort to the letters of intent as evidence of agreement between the parties in respect of the option to purchase. In the recent case of *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] SGCA 27 ("*Zurich Insurance*") the Court of Appeal stated the law on the significance of extrinsic evidence to contractual interpretation. In particular, the court held (at [114]-[120], [132(c)]) that ambiguity was not a prerequisite for the introduction of contextual evidence.

22 The Tenancy Agreements were entered into on 8 August 2007, more than a year after the letters of intent were signed on 13 July 2006. Any number of changes could have been made during the parties' negotiations in the interim. As the Court of Appeal reiterated in *Zurich Insurance*, the principle of objectively ascertaining contractual intention remains paramount. It also warned (at [132(f)]) that the court "should always be careful to ensure that extrinsic evidence is used to explain and illuminate the written words, and not to contradict or vary them." In that case, the parties did not dispute that the terms of the contract in question represented the complete agreement between them. Thus, under s 94 of the Evidence Act no extrinsic evidence was admissible. The present case is only cosmetically different: while the plaintiff asserted that the option to purchase was omitted from the Tenancy Agreements due to its own oversight, it could not deny that the offer letters and the Tenancy Agreements do not provide for any such option to purchase. Thus by its claim the plaintiff sought to hold the defendant to an alleged obligation in the Tenancy Agreements, evidence of which is nowhere to be found in the same, but only in the earlier letters of intent. To allow the plaintiff to proceed to trial would be an error of law and contrary to s 94 of the Evidence Act. The holding in *Zurich Insurance* that ambiguity is not a prerequisite for the admissibility of extrinsic evidence does

not change the fundamental rule that a contract is to be interpreted objectively. The absence of a term regarding an option to purchase in either the offer letters or the Tenancy Agreements must therefore be conclusive.

23 The defendant also argued that even if the letters of intent amounted to an agreement between the parties, clause 18 provided that "[w]ithin 12 months from date of agreement, tenant has an option to purchase at the following price…." The defendant asserted that the period of 12 months expired on 12 July 2007, the "agreement" being the letters of intent themselves and not the Tenancy Agreement (which was referred to as such in other clauses of the letters of intent). This was not *per se* a ground for striking out the plaintiff's claim. The "agreement" which was to determine the period of the option to purchase was not defined, and could have been the letters of intent or the offer letters or the Tenancy Agreements; this was an ambiguity that, while not prerequisite for the admissibility of extrinsic evidence, could justify resort to such contextual evidence. However, this issue was moot in the present case because the letters of intent were not binding. Thus the purported exercise of any option to purchase would have to be by the parties' subsequent agreement and not as a matter of contractual right in accordance with the letters of intent.

24 The plaintiff's claim had to be struck out not because the plaintiff attempted to exercise the option to purchase after the expiry of 12 months, but because it was not logically possible for the claim to succeed: it was not disputed that the letters of intent were subject to contract and that the contract that materialised to give effect to the parties' intentions (*i.e.* the offer letters and, later, the Tenancy Agreements) did not provide for any option to purchase. The plaintiff as good as admitted that it had no case on the basis of the signed documents. Its claim was obviously unsustainable and, as such, frivolous. I did not, however, find that the claim was scandalous or an abuse of the process of the court. Nor was it vexatious in the sense that it was brought "to annoy or embarrass [the defendant], or [was] not calculated to lead to any practical result." (*Goh Koon Suan v Heng Gek Kiau* [1990] SLR 1251) While the "categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed and will depend on all the relevant circumstances of the case," (*Gabriel Peter & Partners v Wee Chong Jin* [1998] 1 SLR 374 at [22]) there is no evidence here of a lack of *bona fides* or an attempt at oppression on the plaintiff's part.

25 For completeness, I should also note that the plaintiff was, as the defendant argued, not entitled to plead the allegations in its reply (see [7]-[9] *supra*) that were not consequential upon the amendments made in the defence (amendment no. 1) (O 20 rr 3, 4; *Singapore Civil Procedure 2007* at [20/4/8]). Considering that these allegations of Angela Ang's oral representations were contradicted by the affidavit of Winston Woon, who affirmed that the plaintiff had fully appreciated the nature of the transaction, and given the provision in the booking forms that the developer was under no obligation to issue the option to purchase, there was some merit to the defendant's argument that the matters pleaded in the reply were bare allegations of doubtful genuineness, made in an attempt to defeat the striking-out application.

Conclusion

26 As the plaintiff characterised its own case, it was "an aggrieved purchaser who thought initially that it had entered into a good bargain but realised subsequently that it had been short-changed because it was not careful with the contractual documents."[note: 1] The plaintiff cannot now premise a claim on its own failure to ensure that the options to purchase were incorporated into the final contract. The letters of intent were not binding or enforceable, and the plaintiff thus had no cause of action with any prospect of success. As Nathan J said in *Connell v National Companies and Securities Commission* 15 ACLR 75 at 79 (quoted by Choo Han Teck J in *Kim Hok Yung v Cooperatieve Centrale Raiffeisen-Boerenleenbank BA* [2000] 4 SLR 508 at [18]), the "forlorn nature of the plaintiff's

claim is apparent on the documents. Nothing could breathe life into it." The appeal was dismissed with costs to the defendant fixed at $4,000.

[note: 1]Plaintiff's written submissions at [11]