

Lim Ah Laik and Another v Surrender Singh and Another
[2007] SGHC 144

Case Number : OS 384/2007
Decision Date : 06 September 2007
Tribunal/Court : High Court
Coram : Judith Prakash J
Counsel Name(s) : James Ponniah (Wong & Lim) and C P Lee (C P Lee & Co) for the plaintiffs; Tan Chau Yee and Yong Shu Hsien (Harry Elias Partnership) for the defendants
Parties : Lim Ah Laik; Leow Poh Tin — Surrender Singh; Alka Solanki

Land – Sale of land – Conditions of sale – The Singapore Law Society's Conditions of Sale 1999 – Condition 29 – Whether Condition 29.8(c)(ii) operating to cause contract for sale and purchase to cease to have effect upon failure to make date of completion set by notice to complete

Land – Sale of land – Contract – Completion – Whether specific performance of option to purchase should be ordered – Whether specific performance of contract for sale and purchase should be ordered

6 September 2007

Judith Prakash J

Introduction

1 I heard this action, Originating Summons No. 384 of 2007 (“OS 384”), together with a connected action, Originating Summons No. 386 of 2007 (“OS 386”). Both sets of proceedings concerned the sale and purchase of the apartment unit known as 93 Yishun Street 81 #02-11, Orchid Park Condominium Singapore (“the property”). The defendants in OS 384 (“the vendors”) are husband and wife and they are the legal owners of the property and the plaintiffs in OS 386. The plaintiffs in OS 384 (“the purchasers”) are also husband and wife and they are the persons who wanted to buy the property and the defendants in OS 386.

2 By OS 384, the purchasers asked for orders to the following effect to be made:

- (a) specific performance of the Option to Purchase granted by the vendors on 22 October 2006 and exercised by the purchasers on 25 October 2006 in respect of the property;
- (b) alternatively, specific performance of the contract entered into when the purchasers paid the sum of \$18,000 to the vendors on 15 January 2007 and were given vacant possession of the property;
- (c) damages for breach of contract in lieu of specific performance; and
- (d) interest at the rate of 10% p.a. on the sum of \$416,000 to be paid by the vendors to the purchasers from 2 February 2007 up to and including the date of actual completion.

3 By OS 386, the vendors asked for orders to the following effect to be made:

- (a) the caveat no. IA/542272Q entered on volume 409 folio 20 of the register kept at the

Singapore Land Authority lodged by the purchasers on 15 December 2006 against the property be withdrawn, cancelled or removed from the said register;

(b) the purchasers do forthwith procure the withdrawal, cancellation or removal of caveat no. IA/578342F entered on volume 409 folio 20 of the register kept at the Singapore Land Authority lodged by the purchasers' mortgagee, NTUC Income Insurance Cooperative Limited, on 25 January 2007 against the property;

(c) the purchasers do reinstate the property to its original condition or pay the vendors damages to be assessed;

(d) the purchasers do deliver to the vendors forthwith vacant possession of the property and all keys to the property;

(e) the purchasers do return to the vendors forthwith the computer-generated Subsidiary Strata Certificate of Title Volume 409 Folio 20; and

(f) the purchasers do pay the vendors damages for the purchasers' breach of contract of the sale and purchase of the property and/or damages for the purchasers' wrongful refusal or failure to withdraw the caveats.

4 After hearing the parties, I found for the vendors and granted them orders in terms of various prayers of OS 386. I also ordered that the purchasers were to pay the vendors damages for breach of contract as assessed by the registrar. I dismissed OS 384 and ordered that the purchasers should pay the vendors' costs of the proceedings with the restriction that the vendors should be entitled to recover only one set of costs. The purchasers have appealed against my decision. This judgment forms my grounds for the orders I made in both OS 384 and OS 386.

Factual background

5 On 22 October 2006, in consideration of the payment of the sum of \$4,100, the vendors granted the purchasers an option to purchase the property ("the Option") at the price of \$416,000 subject to the terms and conditions set out in the Option. On 25 October 2006, the purchasers exercised the Option by signing the portion marked "Acceptance Copy" and delivering the same together with the sum of \$16,700 (representing the balance of the deposit of 5% of the price) to the vendors' solicitors.

