

Yeo Yoke Mui v Kong Hoo (Private) Ltd and Another
[2001] SGHC 28

Case Number : Suit 1236/1997, RA 600001/01
Decision Date : 08 February 2001
Tribunal/Court : High Court
Coram : Judith Prakash J
Counsel Name(s) : Salehah Johari (Salehah & Co) for the 1st defendant; Suhaimi Lazim with David Kong (Shook Lin & Bok) for the 2nd defendant
Parties : Yeo Yoke Mui — Kong Hoo (Private) Ltd; Ng Liang Poh

JUDGMENT:

Cur Adv Vult

1. This registrars appeal arises out of an assessment of the damages that the plaintiff, Ms Yeo, has to pay the first defendant, Kong Hoo (Private) Ltd (KHPL), resulting from the repudiation by Ms Yeo of her contract to purchase the house and premises at 93 Cashew Terrace, Singapore (the property) from KHPL. The issue is whether such damages should be assessed as at the date of the breach or the date of the trial.

Background

2. On 11 March 1997, KHPL granted Ms Yeo an option to purchase the property at the price of \$1,960,000. Under the terms of the option, completion of the sale and purchase was scheduled for 13 June 1997. On 2 May 1997, Ms Yeo exercised the option. Three weeks later, she became aware that the property was subject to road reserves that would affect her ability to extend the house and, on 30 May 1997, she purported to rescind the sale and purchase on that ground.

3. KHPL did not accept the rescission of the sale and purchase agreement. On 17 June 1997, four days after the scheduled completion date, KHPL served a notice on Ms Yeo requiring her to complete the purchase of the property within 21 days thereafter. Ms Yeo ignored this notice. Instead, she commenced this action against, *inter alia*, KHPL, seeking a declaration that she was entitled to rescind the sale and purchase agreement and the return of the ten percent deposit which she had paid KHPL. KHPL denied that there was such a rescission and put in a counterclaim for specific performance of the agreement or, alternatively, damages.

4. In late July 1997, some time after the counterclaim had been filed, KHPL instructed a property agent to market and sell the property. Advertisements for the sale of the property appeared in the newspapers between August and October 1997. Enquiries were made and the property was shown to a few prospective purchasers but no sale contract materialised.

5. The trial took place in August 1998. During the course of the trial, KHPL abandoned their claim for specific performance and elected to pursue their claim for damages instead. In November 1998, the trial judge dismissed Ms Yeos claim against KHPL, gave judgment in favour of KHPL on the counterclaim and ordered that there be an assessment of the damages to be paid to KHPL. It should also be noted that there was a second defendant in the case, the solicitor, Mr Ng, who had originally advised Ms Yeo on the purchase. At first instance Ms Yeo was not successful in her claim against the solicitor but she succeeded on appeal. The practical result was that any damages ordered to be paid by Ms Yeo to KHPL would actually be borne by Mr Ng.

The assessment

6. The main legal issue canvassed during the assessment was whether the date at which the damages sustained by KHPL should be assessed was the date of the breach of contract ie 13 June 1997 when Ms Yeo failed to complete the purchase or whether it was the date at which KHPL elected to pursue their remedy in damages instead of insisting on specific performance ie August 1998. The Assistant Registrar held that by instructing the property agent to market and sell the property in July 1997, KHPL had clearly elected to accept Ms Yeos repudiation of the agreement and indicated their intention not to pursue the remedy of specific performance. She concluded that it was therefore appropriate to assess damages as at the date of the breach.

7. On the evidence before her, the Assistant Registrar found that the value of the property as at 30 June 1997 had been \$1.8 million. The difference between that value and the contract price of \$1.96 million was \$160,000 and the Assistant Registrar awarded KHPL that sum as damages for breach of contract. In addition, she held that they were entitled to the estimated costs of a resale on 13 June 1997 and awarded them the sum of \$25,000 under this head. She further held that the total amount of damages awarded to KHPL of \$185,000 should be set off against the deposit of \$196,000 which had been received by KHPL pursuant to the terms of the option. Since the deposit exceeded the damages, she concluded that KHPL had only recovered nominal damages. As a result, an order for costs was made against KHPL.

