Lim Chin San Contractors Pte Ltd *v* Shiok Kim Seng (trading as IKO Precision Toolings) [2012] SGHC 105

Case Number	: Suit No 1019 of 2009(Registrar's Appeal Nos 362 and 372 of 2011)
Decision Date	: 15 May 2012
Tribunal/Court	: High Court
Coram	: Philip Pillai J
Counsel Name(s)	: Kelvin Chia (Samuel Seow Law Corporation) for the plaintiff; Eugene Tan and Soh Chun York (Drew & Napier LLC) for the defendant
Parties	: Lim Chin San Contractors Pte Ltd — Shiok Kim Seng (trading as IKO Precision Toolings)

Equity – proprietary estoppel – Remedying the equity

[LawNet Editorial Note: Civil Appeal No 76 of 2012 was partially allowed and Civil Appeal No 78 of 2012 was dismissed by the Court of Appeal on 18 January 2013. See [2013] SGCA 6.]

15 May 2012 Judgment reserved.

Philip Pillai J:

Introduction

1 This present appeal and cross appeal arose out of the Assistant Registrar's assessment of damages pursuant to my decision in *Lim Chin San Contractors Pte Ltd v Shiok Skim Seng* [2010] SGHC 243 ("the Judgment"). In the Judgment, I found that the Defendant had made out a claim for proprietary estoppel and directed that the quantum of compensation is to be assessed by a Registrar. Also, in the Judgment, I specifically directed that the parties are to be at liberty to clarify the terms of the orders I made, and to apply for any ancillary orders so as to give effect to my judgment. I note that neither party had done so. They proceeded to argue the quantum of compensation before the Assistant Registrar on their respective assumptions and both now appeal against the assessment below.

2 All the necessary findings of fact are set out in the Judgment and need not be repeated here for the purposes of this appeal against the assessment below.

Remedial discretion for proprietary estoppel

3 Once the court determines that a proprietary estoppel claim has been established, the court is faced with the unusual task of fashioning an appropriate remedy to satisfy the equity. Compared to the principles governing the assessment of damages pursuant to breach of contract, the principles governing the fashioning of an appropriate proprietary estoppel remedy are still not clear cut. This is necessarily so as the appropriate remedy would always turn on the particular facts of each case out of which the proprietary estoppels arose.

4 The authors of Kevin Gray & Susan Francis Gray, *Elements of Land Law* (Oxford University Press, 5th Ed, 2009) noted at para 9.2.95 that:

> … [I]n deciding how to reinforce or concretise the estoppel claimant's inchoate equity, the court can go much further. *The upholding of a claim of proprietary estoppel opens up the court's jurisdiction to fashion new rights for relevant parties*. The general principle of relief was stated over a century ago in *Plimmer v Mayor etc of Wellington* (1884) 9 App Cas 699 at 714. Here the Judicial Committee of the Privy Council held that when an equity of estoppel has been raised, '*the Court must look at the circumstances in each case to decide in what way the equity can be satisfied*'. The court has an extremely wide discretion to formulate an appropriate remedy. Sometimes the remedial outcome is tantamount to specific enforcement of the original promise of rights; at the other end of the remedial spectrum the circumstances may call for nothing more than an order for money compensation or a simple injunction restraining the landowner's exercise of his adverse rights.
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> [emphasis added; footnotes omitted]

5 While the court in each case has an extremely wide discretion to fashion a remedy, such discretion cannot be exercised arbitrarily and without reference to established principles. Lord Walker cautioned in *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752 at [46] that:

> [E]quitable estoppel is a flexible doctrine which the court can use, in appropriate circumstances, to prevent injustice caused by the vagaries and inconstancy of human nature. But it is not a sort of joker or wild card to be used whenever the court disapproves of the conduct of a litigant who seems to have the law on his side. Flexible though it is, the doctrine must be formulated and applied in a disciplined and principled way. Certainty is important in property transactions.

