IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC 220

Originating Summons No 574 of 2021

Between

Tan Ngiap Tong

… *Plaintiff*

And

Tan Ngep Hong

… *Defendant*

AND

Originating Summons No 1426 of 2017

Between

Tan Ngiap Tong

… *Plaintiff*

And

Tan Ngep Hong

… *Defendant*

JUDGMENT

[Land] — [Sale of land] — [Contract]

Tan Ngiap Tong
v
Tan Ngep Hong

[2021] SGHC 220

General Division of the High Court — Originating Summonses Nos 574 of 2021 and 1426 of 2017
Choo Han Teck J
13 September 2021

27 September 2021 Judgment reserved.

Choo Han Teck J:

1 In this application, the plaintiff seeks a declaration that the defendant wrongfully repudiated an agreement to sell him (the plaintiff) the property known as 16 Sennett Road ("the Property"), and claims $626,341.16 as damages for the breach. The plaintiff is also asking that the sum of $30,049.65 held by Mr Choo Kwun Kiat as the stakeholder from the sale of the Property be released to him.

2 The defendant is the younger brother of the plaintiff. They have not spoken to each other for a decade, and only corresponded through their lawyers. They were tenants-in-common in the Property. The plaintiff held 66% of the Property, and the defendant held the other 34%. In Originating Summons 1426 of 2017, the plaintiff sought an order for the defendant to sell to the plaintiff the defendant's 34% shares at a price based on valuation, or that the Property be

sold in the open market with the plaintiff receiving 66% of the sale proceeds, and the defendant 34% of the sale proceeds. On 19 September 2018, the plaintiff's counsel informed me that the defendant offered to buy the plaintiff's share at the valuation price of $4.9m. But there has been delay on the defendant's end, as the defendant's solicitors replied only on 14 September 2018 that the defendant was unable to raise sufficient funds to complete the purchase. I ordered the parties to get an independent valuation because they had different reports as to the value of the Property, and I also ordered that the Property be sold in the open market with the right of first refusal to the plaintiff, and with liberty to apply. No order of court was extracted.

3 The Property was eventually sold to a third party at $4m. The plaintiff would be entitled to $2.64m based on his share of the Property. However, the plaintiff claims that the sale was made in breach of an agreement between the plaintiff and defendant, made on 5 September 2018 ("the purported Sale Agreement"). The plaintiff claims that if not for the defendant's repudiation, he would have received $3.234m for his share of the Property, based on the purported Sale Agreement in which the valuation for the house would have been $4.9m. Further, the plaintiff claims that he had also incurred expenses on the Property because the defendant failed to complete the purported Sale Agreement. This includes the agent's commission for the sale of the Property, the property tax and insurance he had to pay between the expected completion date under the purported Sale Agreement, and the actual completion date when the Property was sold to the third party subsequently, and a valuation report which had to be obtained because of the defendant's alleged repudiation.

4 The crux of the defendant's case is that there was no agreement concluded on 5 September 2018. The communications between the parties' solicitors were negotiations that were without prejudice to each of their rights.

The defendant proposed to buy the plaintiff's 66% share in a without prejudice letter dated 29 August 2018; this letter did not amount to an offer, but was only to inform the plaintiff the two possibilities: the first was that the plaintiff will sell his shares to the defendant, and the second was that the Property may be sold in open market. The 29 August 2018 letter is at best an invitation to treat not amounting to an offer. There was no agreement reached. No consideration has moved from the defendant to the plaintiff. No deposit was paid. The plaintiff's solicitors sent a copy of the draft Sale and Purchase Agreement ("the draft SPA") which did not incorporate the terms proposed by the defendant, and was not signed by either party. The defendant claims that as of 5 September 2018, the draft SPA has not been sent to the defendant by the solicitors. Hence, the terms of the contract have not been agreed upon; there was no certainty of terms. There was also no intention to create legal relations. Even though parties were negotiating through their solicitors, this is ultimately a domestic context. There could be no intention to create legal relations until all terms were agreed to between the parties, as parties were negotiating through without prejudice letters.

