Lai Ling Wan (alias Lai Lily) *v* Commissioner of Stamp Duties
[2011] SGHC 186

Case Number : Originating Summons No 473 of 2010

Decision Date : 05 August 2011

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Ong Sim Ho, Ong Ken Loon and Guo Jiawen (instructed) (Drew & Napier LLC) and Amolat Singh (Amolat & Partners) for the appellant; Foo Hui Min, Nai Tham Siew Patrick (Inland Revenue Authority of Singapore) for the respondent.

Parties : Lai Ling Wan (alias Lai Lily) — Commissioner of Stamp Duties

Revenue Law – Contract

5 August 2011 Judgment reserved.

Choo Han Teck J:

1 Death and taxes, it is said, are the only certainties in this world. But only one of them is painless on impact. This case is about the other. It is an appeal by one Lai Ling Wan @ Lily Lai ("the Appellant") against an assessment of stamp duty that was performed by the Commissioner of Stamp Duties ("the Commissioner"). The Appellant purchased 83 units in a Tower 1A of a development called "Reflections at Keppel Bay" ("the Development") from Keppel Bay Pte Ltd ("the Developer"). 83 sale and purchase agreements ("the 83 sale contracts") were issued by the Developer and executed by the Appellant. This court was asked to determine the stamp duty which is payable arising from the purchase of the 83 units.

2 The material provision relating to the stamp duty payable is s 22(1) of the Stamp Duties Act (Cap 312, 2006 Rev Ed) ("the Act"). It states:

> Every contract or agreement for the sale of –
>
> (*a*) any equitable estate or interest in any property; or
>
> (*b*) any estate or interest in any property …
>
> shall be charged with the same ad valorem duty, payable by the purchaser, as if it were an actual conveyance on sale of the estate, interest or property contracted or agreed to be sold.

The Appellant intended to stamp each of the 83 sale contracts as individual contracts, at the *ad valorem* rates set out in article no 3(*a*) of the First Schedule of the Act. The Commissioner was of the view that the 83 sale contracts cannot be stamped individually and that stamp duty has to be paid on the basis that all 83 units were transferred to her under a single instrument of transfer at the aggregate price of $226,472,460. That meant that the appellant had to pay a higher amount in stamp duty because stamp duty is calculated at a graduated rate, and the Appellant would have saved $5,400 for each instrument of transfer and be entitled to a refund of $442,680 if her position is correct. The full amount as calculated by the Commissioner had already been paid.

3 The case stated by the Commissioner pursuant to s 40 of the Act expressed the Commissioner's ground, which is that there was only one contract for the sale of all 83 units. At the appeal, the Commissioner reiterated this ground. Prior to the appeal, however, the Commissioner had relied upon two other grounds to support his position. These can be found in the letters the Commissioner had written to the Appellant. The relevant portions of those letters are reproduced in the case stated. It is unclear whether these two other grounds, which are the "larger transaction" and the "block basis" arguments had been abandoned on appeal.

4 The material background facts are as follows. On or around 4 May 2007, the Appellant visited the Development's show-flats with her lawyer, Lim Seow Leng ("Lim"). They were attended to by an associate sales director from CB Richard Ellis (Pte) Ltd ("CBRE"), one Gabriel Tang ("Tang"). Tang arranged for the Appellant to meet CBRE's Leong Boon Hoe ("Leong") and Joseph Tan ("Tan") after she expressed interest in purchasing units in the Development. The Appellant met Leong and Tan on 7 May 2007 and Leong advised the Appellant to sign a letter of intent for the purposes of commencing negotiations. The Appellant signed the letter of intent, dated 7 May 2007 ("the 7 May letter") and addressed it to Keppel Land International Limited ("Keppel Land"). Keppel Land was marketing the Development for the Developer. The relevant portion of the 7 May letter stated:

> I [*ie* the Appellant] would like to extend my sincere interest in purchasing the entire Tower1A on the following terms
>
> 1. Saleable Area : 113,236.23 sqft
> 2. Price : S$226,472,460.00 (S$2000.00psf)
> 3. Payment Terms : Deferred Payment Scheme
>
> -5% Option Fee upon Booking
>
> -15% from 8 weeks of Option Date
>
> -Balance upon T.O.P
>
> 4. Purchasers : [The Appellant] & Others
>
> …
>
> If terms are agreeable, I can arrange for the release of the 5% Option Fee (together with the respective names of the other individual purchasers) in exchange for the Option-To-Purchase.

