

Philip Motha Consultancy Pte Ltd v Jones Lang Lasalle Property Consultants Pte Ltd (formerly known as JLL Property Consultants Pte Ltd)
[2002] SGHC 283

Case Number : Suit 459/2002/Z
Decision Date : 27 November 2002
Tribunal/Court : High Court
Coram : Tan Lee Meng J
Counsel Name(s) : Shrinivas Rai (Hin Rai & Tan) (instructed) and Prasad Karunakarn (Tang & Tan) for the plaintiffs; Patrick Ang and Nicholas Watt (Rajah & Tann) for the defendants
Parties : Philip Motha Consultancy Pte Ltd — Jones Lang Lasalle Property Consultants Pte Ltd (formerly known as JLL Property Consultants Pte Ltd)

Judgment

GROUNDS OF DECISION

1. The plaintiffs, Philip Motha Consultancy Pte Ltd ("PMC"), a real estate agency, claimed from the defendants, Jones Lang Lasalle Property Consultants Pte Ltd ("JLL"), another real estate agency, the sum of \$270,146.25. PMC asserted that this sum was due to them under the terms of their co-brokering agreement with JLL in 1995 for the en bloc sale of a number of properties in Devonshire Road. I dismissed PMC's claim and now set out the reasons for my decision.

Background

2. In the middle of 1995, Mr Philip Motha, PMC's chairman, proposed to Mr Colin Moore, JLL's then managing director, that their companies enter into a co-brokering arrangement for the en bloc sale of a number of properties in Devonshire Road (the "Devonshire properties"). It is pertinent to note that when these discussions between Mr Motha and Mr Moore took place, neither PMC nor JLL had any mandate from the owners of the Devonshire properties to sell the said properties on an en bloc basis.

3. By April 1996, PMC had obtained a mandate from the owners of the Devonshire properties for the en bloc sale of their properties. PMC and JLL agreed to market the said properties together and Mr Terence Tang, JLL's then senior manager in the investment sales department, outlined the terms of the co-brokering agreement in a letter to PMC on 23 April 1996. He stated in his letter that the two parties would share the advertising costs as well as PMC's "commission" from the en bloc sale equally. PMC's project consultant, Mr Ang Boon Hua, accepted the terms by signing a copy of Mr Tang's letter.

4. Tenders were called for the en bloc sale of the Devonshire properties. On 29 May 1996, Grandwin Investment Pte Ltd ("Grandwin") submitted a tender bid for the said properties and paid a tender fee of \$900,000. However, they withdrew their tender bid on 10 June 1996 and their tender fee was forfeited. PMC received 30% of the forfeited sum, which amounted to \$270,000, under their arrangements with the owners of the Devonshire properties. They instructed their solicitors, Ms Tang & Partners, to pay half of this sum to JLL.

5. Further attempts by PMC and JLL to jointly sell the Devonshire properties did not bear fruit and by late August 1996, PMC's mandate from the owners of these properties for an en bloc sale expired.

6. Shortly after the expiry of PMC's mandate to sell the Devonshire properties, the owners of the said properties entered into a collective sale agreement and appointed JLL as their marketing agents for a period of three months with effect from 12 September 1996. JLL did not manage to sell the said properties within the period fixed in this collective agreement.

7. The owners of the Devonshire properties did not give up trying to achieve higher returns by having an en bloc sale of their properties. In 1997, they appointed another firm of real estate agents, M/s Edmund Tie & Co, as their exclusive agents for the en bloc sale of their properties. However, no suitable buyer for the said properties was found.

8. Two years later, in 1999, the owners of the Devonshire properties approached JLL once again to handle the en bloc sale of their properties. In September 1999, JLL succeeded in selling these properties and earned a commission for their work.

9. On 1 October 1999, PMC's Mr Motha wrote to JLL, claiming that his company was entitled to half of the commission earned by JLL for the en bloc sale of the Devonshire properties. JLL did not reply to this letter as they thought that PMC's claim was ludicrous. More than one and a half years later, PMC wrote to JLL again on 3 May 2001 to claim half of the commission in question.

10. On 29 May 2001, PMC invoiced JLL for half of the commission earned by JLL for the en bloc sale of the Devonshire properties in September 1999. For the first time, PMC also sought a refund of the amount paid to JLL in 1996 with respect to the forfeited tender fee of Grandwin. As JLL resisted both claims, PMC instituted this action against them.