6 The court's duty is to do equity and no more than equity: *Cameron v Murdoch* [1983] WAR 321 at 360. This means that the court, as a court of conscience, goes no further than what is necessary to prevent unconscionable conduct: *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 419. The court seeks, amongst other aims, to preserve some kind of proportionality between the detriment which has been incurred by the estoppel claimant and the remedy eventually awarded: *Jennings v Rice* [2003] 1 P & CR 100 at 111 ("*Jennings*"). In more recent cases, this approach has been referred to as the 'minimalist approach'. Robert Walker LJ (as he then was) in *Gillett v Holt* [2001] 1 Ch 210 at 237 neatly explains the minimalist approach as follows:

> The court's aim is, having identified the maximum [extent of the equity], to form a view as to what is the minimum required to satisfy it and do justice between the parties. The court must look at all the circumstances, including the need to achieve a "clean break" so far as possible and avoid or minimise future friction: see *Pascoe v Turner* [1979] 1 WLR 431, 438-439.

7 In the present case, I have already found at [33] of the Judgment that an outright order to sell the unit to the Defendant is out of the question, the more appropriate remedy being an award of monetary compensation. I shall now turn to the principles that govern the quantification of such an award.

Expectation - or reliance-based approach

8 When awarding monetary compensation as a remedy for a proprietary estoppel claim, the court could adopt either an expectation-based approach or a reliance-based approach in quantifying the compensation, depending on the facts of each case. The difference is that the expectation-based approach looks to the plaintiff's position had the representations been carried through, whereas the reliance-based approach looks to the plaintiff's position had the defendant not made the representations. It is clear that while the court may take into account any of the above bases of

quantifying the compensation, no single approach is determinative. The court could even arrive at an intermediate figure taking into account the different bases: *Clayton v Green* (1979) NZRL 139 at 140.

9 The issue of whether the court should address the claimant's expectations or the losses or detriment the claimant sustained as a result of his reliance upon the representation was addressed by Sundaresh Menon JC in *Hong Leong Singapore Finance Ltd v United Overseas Bank Ltd* [2007] 1 SLR(R) 292 ("*Hong Leong*"). After undertaking a comprehensive survey of the existing authorities, Menon JC concluded (at [247]-[249]):

> 247 The approach taken in *Jennings v Rice* towards fashioning an adequate but proportionate remedy is consistent with that taken in particular by Mason CJ in the Australian High Court decision in *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394. Mason CJ noted as follows at 413:
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> > [T]here must be a proportionality between the remedy and the detriment which is its purpose to avoid. It would be wholly inequitable and unjust to insist upon a disproportionate making good of the relevant assumption.
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> 248 This was followed by our Court of Appeal in LS Investment. ***However, it is important to note that proportionality is but one element, albeit a critical one, to be considered in fashioning the appropriate remedy. The court may consider all the relevant circumstances including the expectations, the detriment, avoiding injustice to others (see, eg, Giumelli v Giumelli (1999) 196 CLR 101) and the conduct of the parties .*** Prof Tan Sook Yee in Singapore Land Law puts it thus at p 104:
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> The courts respond to the equity when it is raised, by taking into account all the surrounding circumstances, the conduct and the expectation of the parties.
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> 2 4 9 ***The key to this response is flexibility so as to ensure that the remedy is appropriate to the equity in each case.*** It may involve giving effect to the common expectation as was the case in *Lim Teng Huan v Ang Swee Chuan* [1992] 1 WLR 113; or limiting the relief so as to preserve a degree of proportionality between the detriment and the relief as was the case in Gillett v Holt ([178] *supra*); or to award monetary relief as was the case locally in *Khew Ah Bah v Hong Ah Mye* [1971-1973] SLR(R) 107 and in Australia in *Giumelli v Giumelli* ([248] *supra*). It may even be found that the equity had been satisfied by enjoyment and was therefore exhausted as was the case in *Sledmore v Dalby* (1996) 72 P & CR 196.
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> [emphasis added in bold italics]

10 The approach in *Jennings*, which adopts the fulfilment of the claimant's expectation as a starting point, has been repeatedly endorsed in subsequent cases. However, I note that the approach has not received universal support. Professor John Mee concluded critically in his chapter "The Role of Expectation in the Determination of Proprietary Estoppel Remedies" published in *Modern Studies in Property Law, Volume 5* (Hart Publishing, 2009) (Martin Dixon ed) 389 at p 415 that:

> [T]he only appropriate role for expectation is as a cap on a remedy determined on the basis of other factors. This involves a rejection of the notion, supported by *Jennings v Rice*, that the fulfilment of the expectation should be the *prima facie* remedy, to be granted unless such a remedy would be disproportionate to the detriment suffered by [the claimant] … [U]nderstandably, courts and commentators feel uneasy with the idea of a completely discretionary approach to remedies. In a sea of discretion, the only two concepts to which one

can cling are expectation and detriment.

11 Therefore, to summarise, the authorities suggest that I am not bound by any specific measure in quantifying the amount of compensation to be awarded. Mr Shiok's expectations and reliance are certainly relevant factors which I would take into account, but these factors are not determinative. Ultimately, the court would have to look at all the circumstances of the case in order to arrive at a proportionate award that would satisfy the equity raised by the estoppel. The court has discretion to adopt whichever measure (or any intermediate figure) that it considers to be the most appropriate sum given the facts of the case.

12 With the above principles in mind, I shall now address the quantum of compensation that would in my view sufficiently satisfy the equity raised by the proprietary estoppel claim.

The content of the equity

13 The relevant findings of fact in the Judgment that will guide the exercise of my remedial discretion are as follows:

> 13 On balance, therefore, I believe Mr Shiok's story in this regard. *I find that, during their first meeting, Mr Lim must have told Mr Shiok that a mezzanine floor could be built and that he would apply for the necessary approvals for the mezzanine floor.* There is also no evidence that Mr Lim warned Mr Shiok that a mezzanine floor would be irregular until approved. Since Heng Loong had not entered the picture at this point, these representations must have been made on behalf of the plaintiff. I also find that these representations must have materially induced Mr Shiok into entering into the first tenancy agreement.
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> …
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> 29 On the evidence, I find that Mr Lim must have represented to Mr Shiok, at the time the first tenancy agreement was signed, that he could buy the unit at some point in time. Otherwise Mr Shiok would not have invested so much into the unit. The renovation by Heng Loong alone cost over $100,000 and took six months. This expenditure in terms of money and time could not have been justified on the formal terms of the first tenancy agreement which lasted two years and for which Mr Shiok was willing to pay $3,200 a month. …
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> 30 *I therefore find, on the basis of the parties' dealings during the first tenancy agreement, that Mr Lim had represented to Mr Shiok that he could buy the unit. And in material and detrimental reliance thereon, Mr Shiok entered into the first tenancy agreement, renovated the unit and built the mezzanine floor.* …
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> [emphasis added]

14 A closer scrutiny of my findings of fact above would quickly reveal that there were actually two different representations that Mr Lim made to Mr Shiok. The first representation that Mr Lim made was that Mr Shiok could build a mezzanine floor and that Mr Lim would apply for the relevant approvals. The second representation that Mr Lim made was that Mr Shiok could buy the unit from Mr Lim at some point in time. Following my finding of proprietary estoppel, the equities that are raised in respect of these two representations ought to be satisfied by monetary compensation.

15 Although the two representations are somewhat related, it would be conceptually clearer to treat them as independent of each other when considering the appropriate remedy to satisfy each

equity.

Representation that Mr Shiok could build a mezzanine floor

16 The equity that arose in respect to this representation is different from that which arose in respect to the representation that Mr Shiok could purchase the unit, because Mr Shiok's expectation could not have been fulfilled here. The mezzanine floor would have caused the plot ratio of the building to exceed the legally permissible ratio, making the expectation illegal. If I follow the approach in *Jennings* and take Mr Shiok's expectation as a starting point, he would recover nothing. This is clearly not an appropriate measure.

17 Since there is no legally referable expectation to speak of, I am of the view that compensation should be assessed on the basis of the detriment incurred. In this regard, in fashioning an award, I shall consider both (i) the cost of the improvement, and (ii) the enhancement to the value of the land.