The Appellant then appointed Lim under a power of attorney to liaise with CBRE and the Developer on her behalf, and Lim commenced discussions with them. Besides the units in Tower 1A, the Developer also offered the Appellant units in other towers. After considering the offer, the Appellant decided to purchase only 83 strata lots comprising all the units in Tower 1A.

5 During these discussions, the Developer raised for the first time, an additional condition to the sale of the 83 units, namely, that the Appellant undertakes not to offer any units in Tower 1A for sale within six months from the date of exercising the options to purchase. The Appellant's agreement to the Developer's new condition was conveyed to Dennis Tay of Keppel Land *via* CBRE's letter dated 10 May 2007 ("the 10 May letter"). The 10 May letter stated:

Subject to Contract

Dear Dennis

Tower 1A, REFLECTIONS AT THE BAY

We refer to our negotiation in respect of the purchase of the above.

We are pleased to confirm that our client, [the Appellant,] has agreed to purchase the property on the following terms and conditions:

(1)	**Saleable Area**	:	113,236.23 sq.ft
(2)	**Purchase Price**	:	S$226,472,460.00 (S$2,000.00 psf)
(3)	**Payment Terms**	:	**Deferred Payment Scheme** 5% Upon Booking 15% within 8 weeks from Option Date Balance upon TOP
(4)	Special Condition	:	The Purchaser hereby undertake not to offer any units in Tower 1A for sale for a period not exceeding 6 months from the date of exercising the Option-to-Purchase

As mentioned, [the Appellant] will be purchasing the units in various names, details of which will be forwarded to you upon presenting the 5% option fee.

[The Appellant] is presently outstation and will make arrangement for her banker (UBS) to prepare the option fee of **$11,323,623.00**. The cheque will be sent to you not later than Monday 14 May 2007.

6 Thereafter, on 14 May 2007, the Appellant issued a single cashier's order and paid the 5% option fee to the Developer. On 6 June 2007, her solicitors lodged a single purchaser's caveat in respect of the 83 units. This caveat contained the particulars of each of the 83 strata units. In total, 83 sale contracts all dated 8 June 2007 were entered into between the Appellant and the Developer pursuant to the exercise of the respective 83 options to purchase. On 8 June 2007, Lim signed 83 deeds of undertaking in favour of the Developer on behalf of the Appellant not to offer any of the 83 units for sale for a period of six months from the date of the Appellant's exercise of the options to purchase. On 9 July 2007, the Appellant issued a single cashier's order and paid the balance 15% purchase price to the Developer.

7 The issue before me was whether, as between the Appellant and the Developer ("the Parties"), they had entered into one contract for the sale of 83 units or 83 separate contracts for the sale of one unit under each contract. The evidence, documentary or otherwise concerning the negotiations between the parties does not show that the parties intended the Appellant to purchase a collective interest. The 7 May letter was not an enforceable contract between the Parties. It recorded an expression of the Appellant's interest to the Developer to purchase units in the Development. As a matter of construction, the 7 May letter was not an offer made by the Appellant to purchase the 83 units. The language used was tentative and equivocal, and merely expressed the Appellant's keenness to purchase. Even if the 7 May letter constituted an offer to buy the 83 units as one collective interest from the Developer, the evidence showed that the Developer did not accept it. The Developer rejected it when it made a counter offer and proposed an additional condition, namely, that

the Appellant undertakes not to dispose of any of the units in Tower 1A within six months of the date of exercising the options to purchase.

8 The 10 May 2007 letter which followed showed that the Parties had agreed upon the essential terms, namely, the identity of the property, the parties and the purchase price. However, it was prefaced with the phrase "subject to contract", an expression readily understood by lawyers and non-lawyers alike to mean that until a formal written agreement is drawn and executed between the parties, there would be no binding contract between them: *Compaq Computer Asia Pte Ltd v Computer Interface (S) Pte Ltd* [2004] 3 SLR(R) 316.