8. KHPL has appealed against the above findings and orders.

The law

9. The law relating to an award of damages in lieu of an order for specific performance of a contract for the sale and purchase of land has been canvassed fairly frequently before the courts of Singapore. The most recent reported decision, and one that contains an excellent analysis of the legal position, is that of *Ho Kian Siang v Ong Cheng Hoo* [2000] 4 SLR 376. There, Lee Seiu Kin JC, considered the leading authority of *Johnson v Agnew* [1980] AC 367, as well as the following local cases: *Indian Overseas Bank v Cheng Lai Geok* [1992] 2 SLR 38, *Meng Leong Development v Jip Hong Trading Co* [1984-1985] SLR 27 and *Tay Joo Sing v Ku Yu Sang* [1994] 3 SLR 719.

10. Having set out the five propositions of law put forward by Lord Wilberforce in *Johnson v Agnew*, Lee JC noted:

From these propositions it can be seen that, in respect of contracts capable of specific performance, the law does not require the innocent party at the time of breach, to accept the repudiation and treat the contract as discharged. He is permitted to pursue his remedy of seeking an order for specific performance, whether exclusively or as an alternative to damages. However if he proceeds in the alternative, at the trial he would be required to elect which remedy to pursue, ie whether specific performance or damages. The question before me is as follows: if the innocent party elects for damages only at the trial, what would be the appropriate date for the assessment of such damages.

11. The Judge went on to hold that the date of trial was the correct date for assessing damages. In doing so, Lee JC followed the decision of the Privy Council in the *Meng Leong Development* case that endorsed the trial judges selection of the date of trial as the date for the assessment of the damages. Lee JC also cited the commentary in para 960 of 44(1) *Halsburys Laws of England* (4th Ed, Reissue) to the effect that where damages were awarded in lieu of specific performance, the normal rule that damages should be assessed as of the date of the breach of contract did not apply. The selection of the appropriate date was at the courts discretion but the date usually chosen was the date at which the remedy of specific performance ceased to be available. Lee JC opined that if damages were to be assessed as at the date of the breach, then the right given to the innocent party to seek specific performance would be worthless. If the innocent party were required to mitigate his damages from the time of breach he would in effect be confined to seeking his remedy in damages (at 30). With respect, I entirely agree with this observation.

12. Having considered the above-mentioned cases and the other authorities cited by both counsel, it appears to me to be settled that an innocent party who sues for the specific performance of a contract for the sale and purchase of land or, in the alternative for damages, and who elects at the trial to pursue only the damages claim, is prima facie entitled to have those damages assessed as at the date of trial. The selection of the date is, however, at the courts discretion and, as the same passage from *Halsburys* points out, if the innocent purchaser has been guilty of delay in pursuing his claim, assessment may be directed at an earlier date. This is precisely what happened in the *Tay Joo Sing* case where 25 months elapsed between the date when the vendor wrongfully repudiated the contract and the date when the innocent purchaser commenced action against him for specific performance.

13. Delay in seeking a remedy is not the only reason why the court might decide not to select the date of trial as the date of assessment. The same passage in *Halsbury* mentioned other factors that might persuade a court that it would be unjust to select this date. In the present case, there is no allegation that KHPL delayed in seeking their remedy. No such allegation can be made since once action started, KHPL was expeditious in its filing of its counterclaim for specific performance and/or damages.

14. The submission made by Mr Lazim, counsel for Mr Ng, was that the date of the trial was not the appropriate date in this case because the act of KHPL in instructing the property agent in July 1997 to sell the property amounted to a clear intention on their part to accept the repudiation of Ms Yeo and to go into the market in order to mitigate their loss. It was submitted that such act was clearly inconsistent with KHPLs contention that they were, at the material time, seeking to affirm the agreement and claiming specific performance instead. This intention to accept Ms Yeos repudiation was communicated to the public at large including Ms Yeo, via the many advertisements for the sale of the property.