6 Clause 4 of the terms and conditions of the Option stipulated that the sale was subject to "The Singapore Law Society's Conditions of Sale 1999" ("Conditions of Sale") so far as the same were applicable to a sale by private treaty and not varied by or inconsistent with the special conditions in the Option. Under cl 6 of the Option, the sale and purchase of the property was to be completed on 6 December 2006.

7 On 5 December 2006, the purchasers' then solicitors wrote to the vendors' solicitors and asked for an extension of the date of completion to 29 December 2006. The vendors were not willing to extend the completion date. In their reply dated 9 December 2006, the vendors' solicitors gave the purchasers a notice to complete ("the Notice") the sale and purchase of the property within 21 days of the date of that letter pursuant to cl 29 of the Conditions of Sale. The letter also stated that in respect of completion, time was to be of the essence. By virtue of the Notice, the new completion date was 30 December 2006.

8 On 22 December 2006, the purchasers' solicitors wrote to the vendors' solicitors and sought "a final extension for the completion of the property to 15 January 2007". The letter confirmed "that this is the final extension request and [the purchasers] confirm that they will be willing able and ready to complete the purchase on 15 January 2007".

9 The vendors did not respond and, therefore on 26 December 2006, the purchasers' solicitors wrote a further letter in which they stated that they understood that the vendors "[had] been put to much inconvenience and financial losses due to the delays in completion caused by [the purchasers'] situation (delay in getting bank's approval for loans)". The solicitors appealed for the vendors to grant a final indulgence for an extension of the completion to 15 January 2007 and stated that the purchasers were willing to compensate the vendors for all reasonable losses.

10 On 27 December 2006, the vendors' solicitors wrote two letters to the purchasers' solicitors. By the first letter, which was an open letter, the solicitors refused the purchasers' request for a further extension of time and reiterated the vendors' position that if the sale and purchase was not completed within 21 days after service of the Notice, the vendors would enforce their rights against the purchasers. The second letter was marked "without prejudice". It stated "[s]trictly on a without prejudice basis, our clients will consider granting your clients a final extension to complete the sale and purchase up to 15th January 2007 provided your clients will compensate our clients a sum of S\$20,000 (this will be inclusive of any late completion interest which will accrue to our clients)". The letter also stated that if the vendors' solicitors did not hear from the purchasers' solicitors by the close of business on the same day, the vendors' offer would be withdrawn.

11 The purchasers did not contact the vendors again until 5 January 2007. On that day, their solicitors wrote to inform the vendors' solicitors that the purchasers were now ready, willing and able to complete the purchase of the property as they had received loan approval from NTUC Income Insurance Cooperative Limited ("NTUC"). They asked whether the vendors were agreeable to resuming the transaction. This letter was followed up by a without prejudice letter dated 8 January 2007 wherein their solicitors stated that the purchasers were willing to offer \$15,000 to the vendors in full and final settlement of the latter's expected losses. The letter asked that the vendors accept the offer on an urgent basis so that the purchase and sale of the property could be completed on 15 January 2007.

12 The next day, the vendors' solicitors informed the purchasers' solicitors, on a without prejudice basis, that their clients would accept the offer of \$15,000 in full and final settlement of their expected losses on the following conditions:

(a) payment of the sum of \$15,000 was to reach the vendors' solicitors by close of business on 10 January 2007 and if the cheque was not honoured on first presentation, the sale would not proceed; and

(b) completion was to take place on 15 January 2007 and no further requests for extensions of time would be entertained.

13 Unfortunately, there was another hitch. On that same day, 9 January 2007, the purchasers' solicitors advised the vendors' solicitors that NTUC was only able to process the loan on or before 29 January 2007. They asked whether the vendors were willing to grant the purchasers "this final extension". They indicated that they were ready to deliver the purchasers' cheque for \$15,000 by the next day. They also asked for early collection of the keys to the property to enable the purchasers to do renovation work.