9 Of course, in exceptional circumstances the expression "subject to contract" may not prevent a contract from arising, but there were no such exceptional circumstances here, unlike the circumstances in *SM Integrated Transware Pte Ltd v Schenker Singapore (Pte) Ltd* [2005] 2 SLR(R) 651 ("*SM Integrated*"), a case which the Commissioner relied upon. *SM Integrated* is distinguishable from the present case. The issue in *SM Integrated Transware* was whether the parties had been negotiating on a "subject to contract" basis. The only document that bore that expression there was a letter of intent sent out at a very early stage of negotiations. The trial judge found that the letter was merely meant to evidence interest in the negotiations and was ignored once negotiations were underway. On an objective interpretation, neither party had relied on the qualification. It thus did not prevent a contract from arising.

10 In the present case, the Parties had intended that enforceable rights in relation to sale and purchase of the 83 units would arise only from the terms contained in the individual options to purchase which were issued shortly after the 10 May letter. This understanding is unequivocally reflected in a letter from the Developer's solicitors in reply to the Commissioner who had asked the Developer, "Whether the purchaser can choose not to buy any of the units following the granting of the Option to Purchase". The Developer's solicitors wrote —

> The sale is premised on 83 separate Options to Purchase in the prescribed format being issued to the purchaser. As such, the purchaser can choose not to exercise any of the Options to Purchase granted by the Developers and thus not to proceed with the purchase of these units.

11 Finally, the Commissioner relied upon *UOL Development (Novena) Pte Ltd v Commissioner of Stamp Duties* [2008] 1 SLR(R) 126 ("*UOL Development*"). In *UOL Development*, a developer tendered for the purchase of 53 properties from their registered proprietors. After the developer's tender was accepted, their solicitors requested the registered proprietors' solicitors to forward 53 letters of acceptance. For the purposes of assessment of the payable stamp duty, the similar question arose as to whether there existed only one contract for the collective sale of the properties or 53 separate contracts. The High Court held that it was the former. *UOL Development* is, however, different from the present case in two material respects. First, the registered proprietors' had intended to sell collectively in order to fetch a higher price. The registered proprietors' invitation to tender was also construed objectively as an offer made by them to sell a collective interest. This in turn necessarily meant that the purchaser intended to purchase a collective interest. There was also a finding of fact that the developer knew it had purchased the properties as a collective interest. Secondly, s 33A of the Act was relied upon in *UOL Development*. Section 33A(1) of the Act authorises the state to alter the intended tax treatment of an arrangement between two contracting parties. The general effect of s 33A of the Act was to give the Commissioner the right to disregard or vary arrangements as he thinks appropriate, which purpose or effect was to reduce or avoid tax liabilities, without prejudice to the arrangement's validity as it may have in any other respect. In *UOL Development*, it was found that the developer's request to the registered proprietors' solicitors to issue 53 letters of acceptance was unnecessary in the light of the collective invitation to tender. It seemed so clearly an

afterthought that was meant to let the developer evade tax liabilities, and not for any legitimate commercial purpose. The Commissioner did not rely on s 33A(1) of the Act in this case.

12 In these premises, there were no binding contractual obligations until the 83 sale contracts were executed on 8 June 2007. These individual sale and purchase contracts comprised the bargain between the Parties. The objective interpretation of this bargain was that the Developer sold and the Appellant purchased 83 units of the Development as individual strata lots. Their respective rights and liabilities were regulated by each individual sale and purchase contract. The Appellant was therefore entitled to stamp each of the 83 sale contracts as separate and distinct instruments of transfer, being individual contracts for the sale of the respective interest in each unit.

13 That only one caveat was lodged and one cashier's order used each time to make payment to the Developer did not affect the nature of the bargain that there was to be 83 separate contracts for the sale of one unit under each contract. A caveat does not create a new interest or modify an existing interest in land. The Appellant's use of one caveat to protect all her 83 separate interests does not in any way prove that only one contract was entered into. Furthermore, given that the number of caveats to lodge was a matter entirely for the Appellant to decide and was outside of the scope of the Parties' agreement, it could not have had any impact on it. The mode of payment between the Parties is irrelevant to the issue at hand. Contracting parties are free to agree on how they are to pay each other without having it affect other substantive contractual obligations.