15. Mr Lazims argument went this way. First he cited the passage from Lee JCs judgment which pointed out that the innocent party to a contract capable of specific performance is permitted, in the event of a breach, to pursue his remedy of seeking an order for specific performance, whether exclusively or as an alternative to damages. That party would, however, if he proceeded in the alternative, be required at the trial to elect which remedy to pursue. Mr Lazim then submitted that at law an election requires an intention on the part of the innocent party to choose one of two remedies which choice was communicated to the other party or to do an unequivocal act, such act being done to the knowledge of the other party. As a general rule, I have no quarrel with that proposition. I would point out that in this case, by making a claim in court for both remedies, KHPL was indicating that they had not yet decided which remedy they really wanted and were reserving their position.

16. Counsel went on to submit that the party who elects to pursue his alternative claim for damages in lieu of specific performance must clearly elect to accept the repudiation by the other party and is then subject to his duty to mitigate his loss. I do not agree with this argument because in a case like the present where the election need not take place until the date of trial there can be no question of a duty to mitigate arising when at the trial the innocent party elects damages instead of specific performance. If the election took place at any date prior to the trial then, subject to any contractual provision relating to the assessment of damages (for example Condition 29 of the Law Societys Conditions of Sale) I would think that the date for assessment would be the date of the election. If that were taken as the date no question of mitigation would arise either.

17. Further, the act of election, if it is said to be constituted by anything other than an express statement that the innocent party is no longer pursuing the remedy of specific performance, must be an action which puts it beyond the power of the innocent party to deliver specific performance subsequently. In this connection, I refer to *Johnson v Agnew* which indicated the correct date as being the date when the contract is lost. In the context of the present case where by counterclaiming for specific performance, KHPL had impliedly undertaken that they would be able to deliver title to the property to Ms Yeo should the court order it, no action of theirs testing the market for possible alternative purchasers could result in the contract being lost vis--vis Ms Yeo. They would only have put it beyond their power to complete their sale and purchase with Ms Yeo if they had granted an option in respect of the property to a third party or entered into a sale and purchase contract with a third party. Scouting around for prospective purchasers was not, in my opinion, an irrevocable change of their position. It was an invitation to treat and not an irrevocable offer to sell.

18. It was further submitted that KHPL in claiming specific performance had chosen to place the matter in the hands of a court of equity and would be governed by equitable principles. Since KHPL had instructed their agent to market the property and had

communicated to the public at large their intention of selling the property, an action which it was submitted was inconsistent with their on-going claim to specific performance, it would be inequitable for KHPL to contend that they did not elect to abandon their claim for specific performance until the trial.

19. I cannot accept this submission. The act of KHPL in marketing the property and in informing the public that they were interested in offers for it did not affect Ms Yeo in any way. She did not act on that knowledge to her detriment. Her position was not changed by KHPL's attempts at a resale. At all times, she was adamant in her stand that she was not obliged to buy the property and was entitled to the return of her deposit. I do not see anything inequitable in the course pursued by KHPL. As the innocent party they were entitled, while pursuing the remedy of specific performance which the law gave them, to cast around to ascertain whether their interests would be better served if they accepted Ms Yeos repudiation and resold the property to some one else. One of the ways of doing this was to ask their agent to market it for them. Until and unless the marketing arrangements resulted in KHPL being unable to deliver title to the property to Ms Yeo, there would be no negative impact on her rights nor any inconsistency between KHPL's actions and its on-going claim for specific performance. Accordingly, until that time, nothing would have happened which a court of equity would have to take note of.

20. This appeal must be allowed. I accordingly set aside the orders below. I will see the parties on the consequential orders to be made.

21. Although it is no longer relevant since the damages which KHPL will now recover would exceed the amount of the deposit, I should state my view that even on the damages awarded to them below, they were entitled to costs. A sum of \$185,000 cannot be considered nominal. The fact that the amount of damages was lower than the amount of the deposit does not make it nominal. KHPL did not forfeit the deposit and then sue for additional damages. In this case, the deposit was not the measure of the damages. The deposit was retained because KHPL were seeking specific performance and not because they were claiming to be entitled to the deposit as their damages. Thus as long as KHPL were eventually awarded more than a nominal amount as damages they would be entitled to costs notwithstanding that the amount awarded did not exceed the deposit paid.

Judith Prakash

Judge

Copyright © Government of Singapore.