14 Between 11 and 15 January 2007, the parties' solicitors exchanged further "without prejudice" correspondence on the issue of compensation. On Monday, 15 January 2007, the vendors' solicitors sent an e-mail to the purchasers' solicitor, Mr Tan which stated, *inter alia*:

Our client instructs that he will agree to completion on 29th Jan 07 on the following conditions:

1. Your clients pay an additional sum of \$3,000 (over and above the sum of \$15,000 indicated in your letter) i.e. a total of \$18,000 is to be paid to our clients; and
2. Payment of the said sum of \$18,000 shall be made by 5 pm, Monday 15 Jan 2007 and if paid by cheque, such cheque shall be honoured upon first presentation; and
3. There shall be no further extension beyond 29 Jan 2007; and
4. In the event that your clients are unable to complete on 29 Jan 2007, our clients shall be entitled to keep the sum of \$18,000, as well as the 5% deposit (\$20,800) paid to them earlier i.e. a grand total of \$38,800.00.

15 The purchasers' solicitors replied the same day accepting the terms. The material part of their letter read:

We hereby agree and enclose our clients' cheques totalling S\$18,000.00 in respect of the full and final settlement of your client [sic] losses in return for your client [sic] agreement to extend completion date of the above property on 29/1/2007.

On 26 January 2007, the vendors delivered possession of the property to the purchasers on the terms of a letter of undertaking signed by the purchasers.

16 Completion did not take place on 29 January 2007. The vendors' solicitors were informed that same day that the purchasers could not complete that day because the Central Provident Fund Board would only be able to release payment of a sum of \$13,678.62 on Wednesday, 31 January 2007. They therefore sought "[the vendors'] final indulgence of an extension of time until Wednesday, 31 January 2007". The letter also stated that an aborted sale would cost the purchasers severe hardship, and therefore they were asking for the vendors to exercise compassion and grant the two days' extension.

17 By this time, however, the vendors were no longer willing to accept any delays. The next day, their solicitors informed the purchasers' solicitors that the vendors were not proceeding further with the sale of the property. They asked the purchasers to reinstate the property to its original condition immediately.

18 The purchasers were, understandably, upset. They changed solicitors and on 1 February 2007, their new solicitors gave the vendors' solicitors notice to complete the sale and purchase of the property within 21 days of the said notice. The vendors did not accept that the purchasers were entitled to give them notice to complete. On 9 February 2007, their solicitors demanded that the purchasers reinstate the property to its original condition, redeliver vacant possession of the property to the vendors, return all keys and the certificate of title to the vendors, and also withdraw the caveats lodged against the property.

19 The parties could not resolve their dispute and, as a result, each of them commenced the proceedings for relief that came before me.

The purchasers' arguments

20 Mr James Ponniah, counsel for the purchasers, reminded me that the contract for the purchase and sale of the property in its original form was not a contract in which time was of the essence. This followed from the general principle that in a contract for the sale and purchase of land which provides for a specified completion date, time is not usually of the essence of the contract and therefore, failure to complete on that specified date does not entitle either party to refuse to complete thereafter. There was nothing in the contract before me that made time of the essence. Accordingly, it was a contract to which Condition 29 of the Conditions of Sale applied. The material part of this Condition reads:

29. Notice to Complete

29.1 This Condition applies in every case except where the Special Conditions provide that time is to be of the essence of the contract concerning the date fixed for completion.

29.2 A notice to complete means a notice in writing requiring completion of the contract in accordance with this Condition.

29.3 If the sale is not completed on the date fixed for completion, either party may give to the other party a notice to complete.

...

29.6 Upon service of an effective notice, parties must complete the transaction within 21 days after the day of service of the notice (excluding the day of service) and time will be of the essence of the contract.

...

29.8 If the Purchaser does not comply with the terms of an effective notice serve by the Vendor under this Condition, then the following terms apply:

(a) on the expiry of the notice to complete or within such further period as the Vendor may allow, the Purchaser must immediately return all title deeds and documents in his possession that belong to the Vendor;

(b) the Purchaser must at his own expense procure the cancellation of any entry relating to the contract in any register; and

(c) without prejudice to any other rights or remedies available to him at law or in equity, the Vendor may –

i) forfeit and keep any deposit paid by the Purchaser; and

ii) resell the property whether by auction or by private agreement without previously tendering a Conveyance to the Purchaser.

...

29.12 At the request or with the consent of the other party, the party serving a notice under

this Condition may extend the term of the notice for one or more specifically stated periods of time in which case the term of the notice is to be treated as expiring on the last day of such extended period.

