Triangle Auto Pte Ltd v Zheng Zi Construction Pte Ltd
[2000] SGHC 229

Case Number : DC Suit 521/2000/p

Decision Date : 10 November 2000

Tribunal/Court : High Court

Coram : G P Selvam J

Counsel Name(s) : Muthu Kumaran (WT Woon & Co) for the plaintiffs; Christopher Yap (Christopher Yap & Co) for the defendants

Parties : Triangle Auto Pte Ltd — Zheng Zi Construction Pte Ltd

Civil Procedure – Summary judgment – Whether judge has power to exclude claims from assessment of damages on own motion

Contract – Remedies – Damages – Deposit in sale and purchase contract – Law relating to deposits and from liquidated damages -Whether $3,000 a non refundable deposit – Whether innocent party entitled to claim damages in excess of deposit

: ***The appeals***

The plaintiffs are dealers in motor vehicles. By an agreement made on 23 March 2000 and evidenced in writing by the plaintiffs` retail customer order and agreement the defendants agreed to purchase from the plaintiffs a motor vehicle at a total price of $73,492 inclusive of the certificate of entitlement (`COE`). The COE price then was about $30,000.

Clauses 3 and 5 of the `Terms and Conditions` read as follows :

> *3. If the purchaser shall fail to take and pay for the goods within fourteen (14) days of notification that the goods have been completed for delivery, the company shall be at liberty to treat the contract as repudiated by the purchaser and thereupon the deposit shall be forfeited without prejudice to the company`s right to recover from the purchaser by way of damages any loss or expense which the company may suffer or incur by reason of the purchaser`s default.*
>
> *5. Deposits are not refundable, in the event of cancellation by the purchaser/hirer.*

As required by the contract, the defendants paid a deposit of $3,000 which was 4% of the price. Later when the COE price fell the defendants wanted a discount. The plaintiffs declined. The defendants, by a letter dated 12 April 2000, repudiated the contract by cancelling their order for the vehicle.

(A)	Net revenue from the contract lost	$	22,500.00
(B)	Additional expenses incurred (estimate)	$	1,000.00

(C)	Value of other benefits from the contract (estimate)	$	12,000.00
(D)	Less deposit forfeited	$	3,000.00
(E)	Damages (A+B+C-D)	$	32,500.00

The plaintiffs accepted the repudiation, forfeited the deposit and brought this action to recover additional damages. Two paragraphs in the statement of claim relating to damages need to be reproduced:

> *9 If the contract had been proceeded with the plaintiffs would have benefited from the contract not only in terms of the revenue or profit from the sale under the contract, but also:*
>
> *1 the subsequent custom or business from repair or servicing the said vehicle;*
>
> *2 the subsequent custom or business sale of parts or components for servicing or repair of the said vehicle;*
>
> *3 the subsequent goodwill or custom or business from the defendants; and*
>
> *4 the subsequent custom or business sale of parts or components for servicing or repair.*
>
> *10 By reason of the foregoing the plaintiffs have lost the benefit of the contract and lost the revenue and/or other benefits they would otherwise have received under or from the contract and have thereby suffered loss and damages.*

The plaintiffs proceeded to apply for interlocutory summary judgment. The defendants resisted the application on the ground that they lawfully terminated the contract by giving up the deposit. Accordingly, they said, there was no further liability.

The deputy registrar of the Subordinate Courts heard the application and gave interlocutory judgment. Damages were ordered to be assessed. The defendants appealed to the district judge in chambers. The district judge affirmed the order for interlocutory judgment made by the deputy registrar. The district judge, however, went further and varied the order to `limit the assessment to damages so as not to include paras 9 and 10(c) of the statement of claim`. In her `brief grounds of decision` the judge explained her decision affirming the interlocutory judgment but omitted altogether any reference to her order excluding certain items of loss. Both parties appealed to High Court judge in chambers - the buyers against the interlocutory judgment and the sellers against the exclusion order.

Michael Tan`s case

The anchor plate of the defendants` appeal was an unreported judgment of Goh Joon Seng J - ***Tan Michael v Loo Choon Yong*** (OS 247/92). The plaintiff, Michael Tan, agreed to sell his membership in

Singapore Island Country Club to the defendant Loo Choon Yong at the price of $240,000. The defendant was required to place a deposit of $12,000 being 5% of the price with a firm of solicitors as stakeholders. The agreement of sale and purchase provided: `The Deposit shall however be forfeited to the transferor should the transferee be in breach of any of the terms herein contained`. Goh Joon Seng J held that the defendant was in breach of the agreement and the plaintiff was entitled to forfeit the deposit of $12,000. The plaintiff wanted something in addition as damages. As it was not a writ action there was no statement of claim stating the loss the plaintiff had allegedly suffered. In any event, he had not resold the membership. There was therefore no provable loss; there was no gain either. On the issue of damages the judge said:

> *This depends on whether the forfeiture was a penalty in which case it would be void or it represented a genuine pre-estimate of loss in the event of any breach of the agreement by the first defendant in which case it would be valid.*

The judge set out the test for penalty by Lord Dunedin in **Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd** [1915] AC 79 and added that the agreement did not reserve any right to the plaintiff to any claim over and above the forfeiture of the deposit. Then he concluded as follows:

> *(i) In my view, therefore, the clause for forfeiture of the deposit of $12,000 represented a genuine pre-estimate of damage in the event of a breach by the first defendant of any of the terms of the Agreement. Accordingly, the plaintiff is entitled to receive the deposit from the second defendants and retain the same as agreed liquidated damages.*
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> *(ii) The plaintiff is, however, not entitled to a further claim for additional loss if any. There is also no evidence of actual loss as the plaintiff still retains his membership and has not resold the same at a loss.*

The judge applied the following passage in 12 ***Halsbury`s Laws of England*** (4th Ed) para 18 to support his decision :

> *Where the stipulated sum is liquidated damages, the plaintiff may recover this sum irrespective of his actual loss or the loss which he is able to prove. He is not, however, entitled to disregard this sum and prove that he has suffered greater damage and neither is the defendant entitled to prove that the plaintiff has suffered less damage. Where the stipulated sum is a penalty the plaintiff may only recover damages in respect of such damage as he can prove, but the amount recoverable may be greater or less than the sum stipulated.*

The defendants in the present case contended that the plaintiffs, by analogy, were entitled to retain the sum of $3,000 as liquidated damages and were not entitled to anything in addition. I do not accept their contention. I shall explain why.

Forfeitable deposit

First, it is necessary to relate the relevant law. A deposit in a sale and purchase contract, if nothing

more is said about it, is a security for damages for breach of contract. If the seller has not suffered any damage he must return it to the depositor. If, however, the contract provides that the deposit is to be forfeited to the seller upon breach by the purchaser, and provided the amount of deposit is customary or moderate, the seller is entitled to retain it even if he suffered no loss. The deposit is considered as earnest money. If his damages are greater he is entitled to recover the shortfall. This concept differs radically from the concept of liquidated damages. The two concepts are governed by separate legal constructs.

The essence of law of deposit with a forfeiture was declared in a trilogy of Privy Council appeals. The first was an appeal from Singapore: **Mayson v Clouet** [1924] AC 980. One Sim Choon Kee contracted to purchase a piece of land in Singapore at a price of $250,000. A deposit of $25,000 was payable upon signing the contract. Two instalments of cash, being 10% each of the balance of the price, were to be paid at certain dates. The balance was to be paid on a stipulated day. Clause 13 of the contract provided that if the purchaser was in breach `his deposit may be treated as forfeited` and there was a reservation of right to re-sell and recover as liquidated damages any loss on the re-sale. The purchaser paid the deposit and two instalments ($50,000), but failed to pay the balance of the purchase price at the stipulated time. The vendor rescinded the contract. The vendor asserted that he was entitled to keep the entire amount of $75,000. He did not assert any actual loss on resale. The purchaser Sim Choon Kee, died. Mayson as the official assignee represented his estate. Mayson on behalf of Sim Choon Kee, deceased, on the authority of **Palmer v Temple** (Unreported) and **Re Parnell, ex p Barrell** [1875] 10 Ch App 512 conceded that the deposit of $25,000 was forfeitable since the contract said so. He wanted the vendor to return the two instalments because the forfeiture clause did not apply to them. The Privy Council decided that since the contract distinguished between the deposit and the instalments and provided for a forfeiture of the deposit only the instalments were recoverable by the purchaser.

The next landmark is a Malaysian appeal: **Linggi Plantations Ltd v Jagatheesan** [1972] 1 MLJ 89 . It also concerned sale of land. The price was $3,775,000. A deposit of $377,500 being 10% of the price was deposited. There was a clause preserving the right to claim additional damages. The purchaser defaulted. The vendor was unable to prove actual damage flowing from the purchaser`s breach. The Federal Court of Malaysia ordered the vendor to return the whole deposit to the purchaser. The Privy Council settled the law that the vendor was entitled to forfeit the deposit as provided in the contract and claim for any damage which he had suffered over and above the amount of the deposit on termination of the contract. In doing so he must give credit for the amount of the deposit.

