Wellspring Investments Ltd *v* Sam Samuel and another
[2014] SGHC 43

Case Number : Originating Summons No 396 of 2013

Decision Date : 11 March 2014

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Joseph Lee and Kelvin Ong (Rodyk & Davidson LLP) for the plaintiff; Godwin G Campos (Godwin Campos LLC) for the defendants.

Parties : Wellspring Investments Ltd — Sam Samuel and another

Land – Encroachment

11 March 2014

Woo Bih Li J:

Introduction

1 The plaintiff, Wellspring Investments Ltd ("the Plaintiff"), is the owner of shop unit #B1-08 ("B1-08") in a row of units in a development at No 17 Dairy Farm Road. The defendants, Samuel Sam and Chow Siow May ("the Defendants"), are husband and wife. They are the owners of an adjoining shop unit #B1-09 ("B1-09"). The Plaintiff claimed that the Defendants' B1-09 was encroaching on its B1-08. The Plaintiff brought this action to claim various reliefs, including a mandatory injunction for the Defendants to pull down a wall separating the two units and to erect a new wall on an alleged proper boundary between the two units.

2 I heard submissions on 28 October 2013. Thereafter, I granted the Plaintiff the reliefs it had sought with damages to be assessed by a judge and costs. I also granted a stay of one of my orders which required the Defendants to pull down and reinstate the wall along the proper boundary pending an appeal to the Court of Appeal. At the Defendants' request, I heard further arguments. That hearing was on 20 January 2014. Thereafter, I affirmed my earlier decision.

The issues

3 The Defendants' arguments raised the following issues:

(a) whether B1-09 was in fact encroaching on B1-08; and

(b) whether the terms of the Plaintiff's purchase of B1-08 or of the Defendants' purchase of B1-09 were relevant.

Whether B1-09 was in fact encroaching on B1-08

4 The Plaintiff's case was straightforward. It had purchased B1-08 from a mortgagee bank ("Maybank"). According to an online search of the Singapore Land Authority ("SLA") database, the area of B1-08 was stated to be 41sqm. However, the actual physical area on site was smaller.

5 The Plaintiff engaged a surveyor, Mr Tang Tuck Kin ("Mr Tang"), in 2005 to conduct a survey of B1-08 and the adjacent units. According to the survey, B1-09 was encroaching on B1-08. The area of B1-09 was stated in a similar online search to be 41sqm, *ie*, the same as that for B1-08. However, the actual physical area of B1-09 was about 61sqm whereas the actual physical area of B1-08 was about 21sqm. It appeared that B1-09 had encroached on B1-08 by about 20sqm, *ie*, by about half of B1-08's 41sqm.

6 The Defendants initially denied that B1-09 had encroached on B1-08. They suggested that the encroachment was by unit #B1-07 ("B1-07") instead. However, they did not engage a surveyor to pursue this allegation and indeed they stopped pursuing this point.

7 The Defendants' second argument was that there was in fact no encroachment by B1-09. They alleged that the existing boundary wall between B1-09 and B1-08 is in the correct place because that boundary wall is correctly placed between two sets of external windows. They implied that the intention of the developer could not have been to place a boundary wall in the midst of a set of external windows. If the boundary wall was moved as the Plaintiff wanted, it would split up one set of external windows which the developer could not have intended. Therefore, their position was that the survey plan for the row of units in question had not been updated as should have been the case. The alleged error was in the failure or omission by the developer to amend the plan to be in line with the existing physical situation on site. Therefore, the existing boundary wall between B1-09 and B1-08 is not in the wrong place.

8 There was also a survey plan that was prepared by Mr Tang in 1993, which showed that the areas of B1-08 and B1-09 were both 41sqm. The Defendants suggested that this survey plan was there only to apportion the share values for each strata title. This argument did not make any sense. There was no reason for the survey plan to give wrong information just to apportion the share values for each strata title.

9 As for the second argument that the 1993 survey plan was incorrect, the Defendants faced various hurdles.

10 First, there was no evidence from the developer to support the Defendants' suggestion.

11 Secondly, the existing boundary wall between two other units, *ie*, B1-07 and B1-08 was already placed in the midst of a set of external windows. If the developer was using the set of external windows as the guide for which each boundary wall was to be placed, then the boundary wall between B1-07 and B1-08 was placed at the wrong location. Yet there was no suggestion by anyone, including the Defendants, that this was the case.