29.13 The notice will operate as though this Condition stipulated such extended period of notice in place of 21 days and time will be of the essence of the contract.

21 Accordingly, Mr Ponniah submitted, in the present case, before time was made the essence of the contract, a notice to complete had to be issued under Condition 29.6. To be effective, this notice had to be quite clear to a reasonable purchaser reading it and must be so plain that the purchaser could not be misled by it (see *Delta Vale Properties Ltd v Mills* [1990] 2 All ER 176 ("the *Delta Vale* case") and *Mannai Investment Co Ltd v Eagle Star Life Assurance* [1997] 3 All ER 352). Mr Ponniah accepted that the notice to complete issued by the vendors on 9 December 2006 was in clear terms and was so plain that the purchasers could not be misled by it. Accordingly, it was an effective notice to complete and the purchasers had to complete in accordance with its terms, *i.e.* on 30 December 2006.

22 Mr Ponniah further submitted that as soon as the notice to complete was served on the purchasers, it took on a life of its own to unilaterally change the rights of the parties upon the expiry of the notice. That event took place on 30 December 2006. After that the rights of the parties were governed by Condition 29.8 of the Conditions of Sale.

23 Condition 29.8(c) provides that the vendor may (i) forfeit and keep the deposit; and (ii) resell the property. The submission was that the second provision released the vendors from the shackles of the contract because the contract had automatically come to an end under the force of the notice to complete. As such, it was submitted, that after 30 December 2006, there was no contractual obligation in existence for the vendors to sell to the purchasers.

24 That being the case, when the purchasers on 15 January 2007 paid the vendors further consideration of \$18,000, there came into existence an agreement to extend the date of completion to 29 January 2007. Therefore 29 January 2007 was the day stipulated for completion under a new contract in which time was not of the essence. Further, by virtue of Condition 29.1, the new contract had an inbuilt stipulation that it was also subject to Condition 29. That being the case, when completion did not take place on 29 January 2007, the vendors were not entitled to walk away and refuse to complete on 31 January 2007 or thereafter without first issuing a second notice to complete pursuant to Condition 29.2.

25 In support of his position, Mr Ponniah relied on the *Delta Vale* case. There, by a contract dated 24 April 1986, the defendant/vendor agreed to sell property to the plaintiff/purchaser. The contract incorporated the English Law Society's General Conditions of Sale ("English Conditions") and provided for completion on 15 May 1986. The plaintiff failed to complete on 15 May 1986. On 20 May 1986, the defendant served a notice to complete pursuant to Condition 23 of the English Conditions (which is the English equivalent of our Condition 29 except that a different number of days is stipulated therein). Condition 23 provided that 15 days notice to complete had to be given. The defendant, however, gave the plaintiff 28 days notice. Despite the expiry of the 28 days, the plaintiff did not complete. Between June and August 1986, various extensions of time to complete were agreed to between the parties, but the plaintiff still failed to complete. Eventually the defendant lost patience and, on 13 August 1986, served a notice on the plaintiff requiring completion within seven days.

26 The plaintiff sued the defendant for specific performance and was successful at first

instance. The judge held that the original notice of 20 May 1986 was bad as it provided for completion within 28 days instead of the 15 days stipulated by Condition 23 and, accordingly, the second notice of 13 August 1986 was also bad. On appeal, the defendant was successful. The Court of Appeal held that the first notice was valid since the defendant was at liberty to grant the plaintiff more time, rather than only the 15 days stipulated in Condition 23. Therefore, the second notice was also valid and made completion within the seven days the essence of the contract. Slade LJ stated in the course of his judgment (at 183):

In all these cases, including the present, the notices in question have belonged to the category of non-consensual documents which, if they are in proper form, are capable of their own force, without any assent by the recipient, of bringing to an end or at very least diminishing his rights. In my judgment, notices to complete served under condition 23, if they are to be valid, must be sufficiently clear and unambiguous to leave a reasonable recipient in no reasonable doubt as to how and when they are intended to operate.