The commission for the en bloc sale

11. PMC's claim for a share of the commission earned by JLL in 1999 for the en bloc sale of the Devonshire properties will first be considered. PMC asserted that an oral agreement in the middle of 1995 gave them a right to share JLL's commission. They contended that this oral agreement was confirmed in a letter dated 19 October 1995 from their chairman, Mr Motha, to JLL. The said letter was in the following terms:

We like to thank you for your verbal agreement in this co-broking arrangement that in spite of and even in the event of any interruption whatsoever including the termination/expiry of our option to find a buyer, followed by subsequent renewal of such options, or in subsequent collective agreements by the owners in which you are appointed to sell, this arrangement of co-broking/[co-operation] between the two of our companies continues until the properties or part thereof are finally sold by you as earlier verbally arranged, when we mentioned that the costs of advertisements as well as the commission would be split 50/50 between us.

12. There are many reasons why PMC cannot rely on the above-mentioned letter. To begin with, JLL denied ever having received the said letter. PMC's Mr Ang, who said that the said letter was sent by ordinary post, admitted that JLL never acknowledged receipt of it. JLL's former managing director, Mr Pan Tien Chor, stated in his affidavit of evidence-in-chief that the letter could have been recently fabricated to bolster PMC's claim.

13. Secondly, the owners of the Devonshire properties had not appointed PMC as their agents for the en bloc sale of their properties in July 1995. As such, it is unlikely that there was an oral co-broking arrangement in July 1995. JLL's Mr Pan explained the position as follows in paragraph 14 of his affidavit of evidence-in-chief:

[I]n all my years of experience as a property consultant, I have never entered into a co-broking agreement with another property consultant where neither of us had obtained the prior authority from the owners to market the properties. To the best of my knowledge, it is very unusual for property consultants to do so.

14. Thirdly, even if there was an oral agreement in mid-1995, it was superseded by the terms of the written agreement between the parties in April 1996. The terms of this written agreement, which were contained in a letter dated 23 April 1996 from JLL's Mr Tang to PMC's Mr Motha, were stated as follows:

SALE OF LAND AT DEVONSHIRE ROAD

This is to confirm that you are agreeable to co-broke with [JLL] on the above and [JLL] will share 50% of your commission. The advertising expenses incurred for the tender sale will also be equally [borne] by yourself and [JLL].

15. The terms of the written agreement of 23 April 1996 differed from the terms of the alleged oral agreement of July 1995. In view of section 94 of the Evidence Act, Cap 97, PMC cannot rely on oral terms which are inconsistent with the terms of this written contract to establish that they are entitled to a share of JLL's commission for the en bloc sale of the Devonshire properties in 1999.

16. A fourth reason for holding that the alleged July 1995 oral agreement did not exist is that Mr Motha himself made no reference to this agreement when he first wrote to JLL's Mr Pan on 1 October 1999 to claim a share of JLL's commission for the en bloc sale of the Devonshire properties. That letter was in the following terms:

Co-broking arrangement – Devonshire Road properties

We would like to congratulate you for having finally succeeded in concluding a sale of above properties.

You will recall that one day in your office room after the first occasion when the sale did not succeed, our Mr Riechard Ang had informed you that our company would take legal action against an owner Loh Siok Hong

You will recall that on that occasion you did encourage our Mr Riechard Ang not to take legal action against Loh Siok Hong saying that if we took legal action against him and if later on the subject of the sale of the Devonshire Road properties was revived and then succeed, our share of the commission would not be included. But if we did not take the intended legal action, then we have a share in the commission for a subsequent successful sale.

Based on you encouragement, we did not proceed with the intended legal action against Loh Siok Hong

Now that the sale is successful we hope eventually you would let us have our share of the commission.

We would like to thank you very much and Best Regards.

17. If there was an oral agreement which gave PMC the right to 50% of the commission earned by JLL in 1999, surely Mr Motha would have referred to it in his letter. Instead, he referred to a promise made by JLL's Mr Pan to share any future commission earned by JLL if PMC did not sue Mr Loh. If PMC was entitled to 50% of the commission to be earned by JLL for the en bloc sale of the Devonshire properties at anytime in the future, JLL would have had no right to deprive PMC of their share of the commission regardless of whether or not Mr Loh was sued. In any case, JLL's Mr Pan categorically denied having promised to pay anything to PMC if the latter did not sue Mr Loh. His evidence was not challenged when he was cross-examined.

18. A fifth reason for supporting JLL's contention that there was no oral agreement in mid-1995, as alleged by PMC, is that the terms of the alleged agreement are so one-sided that no reasonable estate agent would have accepted them. In paragraph 9 of his affidavit of evidence-in-chief, JLL's Mr Pan explained the position in the following rather persuasive terms:

Even if, which is denied, the Plaintiffs made such a proposal to the Defendants, I would not have agreed to the same for the following reasons (i) such a proposal was one-sided and only favoured the Plaintiffs because if the Plaintiffs were the ones to ultimately sell the properties after the termination/expiry of the Options, the Defendants would not be entitled to a share of their profits; (ii) to enter into such an indefinite agreement would essentially prevent the Defendants from marketing the properties in the future when circumstances and market conditions changed; and (iii) in all my years of experience, neither I nor the Defendants had ever entered into

or agreed to such onerous terms in a co-broking agreement.