12 Thirdly, Mr Tang was the surveyor who had prepared the 1993 plan of the development. He was also the surveyor engaged by the Plaintiff in 2005, after the Plaintiff had purchased B1-08. Mr Tang did not say that there was an error in the 1993 plan or that there was an omission to update the plan. On the contrary, his survey in 2005 indicated that B1-09 had encroached on B1-08, as stated above.

13 Fourthly, the area of each unit was stated in the database of the SLA. The suggestion that the areas for B1-08 and B1-09 were wrongly stated was quite astounding, as there was no real evidence to support the Defendants' suggestion. The location of the external windows was unreliable and inadequate evidence to support the Defendants' suggestion, in the absence of any evidence from the developer to that effect.

14 In passing, I mention one other point. It was unclear who was responsible for the position of the existing boundary wall between B1-08 and B1-09. Was it placed there by the developer, or one of the previous owners before Maybank sold B1-09 to the Defendants? The Defendants had initially speculated that the existing wall was put up by the mortgagor but switched their position later and suggested that the existing wall was put up by the developer. In any event, it was immaterial who was responsible for the position of the existing boundary wall.

15 The Defendants' third argument was that the boundary wall was already in existence when they bought B1-09. However, that was immaterial to the Plaintiff's claim for encroachment.

16 The Defendants' fourth argument was that the search on SLA's database for B1-08 revealed that there was no encumbrance. Therefore, the Plaintiff could not claim that B1-09 was encroaching on B1-08. I was of the view that the Defendants had got the argument backwards. It is for the person claiming a valid interest to lodge or register the appropriate instrument on the land register. The absence of notification of any encumbrance on the land register is to the benefit of the Plaintiff and not the Defendants. If the Defendants were right, then an owner may encroach on the property of his neighbour, and when his misdeed is discovered, he is entitled to say that because no encumbrance is recorded in the particulars of the neighbour's property in the relevant land register, his neighbour cannot complain about his encroachment. That is not correct. The same point applies even if the encroachment was committed by a previous owner and not the current owner.

Whether the terms of the Plaintiff's purchase of B1-08 or of the Defendants' purchase of B1-09 were relevant

17 I come now to the second issue. In relation to this issue, the Defendants had two arguments. The Defendants' first argument was that they too had bought their unit from Maybank. They inferred that Maybank's terms of sale of B1-08 to the Plaintiff would be the same as Maybank's terms of sale of B1-09 to them (the Defendants), even though the sale of B1-09 to the Defendants was in 2001 and the sale of B1-08 to the Plaintiff was in late 2004 or early 2005.

18 The Defendants argued that it was likely that the Plaintiff would have bought B1-08 on an "as is where is" basis just as they did when they bought B1-09. They also referred to several terms of their purchase which would preclude a purchaser from raising with Maybank any objection to the area of the unit purchased from Maybank. However, the obstacle facing the Defendants was that there was no privity of contract between the Plaintiff and the Defendants. Even if the terms of sale of B1-08 precluded the Plaintiff from complaining to Maybank about the area of B1-08, the Defendants were not entitled to the benefit of those terms. To overcome this hurdle, the Defendants relied on s 46(2)(*b*) of the Land Titles Act (Cap 157, 2004 Rev Ed) ("the LTA") which states:

> (2) Nothing in this section shall be held to prejudice the rights and remedies of any person—
>
> …
>
> (*b*) to enforce against a proprietor any contract to which that proprietor was a party;
>
> …

19 I was of the view that the Defendants had misinterpreted s 46(2)(*b*) of the LTA. It merely preserves the right of a person to enforce against a proprietor a contract to which that proprietor was a party. It does not create a new right if none existed. The person seeking to enforce the contract must first establish his right to do so. The Defendants were not able to establish that right

since they were not a party to the contract of sale between Maybank and the Plaintiff.

20 The Defendants' second argument was that the Plaintiff was getting a windfall. They suggested that the Plaintiff must have inspected B1-08 and have known that the area of that unit was less than 41sqm. This was "supported" by the fact that the Plaintiff had paid only $90,000 for B1-08. On the other hand, the Defendants had paid $240,000 for B1-09. By referring to the price they had paid, the Defendants were suggesting that they had paid a much higher price than the Plaintiff because they were supposed to get a much larger unit than the Plaintiff; whereas, if the Plaintiff were entitled to the reliefs sought, the area of the two units would be about the same. The Defendants attempted to show that the Plaintiff had paid an unusually low price for a 41sqm unit and that they (the Defendants) had paid an unusually high price for a 41sqm unit by referring to prices reflected in online property searches done for the periods 2002 to 2003 and 2004 to 2005 respectively.