5 The plaintiff disagrees. He claims that just because the correspondence was without prejudice does not preclude the court from finding that there was a valid contract. The language used by the defendant in the 29 August 2018 letter was clearly an offer and not just an invitation to treat. The plaintiff accepted the offer by way of its 5 September 2018 letter. The consideration was the defendant's promise to pay $3.234m figure stated in the 5 September 2018 letter. That no deposit was paid does not mean there was no consideration. As of 5 September 2018, the essential terms — the Property, the price, and parties — have been agreed upon. The additional terms included in the draft SPA do not render the purported Sale Agreement unworkable or void for uncertainty.

Parties clearly intended to be bound, as the negotiations leading up to the purported Sale Agreement took place with the intention to settle the dispute in Originating Summons 1426 of 2017.

6 As a preliminary point, I do not see the need to convert the current Originating Summons to a writ action, nor is there need to grant leave for parties to cross-examine. The material facts concerning the purported Sale Agreement are largely undisputed. Parties have not spoken to each other, and only corresponded through their lawyers. The only question before me is whether an agreement has crystallised, which can be addressed within the four corners of the correspondence, without the need to cross-examine parties.

7 In the 27 August 2018 letter, the defendant's solicitors stated that they were instructed that the defendant would "buy over [the plaintiff]'s 66% share in the property at [the plaintiff]'s valuation of $4,500,000." Two days later, the defendant's solicitors wrote to the plaintiff's solicitors the following:

> 1. our client and/or our client's nominee proposes to buy your client's share in the property known as 16 Sennett Road Singapore 466794 at the price of $3,234,000.00, being 66% of $4,900,000.00;
>
> 2. in the event of such sale to our client and/or our client's nominee, the following terms shall apply:
>
> > a. the sale is to proceed by way of a Sale and Purchase Agreement;
> >
> > b. legal completion is to take place in 24 weeks, as our client requires time to raise funds and arrange for financing;
> >
> > c. your client's claim against our client for the sum of $14,980.28, as well as our client's claim for the sum of $16,055.57 against your client shall both be crossed-out against the other and neither party shall claim against the other for the same under HC/ OS 1426/2017, nor shall such sums be provided for, from the sale proceeds. There shall be no apportionment

> of the existing property tax, etc., for the purpose of legal completion;
>
> d. our respective firms shall act for our respective clients in the sale and purchase.
>
> 3. In the event that your client is not agreeable to our client's proposal for the purchase of your client's share in the property, our client proposes that the property be sold in the **open market** upon the following terms: -
>
> …
>
> [emphasis in original]

8 The 5 September 2018 letter from the plaintiff's solicitors states the following:

> 2. We have instructions to accept your client's offer to buy our client's 66% share based on the valuation price of $4.9m. The consideration is therefore $3,234,000.00.
>
> 3. While our client is of the view that the 24 weeks to complete the purchase requested by your client is too long, our client will, in the interest of amicably settling this long-drawn dispute, agree. The completion of the sale would therefore be 20 February 2019.
>
> 4. The other terms in paragraph 2 of your letter are accepted.
>
> 5. Attached is a copy of the Sale and Purchase Agreement. The deposit payable at the time of signing the Sale and Purchase Agreement is 10% of the purchase price ie. $323,400.00, to be made payable to our client.
>
> 6. As you know the hearing has been adjourned to 19 September 2018. Please have your client or nominee sign the Sale and Purchase Agreement and return it to us together with the deposit by 14 September 2018.

9 The draft SPA attached to the 5 September 2018 letter states that upon the signing of the draft SPA, the defendant is to pay the plaintiff $323,400.00 as a deposit. No deposit was paid, and no SPA signed or executed. The draft SPA also included other terms such as the incorporation of the Law Society of Singapore's Conditions of Sale 1999, and the usual "subject-to" clauses in property transactions.

10 On 5 September 2018, the parties' solicitors exchanged further e-mails. The defendant's solicitor noted that the draft SPA did not provide for a sale to the defendant, or the defendant's nominee. The plaintiff's solicitor replied that the plaintiff would be agreeable to the sale to be made to a nominee, and further stated that the plaintiff "may amend the SPA accordingly".