19. I thus hold without any hesitation whatsoever that it has not been established that there was an oral agreement in mid-1995 on the basis of the terms of Mr Motha's letter dated 19 October 1995. That being the case, the claim by PMC for a share of JLL's commission must be viewed in the context of the terms stated in JLL's letter of 23 April 1996.

20. If all the circumstances of the case are taken into account, JLL's letter of 23 April 1996 does not lend any support to PMC's claim for a share of the commission earned by JLL in 1999 for the en bloc sale of the Devonshire properties. Admittedly, the duration of the co-broking arrangement was not mentioned in the letter of 23 April 1996. However, the context in which the co-broking arrangement was made provides ample evidence as to its duration. The *raison d'être* for this co-broking arrangement was that PMC had by that date a mandate from the owners of the Devonshire properties to sell their properties on an en bloc basis. PMC was thus the party to be paid a commission if the en bloc sale succeeded and JLL was merely lending their brand name to the en bloc sale. That is why JLL's letter of 23 April 1996 specifically referred to the sharing of PMC's commission and not JLL's commission.

21. Once PMC's mandate from the owners of the Devonshire properties with respect to the en bloc sale expired by the end of August 1996, the question of co-broking no longer arose. JLL's Mr Pan explained the position in paragraph 13 of his affidavit of evidence-in-chief as follows:

[I]n my experience as a property consultant, changes in market conditions are inevitable and it would not be prudent for any property consultant to be bound to a co-broke arrangement for such an indefinite time.

22. PMC did not furnish any credible evidence that JLL continued to work with them on a co-broking basis for the en bloc sale of the Devonshire properties after 1996. In fact, other estate agents, namely M/s Edmund Tie & Co, had been invited by the owners of the said properties to find an en bloc buyer for the properties after the expiry of PMC's mandate to sell the properties. As such, when JLL returned to the scene in 1999 after other estate agents had failed to sell the properties on an en bloc basis, they were acting solely for their own benefit. In view of this, PMC's claim for a share of the commission earned by JLL for the en bloc sale of the Devonshire properties in 1999 is dismissed.

The forfeited Grandwin tender fee

23. I now turn to PMC's claim for a refund of the amount paid by them to JLL in July 1996 with respect to the forfeiture of Grandwin's tender fee. PMC asserted that their agreement with JLL, as evidenced in the latter's letter to them dated on 23 April 1996, was only to share any commission earned and advertising expenses. They contended that as the forfeited tender fee was not a "commission" earned by them, JLL had no claim to it. On the other hand, JLL contended that the term "commission", as used in the co-broking agreement, includes forfeited tender fees.

24. It was common ground that PMC's claim is one for money had and received. In this context, it is worth noting that in *Brisbane v Dacres* (1813) 5 Taunt 143, 150, Gibbs J said as follows:

I think that where a man demands money of another as a matter of right, and that other with a full knowledge of the facts upon which the demand is founded, has paid a sum, he never can recover back the sum he has so voluntarily paid. ... If we were to hold otherwise, many inconveniences may arise; ... I think that by submitting to the demand, he that pays the money gives it to the person to whom he pays it, and makes it his, and closes the transaction between them.

25. PMC paid JLL half of their own share of Grandwin's forfeited tender fee with full knowledge of the facts upon which JLL's claim to the said fee was founded. Mr Ang's evidence that he told Mr Pan that PMC would subsequently seek a refund of the amount paid to JLL cannot be accepted. In fact, on 2 July 1996, PMC instructed M/s Tang & Partners to pay JLL without any hint that the money was being paid under protest.

26. It should not be overlooked that although JLL was paid half of the forfeited tender fee in July 1996, PMC did not complain that JLL was not entitled to the amount paid until almost five years later. They had ample opportunities to do so earlier on. When PMC's chairman, Mr Motha, wrote to JLL on 1 October 1999 to claim a share of the latter's commission for the en bloc sale of the Devonshire properties, he made no reference to Gandwin's forfeited tender fee. Furthermore, two years later, when Mr Motha informed JLL that PMC's lawyers will be handling their claim for a share of JLL's commission for the en bloc sale of the Devonshire properties, no mention was made of PMC's right to recover the forfeited tender fee.

27. To sum up, although JLL's letter of 23 March 1996 could have been better drafted, I accept that it was understood that the sharing arrangement extended to forfeited tender fees. I thus hold that PMC is not entitled to claim from JLL the amount paid to the latter in July 1996 with respect to Grandwin's forfeited tender fee.

Costs

28. As both the claims made by PMC were dismissed, JLL are entitled to costs.

Sgd:

TAN LEE MENG

JUDGE

Copyright © Government of Singapore.