21 As regards such evidence, the Plaintiff pointed out that, firstly, the online property searches were general and were not even confined to the Dairy Farm area. They covered District 23 which included Hillview, Bukit Panjang and Choa Chu Kang. Secondly, the Defendants had bought B1-09 in or about April 2001. Yet they were using figures for the period 2002 to 2003. This suggested that the 2001 figures would not support their contention that they had paid an unusually high price for a 41sqm unit. I agreed with these two submissions made by the Plaintiff.

22 The Defendants did not adduce any other evidence to support their allegation that the price they had paid was for a 61sqm unit. At the first hearing of the Plaintiff's application on 30 July 2013, the Defendants' counsel, Mr Godwin Campos ("Mr Campos"), had already raised the allegation that the price that the Defendants had paid was much more than what the price for a 41sqm unit would have been. When I asked him whether he had verified this allegation with the solicitors who had acted for the Defendants in their purchase of B1-09, he said he had not. I granted an adjournment to give the Defendants time to file an affidavit in response to the first affidavit filed for the Plaintiff.

23 The affidavit in response was the first affidavit of the first Defendant filed on 7 August 2013. There was no letter or supporting affidavit from the solicitors acting for the Defendants in their purchase of B1-09. There was therefore no evidence from the solicitors acting for them in their purchase to support their contention that they had paid for a unit larger than 41sqm. This omission, coupled with their tactic of referring to prices for the period 2002 to 2003 of properties in District 23, instead of 2001 prices for properties in Dairy Farm estate only, led me to conclude that their allegation that they had paid for a larger unit was untrue and that it was they who were seeking to reap an undeserved windfall.

24 More importantly, it seemed to me that the issue was not whether the Plaintiff would be obtaining a windfall or whether the Defendants would have suffered a loss if the court were to grant the reliefs which the Plaintiff sought. The real question was whether the Defendants had acquired title to a unit of about 61sqm when they paid $240,000. If the Plaintiff was obtaining a windfall at the expense of Maybank, that was not the Defendants' concern. Even if the Defendants had contracted with Maybank to purchase B1-09 on the basis that B1-09 has a floor area of 61sqm, that would not assist the Defendants vis-à-vis the Plaintiff if B1-09 in fact has a floor area of 41sqm. The Defendants' recourse would be possibly against Maybank only. However, if they were precluded by the terms of their purchase from making any claim against Maybank, then they would have to bear the loss. Therefore, the terms of the Plaintiff's purchase of B1-08 and the Defendants' purchase of B1-09 were irrelevant.

25 In the circumstances, I did not accept the Defendants' argument that the action should have been commenced by way of a writ of summons, as opposed to an originating summons. The

Defendants were suggesting that there were major disputes of relevant facts because the terms on which the Plaintiff had purchased B1-08 from Maybank were relevant. However, as stated above, the Defendants were not a party to that contract. Furthermore, the Plaintiff did establish that B1-09 was encroaching on B1-08.

26 Accordingly, I granted the Plaintiff the reliefs it had sought with damages to be assessed by a judge and costs. I also ordered a stay as mentioned above.

Further arguments

27 Subsequent to my decision on 28 October 2013, the Defendants' solicitors, Godwin Campos LLC ("Campos") wrote on 4 November 2013 to request an opportunity to present further arguments. Various reasons were given but the most pertinent one was in para 4 of Campos' letter. It stated that the Defendants had found old letters (in the plural) written to them by Maybank's solicitors before Maybank sold B1-08 to the Plaintiff. The allegation was that Maybank always knew that B1-08 was only 21sqm. Maybank had asked the Defendants to buy the said 21sqm. The Defendants had declined and Maybank subsequently sold B1-08 to the Plaintiff. The letters were said to be "pivotal to any adjudication of the present matter".

28 Paragraph 6 of Campos' letter stated that the Defendants do not have their sale and purchase agreement as the Defendants' previous solicitors, M/s Boswell, Hsieh & Lim ("BH&L"), had ceased practice some years ago. A letter confirming this could be produced if so required.

29 Paragraph 11 of Campos' letter stated that Maybank and Jones Lang Lasalle (who conducted the auction of B1-08 to the Plaintiff) ought to be made parties to the Plaintiff's action "to bring the fullest facts … for fair and final determination".

30 Campos' letter did not enclose the alleged letters from Maybank's solicitors as should have been done. Nevertheless, I decided to accede to the request for further arguments to be presented. Subsequently, I directed the Registrar of the Supreme Court to write to notify the solicitors of both sides that the old letters which had been referred to in para 4 of Campos' letter had not been enclosed with that letter and also to inform them that the time for filing an appeal pending the outcome of the further arguments was suspended.