His Lordship continued at 184:

After service of the first notice, the time for completion was extended by agreement. In these circumstances, it was open to the defendants, by virtue of condition 23(7), again to invoke the provisions of condition 23, which would then take effect with the substitution of 7 working days for 15 working days. In my judgment, the defendants properly invoked the provisions of condition 23(7) by the second notice, the form of which has not been challenged in this court. On service of that notice it became a term of the contract that it should be completed within 7 working days after service, in respect of which time was of the essence.

(It should be noted that Condition 23(7) of the English Law Society's Conditions of Sale provided that where after service of a completion notice the time for completion had been extended by agreement, either party might then again invoke the provisions of Condition 23 which would thereupon take effect with the substitution of "seven working days" for "15 working days" in sub-condition (3). There is no equivalent of the English Condition 23(7) in the Conditions of Sale)

27 Mr Ponniah argued that on the strength of the *Delta Vale* case, the second notice to complete, which the vendors should have given to the purchasers, need not have been for a period of 21 days and would have been effective even if a shorter period was specified since the first notice to complete dated 9 December 2006 was a valid notice. In any case, a second notice to complete specifying a reasonable length of time had to be given to draw attention to Condition 29 to ensure that the purchasers were not misled as to the fact that the vendors were now making time the essence of the contract and upon expiry of that time, Condition 29.8 would come into effect.

28 As no such second notice to complete was issued by the vendors, on 1 February 2007, Condition 29.8 had not come into play and therefore, when the purchasers issued their own notice to complete on 1 February 2007, the vendors were obliged to complete the sale by 22 February 2007. Their failure to do so constituted a breach of the second agreement made on 15 January 2007. Mr Ponniah referred to the vendors' solicitors' letter of 11 January 2007 which stated that there would be no further extension after 29 January 2007. His position was that the vendors could not rely on that stipulation as it was not a notice to complete pursuant to Condition 29 and would not bring Condition 29.8 into play if completion did not take place on 29 January 2007. Further, the facts showed that the vendors were always willing to extend time in consideration for a few more dollars. As such, only a notice to complete with an express reference to Condition 29, as in the *Delta Vale* case, would drive home the message and leave the purchasers in no doubt that the vendors were making time of the essence and invoking the full force of Condition 29.8 if the purchasers did not

complete before the expiry of the notice to complete. This had to be so, as if the contract in its original form did not expressly make time of the essence, then only resort to Condition 29 could have this effect.

My reasons

29 I did not accept Mr Ponniah's analysis of the facts and therefore considered that the way in which he sought to persuade me to apply the applicable legal principles would not be correct. I considered that after 30 December 2006, no new contract was entered into between the parties and there was therefore no reason for Condition 29 to be re-invoked by the vendors. What had happened was that the original contract for sale and purchase remained in place and the vendors had agreed to an extension of the time given to complete by the Notice, and therefore time remained of the essence. When the purchasers failed to complete on the extended date, the vendors were entitled to rescind the contract. This is a brief summary of my decision. I will explain it further.

30 When the Notice was given on 9 December 2006, time became of the essence of the contract, as the purchasers themselves recognised. Thereafter, the extensions of time that were given were extensions of the term of the Notice. It would be recalled that under Condition 29.12, a party serving a notice to complete may, at the request or with the consent of the other party, extend the term of the notice for one or more specific periods of time and, pursuant to Condition 29.13, when such an extension is given, time continues to be of the essence of the contract. The position here is different from that which exists in England as Condition 23(7) of the English Conditions, which was invoked in the *Delta Vale* case, does not have an equivalent here. Instead, we are governed by Condition 29.12 and therefore the *Delta Vale* case was of no assistance to the purchasers.

31 In this case, the first request made by the purchasers was for the vendors to extend the time for completion under the contract to 29 December 2006. The vendors refused this request and instead chose to issue the Notice. (It is worth noting in passing that although the vendors did not agree to make 29 December 2006 the contractual completion date, the issue of the Notice on 9 December 2006 meant that completion had to take place on 30 December 2006 and therefore, in effect, the purchasers obtained the additional period they had said they needed for completion.) Thereafter, the various agreements to extend time to complete were all made without prejudice to the vendors' rights under the Notice and the Option, as was clearly stated in the correspondence that emanated from the vendors' solicitors. In effect, the extensions were extensions of the time given by the Notice. The fact that the letters did not expressly say that the vendors' agreement to change the completion date was an extension of the Notice cannot change the substantive effect of what was done. It was clear from the correspondence that the vendors at all times were responding to requests for extensions of time in relation to the completion of the original contract and in relation to the Notice that they had given, and were not entering into a new contract. The vendors took care at all times to preserve their position under the Notice.