11 In my view, the issue, however, is whether parties intended to enter into a binding agreement without having signed or executed any formal agreement. Whether there is a binding contract depends on whether parties have the requisite intentions to enter into a binding contract. It could be said that the defendant's solicitor, by stating that the sale is to proceed by way of a sale and purchase agreement, prefaced the offer with a "subject to contract" term in the correspondence, which means that there was no intention to enter into a binding agreement until a formal document is executed. But it could also be said that the defendant's solicitor was only anticipating a subsequent written contract, which does not preclude the formation of an oral agreement.

12 Whether an agreement is "subject to contract" is a matter of substance and not form. Even if there is no express "subject to contract", the court may still construe parties' intention as such. The inquiry is whether the execution of a further contract is a condition precedent, or it is merely an expression of parties' desire for the transaction to proceed in a certain manner. In the latter scenario, the lack of a formal document does not preclude the formation of a contract. The key is whether parties expect to be immediately bound to perform on the agreed terms (see *OCBC Capital Investment Asia Ltd v Wong Hua Choon* [2012] 2 SLR 311). Based on the incontrovertible evidence in the correspondence in this case, it could not have been parties' intention to be immediately bound to perform based on the plaintiff's solicitor's letter dated 5 September 2018, without finalising and executing the draft SPA.

13 Looking at the broader context in which the correspondence took place, parties were engaging in negotiations because of the plaintiff's prior application for the Property to be sold. This was due to the acrimony and deadlock between the plaintiff and defendant. The operative word in the defendant's solicitor's letters is "propose", followed by a few scenarios depending on the plaintiff's response. That this was a negotiation to settle a long-standing dispute between two siblings shows that it could not have been the defendant's intent to be immediately bound should the plaintiff accept his proposal, without finalising the terms of the purchase. Hence, the defendant's solicitor's proposal to proceed with the sale by way of a sale and purchase agreement is not just an expression of a desire to proceed with the transaction in a certain manner; it should be construed as a "subject to contract" condition. Without a formal document, the agreement to purchase the shares in the Property has yet to be crystallised.

14 Furthermore, in addition to the price and the completion date, there were other terms to be finalised in the sale and purchase agreement, such as the amount of deposit payable upon the signing of the draft SPA. These were new terms proposed by the plaintiff's solicitors, which the defendant's solicitors have yet to communicate their client's acceptance. The facts of *Reindeer Developments Inc v Mindpower Innovations Pte Ltd* [2007] SGHC 170, a case referred to by the plaintiff's counsel, are distinguishable. In that case, parties agreed on the terms of sale, including the purchase price, the option fee and option period. The defendant purchaser wrote on the back of the cheque for the option money some of these terms. The cheque was then handed to the plaintiff seller. The court thus found that there was a contract. But here, the terms of the draft SPA have only been communicated for the first time by the plaintiff's solicitors to the defendant's solicitors. As of 5 September 2018, the defendant had not communicated acceptance of the terms of the draft SPA, let alone signed

it or made any deposit to confirm the agreement. I thus find that there was no enforceable agreement to purchase the plaintiff's shares in the Property as of 5 September 2018.

15 The plaintiff's claim for expenses incurred between the purported Sale Agreement and the actual sale of the Property is dismissed for the same reason that there was no contract concluded as of 5 September 2018. As for the sum held by Mr Choo Kwun Kiat as the stakeholder, this is to be paid to the plaintiff and defendant in the ratio of 66:34, being their respective shares in the Property.

16 I will hear parties on cost at a later date if they are unable to agree costs.

- Sgd -
Choo Han Teck
Judge of the High Court

See Tow Soo Ling, Zheng Yangyou (CNPLaw LLP) for the plaintiff;
Yee May Kuen Peggy Sarah, Audrey Liaw Shu Juan (Liao Shujuan)
and Chua Ru En Rachel (PY Legal LLC) for the defendant.