14 The thrust of the Commissioner's case was based on the application of contract law. In contract, however, parties are free to structure their bargain as they wish for mutual benefit, without generally having regard to third-party or public interests. One qualification to the scope of the principle of freedom of contract is that contractual obligations may be unenforceable by one party against the other if they were held to be illegal or contrary to public policy. This is not a case where one of the Parties is attempting to enforce the 83 contracts. The 83 sale contracts were also not illegal or unenforceable. Counsel for the Commissioner attempted to re-characterise the Parties' bargain by relying on a vague argument based on public policy. This attempt manifested itself in the two grounds mentioned above, namely, that the 83 contracts were essentially one transaction (the "larger transaction" argument) and the purchase of the properties was made on a block basis (the "block basis" argument).

15 It was not the Commissioner's case that the Parties' contracts were structured for the purpose of reducing or avoiding tax liabilities such that s 33A(1) of the Act has to be invoked. There was also no evidence to show that that was one of the parties' purpose or intention. Although the Parties' bargain had the effect of reducing tax liabilities, the Appellant had offered persuasive and *bona fide* commercial reasons for structuring the bargain in that manner. The Appellant affirmed in her affidavit that she would not have accepted a single sale and purchase agreement to purchase all the units as a collective interest. A single agreement would have constrained her ability to obtain financing from more than one financial institution. She would also face difficulties in the event of the sub-sale of one or more of the units because the Developer would have to cancel the sale and purchase agreement and re-issue her with fresh sale and purchase agreements. These reasons bring the Appellant's case within the ambit of s 33A(3)(*b*) of the Act which states that the section shall not apply to "any arrangement carried out for bona fide commercial reasons and had not as one of its main purpose the avoidance or reduction of duty".

16 Hence, instead of relying on s 33A of the Act, the Commissioner wrote to the Appellant in a letter dated 17 July 2008:

> … the multiple Sale & Purchase Agreements entered between [the Developer] and [the Appellant]

> are in essence one single transaction. Stamp duty is therefore payable on the total purchase price at which the units were acquired.

It suffices to say that the "larger transaction" rule was derived from interpreting the stamp duties legislation of other jurisdictions and is not part of Singapore law. For example, in *Attorney-General v Cohen and another* [1937] 1 KB 478, the purchaser bought from the same vendor six lots of land at a public auction. Separate contracts of sale were entered into in respect of each lot. The English Court of Appeal was required to determine if four of these sale contracts formed "part of a larger transaction or of a series of transactions" under s 73 of the UK Finance (1909-10) Act, 1910. If so, they would be liable to a higher rate of duty. Slesser LJ held that the provision is intended to prevent persons who are in reality conveying a larger interest from escaping their liability to pay the higher rate of duty by dissecting that larger transaction into artificially discrete parts. While the mischief targeted by that provision which lays down the "larger transaction" rule is broadly similar to that envisaged by s 33A(1) of the Act, the provisions are not *in pari materia* and there are fine but important differences in their operation. For instance, the wording of s 33A(3)(*b*) of the Act expressly requires some degree of investigation into the parties' commercial motivations whereas the judicially-formulated "larger transaction" rule which is based on interpreting a foreign statute may not require such an investigation.

17 The Commissioner also referred to a circular issued by the Inland Revenue Authority of Singapore on 13 March 2008 titled "Stamp duty treatment for properties acquired on an *en bloc* or block basis" ("the Circular"). It is undisputed that the Circular is not subsidiary legislation. The second and third paragraphs of the Circular stated:

> For properties acquired on enbloc or block basis, stamp duty should be calculated based on the total purchase price. This is because, based on the true nature of the transaction, there is only one single contract for the enbloc or block purchase of the properties. Thus the correct tax treatment would be to regard the purchase of the properties as one single transaction.
>
> Even though individual documents may have been prepared for the disposition of the individual properties to the same purchaser, stamp duty should not be paid on the sale price of each individual property to take advantage of the graduated stamp duty tax rates.