32 In this respect, I have to disagree with Mr Ponniah's analysis that the contract for sale and purchase came to an automatic end for all purposes on 30 December 2006 when the purchasers failed to complete. Condition 29.8 sets out the consequences of the failure to complete in accordance with the terms of an effective notice to complete. Sub-paragraph (a) of that Condition explicitly recognises that the vendor may allow the purchaser further time for completion even though the notice has expired by stating "on the expiry of the notice to complete or within such further period as the Vendor may allow", and sub-para (c) sets out the options available to the vendor if he decides not to proceed with the sale. Condition 29.8 was therefore drafted with the provisions of Condition 29.12 in mind. As I have stated, that condition allows the party serving a notice to extend the term

of the notice. It does not specify that the extension must be made before the expiry of the notice, and it can reasonably be interpreted as permitting the vendor to extend the period of the notice even after its initial expiry.

33 In the English case of *Buckland & ors v Farmer & Moody (a firm)* [1978] 3 All ER 929, [1979] 1 WLR 221, the purchasers failed to complete in time and the vendors issued a notice to complete fixing 1 December 1973 as the completion date. A third party, M, was persuaded to take over the contract and complete it, but, after various extensions given by the vendors, M still failed to complete. On 7 February 1974, the vendors' solicitors wrote to the purchasers to rescind the contract. It was held that when the purchasers failed to complete on 1 December 1973, time did not cease to be of the essence so far as they were concerned because M was not the purchasers' agent and therefore, extensions of time granted to M were not given to the purchasers; but even if the purchasers were to be given the benefit of the extensions granted to M, these extensions were fixed dates and had not counteracted the effect of the notice served on 2 November 1973 making time of the essence of the contract. A similar view, *i.e.* that the effect of extending the period for compliance with a notice to complete to a new fixed date would preserve the position that time is of the essence without fresh stipulation to that effect was expressed by Goulding J in *Luck v White* [1984] Conv 313.

34 In the present case, the two extensions which the vendors were prepared to give were both to fixed dates and the extension actually given was to a fixed date. On the basis of the cases cited above, the grant of such an extension could not counteract the effect of the Notice. It is also significant that the basis on which the extension to 29 January 2007 was given was that, firstly, there would be no further extension beyond that date, and secondly, in the event that the purchasers were unable to complete on that date, the vendors would be entitled to keep the \$18,000 consideration without prejudice to the other rights that they would have against the purchasers. These terms, which were accepted by the purchasers, made it quite clear that in regard to the extension, time was still of the essence. In fact even if there had been a new contract (which I do not accept came into existence) those terms would have been terms of the new contract as well, and in the new contract therefore, time would have been made of the essence from the beginning.

35 Mr Tan Chau Yee, counsel for the vendors, submitted, and I agreed, that the allegation made by the purchasers that there was a fresh agreement or contract disregarded the contents of the parties' correspondence. In particular, it disregarded the letter from the purchasers' then solicitors dated 15 January 2007 which stated that the cheque for \$18,000 was sent to the vendors' solicitors "in return for your client [sic] agreement to *extend* completion date of the above property on 29/1/2007" (emphasis added). Throughout the correspondence, both parties referred to the extension of the completion date. They did not use any terms reflecting a new agreement. In fact, in the letter dated 5 January 2007, the first letter sent after the expiry of the notice to complete, the purchasers' solicitors requested the vendors to "resume the transaction".

36 In the circumstances I agreed with the submission made by Mr Tan Chau Yee that when the extended term of the Notice expired on 29 January 2007 the vendors were entitled to rescind the sale. Accordingly, when the vendors informed the purchasers' solicitors on 30 January 2007 that they would not be proceeding further with the sale of the property, they validly brought the contract to an end. Once the contract was rescinded in this manner, the purchasers were not entitled to give any notice to complete. Therefore, the notice that they purported to issue on 1 February 2007 was invalid and ineffective.