The above two cases sealed the propositions of the law: the law relating to deposits in a sale and purchase contract differs from that governing liquidated damages. A reasonable deposit is regarded as earnest money given to guarantee the due performance of the contract and is not regarded as a penalty in English law or common English usage. The defaulting purchaser is not entitled at law or in equity to relief against forfeiture. Equitable relief applies only to penalty that is to say excessive liquidated damages. If the deposit amount is excessive it will also be caught by the law of penalty. This is an instance where judges give legal effect to the ancient saying: Nothing too much. The magic number of 10% of the price has been regarded as a reasonable deposit in sale and purchase of immovable property and it is intended to encourage performance.

A third Privy Council case gave its imprimatur to the law as stated above in an appeal from Jamaica: **Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd** [1993] AC 573. Lord Browne-Wilkinson delivering the joint judgment said at p 579: `It is not possible for the parties to attach the incidents of a deposit to the payment of a sum of money unless such sum is reasonable as earnest money`. In this case the contract contained a forfeiture clause in respect of a deposit of 25% of the price. The Privy Council held that the vendor must establish the reasonableness of any deposit in

excess of 10% as intended to encourage performance. The vendor failed to establish it as reasonable and lay claim to the traditional concept of earnest money. These principles were settled in contracts relating to the sale of land. They apply with the same force and effect to sale of goods: See **Stockloser v Johnson** [1954] 1 QB 476 and **The Blankenstein; Damon Compania Naviera v Hapag-Lloyd International SA** [1985] 1 All ER 475[1985] 1 Lloyd`s Rep 93[1985] 1 WLR 435.

Liquidated damages

A deposit with a forfeiture right is vastly different from liquidated damages. The nature of the latter makes it inappropriate in a sale and purchase contract. Liquidated damages are agreed damages. The purpose here is to avoid difficulties relating to proof of actual loss. Subject to the law of penalty and exemption clause neither party may depart from the agreement. The contract breaker is barred from asserting that the seller suffered no loss or his loss is much less than what was agreed. The innocent party cannot ignore the liquidated damages clause and seek greater damages. See **Cellulose Acetate Silk Co Ltd v Widnes Foundry(1925) Ltd** [1933] AC 20 and Suisse **Alantique SociÃ©tÃ© D`Armement Maritime SA v Rotterdamsche Kolen Centrale** [1967] 1 AC 361. More importantly, unlike liquidated damages, a deposit with a right of forfeiture is a right ***in rem*** . The buyer places the money or its equivalent in the power and possession of the seller. Upon breach by the buyer, the deposit is transformed into the property of the seller by operation of the forfeiture clause. Liquidated damages constitute a chose in action; nothing is deposited with the innocent party.

The above principles clearly applied to the deposit in the ***Michael Tan*** case. Although on the facts the result would have been the same, ***Michael Tan*** `s case more appropriately belonged to the regime of deposit with a right forfeiture and not liquidated damages. The sum of $12,000 was not agreed damages. It was earnest money. Subject to proof Michael Tan could claim additional damages. But he had no proof. ***Michael Tan*** `s case therefore does not assist the defendants.

Applying the law outlined above and in particular the principles pronounced in the ***Linggi Plantations*** case I conclude that the $3,000 was a deposit with no right of refund. It was earnest money to ensure performance. The amount was eminently reasonable. There was a repudiatory breach of the contract by the defendants when they declared that they cancelled their order for the vehicle and gave up the deposit. Thereupon cll 3 and 5 kicked in. The plaintiffs had a contractual as well as a common law right to institute this action to prove all their losses and give credit for the deposit amount of $3,000. That was exactly what they did. The interlocutory judgment in the circumstances was indefeasible.

The seller`s appeal

Now the sellers` appeal. The judge`s act of excluding paras 9 and 10(c) from the assessment was in effect striking them out of the statement of claim. It was incongruous to say at once that there would be an assessment but there would be an assessment only of some items but not all. It was common ground that the judge`s act of restriction was on her own motion. The defendants did not ask for it. The defendants` readily conceded before me that they had to deal with all heads of damage in assessment proceedings. Creating an issue and deciding it without informing the parties of it, let alone affording them no opportunity to adduce evidence and submit on it, is an unjudicial act. Rules of justice forbid such a course of action by any judicial tribunal. At first blush, the heads of damage may appear unsound and speculative but it is for the assessing court to decide on them after all admissible evidence is adduced and arguments are presented. No judge has the authority to strike out any claim except when the adversary takes out an application for it and makes out his

application. Accordingly, I set aside the order of restriction and affirm the plaintiffs` right to present their case on all heads of damage.

In the result the defendants` appeal is dismissed and they shall pay the costs of the appeal. The plaintiffs` appeal is allowed with no order as to costs. Since the exclusion of paras 9 and 10(c) was an inadvertence of the judge the defendants should not be distressed for it.

Outcome:

Defendants` appeal dismissed; plaintiffs` appeal allowed.