18 This case is unusual in the sense that the improvements made to the land in the form of an additional mezzanine floor were illegal and had to be removed pursuant to a court order. That left the condition of the land in the same state as that before any improvements were made to it. Therefore, an assessment based on the enhancement to the value of the land would cause Mr Shiok to recover nothing. This is clearly not an appropriate measure either.

19 Therefore, the more appropriate (and in fact, only) measure that I can take into account is the cost of improvements. Mr Shiok's counsel submitted that the renovation costs amounted to $188,817.98. I take this figure into account in my final award.

20 On a separate note, the cost of removing the mezzanine floor would ordinarily have been a cost incidental to the representation made by Mr Lim to Mr Shiok that he could build a mezzanine floor. However, in this case, since the plaintiff had already removed the mezzanine floor at its own cost, I accordingly hold that no compensation for the costs of removal of the mezzanine floor is to be awarded.

Representation that Mr Shiok could purchase the premises

21 The representation that Mr Shiok could purchase the premises could have been legally fulfilled, unlike the expectation that Mr Shiok could build a mezzanine floor. Therefore, following the approach in *Jennings*, I take Mr Shiok's expectation, *ie*, the position that Mr Shiok would have been in had he had the opportunity to purchase the premises, as the *prima facie* basis of compensation, unless the outcome is disproportionate to the detriment suffered.

22 Besides having lost the opportunity to purchase the premises, Mr Shiok was also put through a series of related summonses in this suit that would not have occurred had Mr Lim made good this representation. Therefore, I also take the legal costs into account when determining the appropriate award to satisfy this equity.

Loss of opportunity to purchase the premises

23 It is clear on the facts that Mr Shiok had lost the opportunity to purchase the premises because of Mr Lim's conduct. I had already found at [29] of the Judgment that:

> 29 … *In particular, the first tenancy agreement's duration of two years shows that it must*

have existed as an understanding between the parties alongside their contractual arrangements. I find additional support for this conclusion in the note scribbled by Mr Lim on Mr Shiok's letter of 27 November 2006 (see *supra* [16]), stating that a sale might be delayed to September 2007 pending the issuance of the CSC. The note may well be an internal note, as Mr Lim claimed. *However, its existence indicated that the possibility of a sale to Mr Shiok, albeit outside the terms of the first tenancy agreement, was very much on the mind of Mr Lim.* Otherwise, there seemed no reason why the note would be scribbled on Mr Shiok's letter, as opposed to some other place.

[emphasis added]

24 In the ordinary course of events, Mr Lim could not have sold the promises at the agreed price without offering Mr Shiok the opportunity to purchase the premises first. However, by conducting himself in a manner "that was not beyond reproach", as I have found at [35] of the Judgment, Mr Lim had caused Mr Shiok to lose the opportunity to purchase the unit.

25 Counsel for Mr Lim submitted that this opportunity is valueless because, first, the condition precedent under the second tenancy agreement requiring a Certificate of Statutory Completion ("CSC") to be issued had not been fulfilled; and second, even if the condition precedent was fulfilled, the parties had not agreed upon the price and timing of the sale.

26 I find Mr Lim's submissions on this issue to be misconceived. The reason why a party would choose to rely on the doctrine of proprietary estoppel is precisely because he is not entitled to his strict legal rights. Also, even though the parties had not agreed upon a price and the time of sale, the opportunity to purchase does not become valueless. A loss of a chance, no matter how small, is still the loss of something of value and is thus capable of being the subject of compensation. The difficulty in valuing the chance is an entirely different matter altogether. In the context of a personal injury claim, Lord Diplock explained in *Mallett v McMonagle* [1970] AC 166 at 176 that:

> The role of the court in making an assessment of damages which depends upon its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. *But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards.*
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> [emphasis added]

27 Although these principles are taken from a different context, I find that they are equally applicable in the present case. The opportunity to purchase the unit is clearly of some value to Mr Shiok since he had already invested more than $100,000 in renovation costs, and it is undeniable that Mr Shiok had lost the opportunity when Mr Lim ultimately did not allow him to purchase the unit. It is irrelevant whether or not Mr Shiok could have bought the unit because, even if Mr Shiok could not have bought the unit himself, he had given evidence that there were unnamed persons who were willing to back him up, as I have found at [33] of the Judgment. Therefore, justice would necessitate me ascribing some value to this lost opportunity in order to satisfy the equity raised.