In my view, the Circular does not assist the Commissioner's case. First, the Circular is irrelevant as a justification for the Commissioner's position in the present case because it was published after the present case had arisen.

18 Secondly, the Commissioner cannot rely on its own administrative practice to justify a particular interpretation of the Act's provisions. What the Commissioner did or is doing as a matter of practice does not in any way inform the issue of whether it is legally entitled to do so: *Comptroller of Income Tax v GE Pacific Pte Ltd* [1994] 2 SLR(R) 948 at [35].

19 Thirdly, the terms that are used in the Circular – "*en bloc*" and "block purchase" – are problematic in both senses of the adjective. Neither term is a term of art. The attempt by both parties to this case to define the terms was therefore not helpful.

20 The Appellant relied on *Ng Swee Lang and another v Sassoon Samuel Bernard and others* [2008] 2 SLR(R) 597 at [42] to say that the distinct nature of an *en bloc* sale is that it is based on a single collective agreement, and not an aggregation of all the individual interests. She then sought to distinguish her case from an *en bloc* sale; but in my view, *Ng Swee Lang* did not involve the same considerations, and how it defined the term *en bloc* was irrelevant for present purposes. That case

construed the nature of the sale and purchase agreement for the collective sale of condominiums and flats in Singapore under the Land Titles (Strata) Act (Cap 158, 1999 Rev Ed). That statute allowed a sufficient number of subsidiary proprietors to sell the collective interest to a purchaser, notwithstanding the existence of some objecting subsidiary proprietors. The term *en bloc* sale was used merely as a convenient label to describe a sale made under those circumstances which, under the Land Titles (Strata) Act, was construed as a single sale and purchase transaction of the subject property as a whole between the majority owners and the purchaser. I believe that the Appellant felt obliged to provide an opinion on what *en bloc* meant because the Commissioner had previously invoked the term "block basis" to support his position, and the Appellant thus wrongly, but understandably, treated them to be synonymous.

21 I now turn to the term "block basis". On 22 August 2008, prior to this appeal, the Appellant had lodged an objection pursuant to s 39A(1) of the Act against the Commissioner's assessment. The Commissioner then issued a notice on 26 April 2010 under s 39A(5) of the Act to set out his grounds for dismissing the objection:

> With reference to Section 5 of the Stamp Duties Act, the true nature of the transaction was to acquire the entire Tower 1A in [the Development] on a block basis and hence the duty has to be stamped based on the global purchase price.

22 In this appeal, the Commissioner attempted to clarify the meaning of both terms. Counsel submitted on his behalf that there is a difference between an *en bloc* and a block sale, and the present case involves the latter. He stated that:

> … While the en bloc, or collective sale is well-understood due to the highly-publicised disputes that have been adjudicated in the courts, the term "block purchase" simply refers to the purchase of more than one unit of property in a single contract by a purchaser from a vendor. There is no need for a meeting of minds (consensus id idem) between the purchaser and vendor, such that the purchaser will not proceed with the sale unless the vendor agrees to sell all the property that the purchaser desires to purchase.

This submission cannot succeed because it ignored Loh Yow Khim's affidavit, affirmed on the Commissioner's behalf on 6 July 2010, which stated that the issue in the present case is whether there was an "*en bloc*" sale. This affidavit, affirmed two years after the Circular was published, showed that the Commissioner did not have a consistent view of the two terms from the outset and the ambiguity remains. It thus showed that a meaningful difference between them in this context was unlikely to be found. This was not surprising since they are not terms of art and, according to *The Chambers Dictionary* (Chambers Harrup Publishers, 11th Ed, 2008), *en bloc* simply means "as one unit or wholesale" in French.

23 Fourthly, the Circular will be inconsistent with the Act if we assume that a sale on a block basis means what counsel submitted on behalf of the Commissioner in this case. The Circular will deem all properties acquired on a block basis to be made under a single contract since that will always be "the true nature of the transaction". Not only does it beg the question, it is contrary to s 33A(3)(*b*) of the Act which provides that the tax treatment must be applied with reference to the purpose behind the arrangement. Hence, there cannot be a uniform treatment of block purchases.

24 For the reasons above, I find in favour of the Appellant. Her appeal is allowed with costs to be taxed if not agreed.