31 On 6 December 2013, Campos wrote to forward one letter dated 23 September 2002 from Rajah & Tann LLP ("R&T") (Maybank's solicitors) to the Defendants ("the R&T Letter") and one letter dated 12 November 2003 from BH&L to the Defendants. The contents of each letter were revealing as I will elaborate on later.

32 The further arguments took place on 20 January 2014. Mr Campos, counsel for the Defendants, did not even seek to elaborate on why the Defendants could not find the two letters from R&T and from BH&L earlier.

33 In any event, the letter from BH&L did not help the Defendants' case. It showed that BH&L had informed the Defendants in November 2003 that BH&L would cease practice from 1 January 2004. That letter also asked the Defendants to "collect the complete file" relating to B1-09 for their own safe-keeping. This letter came as a surprise to me. As mentioned above, I had given time to the Defendants to try and get whatever information they might need from the solicitors who had acted for them in the purchase of B1-09. Mr Campos did not disclose then that their previous solicitors had ceased practice and that the Defendants already had an opportunity to collect the complete file from the previous solicitors. Perhaps Mr Campos did not know about BH&L's letter dated 12 November 2003.

Eventually, Mr Campos confirmed that the Defendants did in fact collect the complete file from BH&L.

34 As for the R&T Letter, it referred to a letter dated 25 June 2002 (from R&T to the Defendants) and an email dated 28 June 2002 (from the Defendants to R&T). Mr Campos said that the Defendants could not locate the earlier letter dated 25 June 2002 or their email. No elaboration was given. Mr Campos did not ask R&T for a copy of either. His only excuse was that the communication was so long ago. In any event, the R&T Letter was revealing.

35 It showed that the Defendants had realised in 2002, if not earlier, that B1-09 only had a floor area of 41 sqm, and that the Defendants had already made an issue of this with Maybank. The R&T Letter did not agree with the Defendants that they were entitled to an additional 20sqm. This suggested that the Defendants were not truthful when they contended that they had in fact contracted to buy a unit of 61sqm. They might have thought that the unit was of that size but that was different from saying that their contract specified that size. Indeed, they were unable to produce any document to support the latter.

36 Furthermore, the R&T Letter did not say that B1-08 was only 21sqm as was alleged in Campos' letter dated 4 November 2013. On the contrary, the R&T Letter had proposed that the Defendants purchase the additional area occupied by them (about 20sqm) and the "remaining" area of B1-08 (about 21sqm) at a price to be agreed. R&T also threatened to take steps to recover "the encroached area" from the Defendants if there was no agreement on the proposal. Paragraph 4 of Campos' letter was therefore misleading.

37 Ironically, the substance of the R&T Letter made the Defendants' case worse. It showed that:

(a) The Defendants knew that their allegation in the present action that any encroachment was by B1-07 (and not B1-09) or that there was no encroachment of B1-08 was false. They already knew in 2002 that B1-09 was encroaching upon B1-08.

(b) If the Defendants genuinely believed that an error had been made in the 1993 survey plan, they would have made an application for rectification in 2002 or 2003 after R&T's letter. They did not do so and only mentioned rectification in 2013 and 2014 in the proceedings before me.

(c) Maybank was disputing with the Defendants that they were entitled to 61sqm, contrary to the Defendants' suggestion. This reinforced the point that the Defendants' emphasis on their purchase price was irrelevant.

(d) The Defendants were given the opportunity to buy B1-08 comprising the encroached area of 20sqm and the remaining area of 21sqm. They chose not to do so.

(e) Maybank knew that B1-08 was 41sqm and knew about the problem of the encroachment. There was no basis to suggest that Maybank had sold or transferred only 21sqm to the Plaintiff when Maybank sold B1-08.

38 Unsurprisingly, Plaintiff's counsel did not pursue his objection to the Defendants' introduction of the two letters from BH&L and from R&T.

39 As for the Defendants' repeated arguments that more information should be given about the terms of the contract between the Plaintiff and Maybank, I have said above that such terms were irrelevant. The Defendants are not a party to that contract and they acquired title to their own unit of about 41sqm only.

40 I was of the view that the Defendants had been economical with the truth. They have had the benefit of wrongfully occupying the additional 21sqm for about 12 years with full knowledge of the encroachment. I affirmed my orders given on 28 October 2013 including the stay order pending an appeal.