28 However, in the absence of any submissions to guide the exercise of my discretion in valuing

this lost opportunity, I would adopt a minimalist approach in coming up with a figure. This figure must be low enough such that reasonable men would not regard it as excessive or extravagant, but high enough such that if it was to be set any lower, reasonable men would not regard it as sufficient to satisfy the equity raised. Taking into account the fact that the opportunity was not an option but merely a right of first refusal, I am of the view that 10% of $462,054.00 (the agreed purchase price under the first tenancy agreement) would be an appropriate reflection of the value of Mr Shiok's lost opportunity. This works out to $46,205.40.

Costs of litigation

29 I stated above at [22] that Mr Shiok was put through a series of law suits instituted by Mr Lim in respect of the mezzanine floor and the premises, that would not have occurred had Mr Lim made good his representations. I have found in the Judgment that Mr Shiok had successfully made out a claim of proprietary estoppel. This also meant that Mr Lim was not entitled to insist upon his strict legal rights by commencing and pursuing several legal actions against Mr Shiok, despite having made the representations earlier. Therefore, I am of the view that the legal costs that Mr Shiok incurred in order to defend all the related suits commenced by Mr Lim with respect to the mezzanine floor and the recovery of the premises should also be recoverable as compensation. To hold otherwise would have been grossly unfair to Mr Shiok, since these legal costs had arisen from the very subject matter over which proprietary estoppel was found to have operated against Mr Lim.

30 However, as I had not directed the parties to make any submissions as to the quantum of legal costs incurred by Mr Shiok so far, I order that this portion of compensation is to be agreed upon or otherwise subject to taxation by the Registrar.

Loss of actual or potential profits

31 I do not consider that the loss of profits to Mr Shiok, whether actual or potential, to be a relevant factor to take into consideration in fashioning an appropriate award of compensation in the present case. Given that I have already awarded Mr Shiok (i) the full cost of installing the mezzanine floor; (ii) the loss of an opportunity to purchase the unit; and (iii) the costs of defending all the earlier related legal suits arising from the same subject matter, I am of the view that the equity raised by the proprietary estoppel claim has been satisfied. To award Mr Shiok the loss of his actual or potential profits as well would clearly be grossly disproportionate to the equity raised in the present case. I stress again that the aim of fashioning a proprietary estoppel remedy is to satisfy the equity and not to indemnify Mr Shiok for all the losses that he had suffered.

Conclusion

32 Therefore, taking into account all the factors raised in this judgment, I am of the view that the minimum sum that Mr Shiok is entitled to in order to satisfy the equity raised is as follows:

(a) Cost of installing the mezzanine floor amounting to $188,817.98;

(b) Loss of opportunity to purchase premises quantified at $46,205.40; and

(c) Costs for all related legal actions to be agreed or taxed.

33 I further order simple interest of 5.33% per annum to be payable on items (a) and (b) above starting from 8 October 2008, being the date on which Mr Shiok filed his defence and counterclaim. No interest is payable on item (c).

Costs

34 Given that neither party had succeeded fully in this appeal, I make no order as to costs. However, for clarity, I note that pursuant to my order at [29] above, Mr Shiok would be entitled to recover the costs of this appeal from Mr Lim as well.

Addendum to judgment

31 May 2012

Philip Pillai J:

35 After I delivered my grounds of decision, both counsel requested for further arguments before me, and after hearing them I made the following orders:

(a) compensation referred to at [32(c)] above be fixed at $3,000;

(b) cost of this appeal fixed at $8,000 (inclusive of disbursements) to be paid by Mr Lim to Mr Shiok; and

(c) cost of the hearing below to be paid by Mr Lim to Mr Shiok to be taxed if not agreed.