

By Products Traders Pte Ltd and Another v JAK Alhadad & Co Pte Ltd
[2004] SGHC 265

Case Number : Suit 453/2003
Decision Date : 26 November 2004
Tribunal/Court : High Court
Coram : Tan Lee Meng J
Counsel Name(s) : Tan Kah Hin (Choo Hin and Partners) for plaintiffs; Nor'ain bte Abu Bakar and Ruby Tan (Abu Bakar Tan Ibrahim and Partners) for defendant
Parties : By Products Traders Pte Ltd; David Reginald Ellis Broadley — JAK Alhadad & Co Pte Ltd

Contract – Breach – Subject matter under contracts for sale and purchase of property no longer existed – Vendor could not fulfil contractual obligations to transfer property – Whether deposits paid under contracts refundable

Contract – Discharge – Anticipatory breach – Whether purchaser repudiated contract

Contract – Misrepresentation – Whether any misrepresentation by seller to induce purchaser to enter into contractual relations

26 November 2004

Judgment reserved.

Tan Lee Meng J:

1 The first plaintiff, By Products Traders Pte Ltd ("BP"), and the second plaintiff, Mr David Reginald Ellis Broadley ("Broadley"), who both paid the defendant, JAK Alhadad & Co Pte Ltd ("JAK"), deposits under contracts for the sale and purchase of a number of properties in Singapore, sued to recover the said deposits after JAK was no longer in a position to perform its obligations under the said contracts. JAK refused to refund the said deposits on the ground that the plaintiffs repudiated the contracts in question and filed a counterclaim with respect to losses suffered as a result of the plaintiffs' alleged breach of contract.

Background

2 The dispute in the present case concerns the sale of 25 properties in Singapore that belonged to the late Shaik Ahmad bin Abdullah Wahdain Basharahil ("Shaik Ahmad"), who died in Madura, Indonesia, on 15 July 1953. In his will ("the Will"), Shaik Ahmad required the said properties to be placed on trust after his death for the benefit of the persons who would, in accordance with Mohamedan law, have been entitled to his estate if he had died intestate.

3 The trustee appointed by Shaik Ahmad in the Will did not reside in Singapore. As such, the Public Trustee was appointed trustee by virtue of an order of court on 11 October 1976. With this order, Shaik Ahmad's 61 immovable properties in Singapore became vested in the Public Trustee. Of these, 32 were compulsorily acquired by the State. This left the estate of Shaik Ahmad ("the estate") with only 29 properties in Singapore.

4 Under the terms of the Will, Shaik Ahmad's assets were to be distributed 21 years after his death. However, the distribution, which was scheduled for 1979, was delayed and as late as the 1990s, the beneficiaries had not received any part of the assets. Soon, far too many persons claiming to represent all the beneficiaries under the Will started to sell the estate's properties even though the legal title to the properties was vested in the Public Trustee.

5 On 5 November 1994, one Abdurrachman Abdullah Wachdin Basyarahil ("Abdurrachman"), who claimed to be "the attorney of the heirs and heiresses" of Shaik Ahmad and the sole representative of all the beneficiaries under the Will, entered into an agreement to sell the estate's 29 properties to JAK for \$14m. The parties were aware that the properties were subject to caveats and claims by other parties and Abdurrachman undertook to "use his best endeavours to render the property free from all encumbrances at the date of completion". JAK claimed to have paid Abdurrachman \$500,000.00 immediately and an additional sum of \$490,000.00 subsequently.

6 JAK planned to make a hefty profit by reselling the estate's 29 properties. On 17 November 1994, it granted Broadley an option to purchase the 29 properties for \$24m. Broadley paid JAK \$750,000 for the option and lodged a caveat against the properties on 18 January 1995.

7 Abdurrachman's application to become the trustee of the estate was dismissed by the High Court in August 1995. JAK soon realised that it had been deceived by Abdurrachman and on 16 September 1995, its then director, Mr Syed Jafaralsadeg bin Abdul Kadir Alhadad ("Jafar"), reported to the Singapore police that Abdurrachman had cheated his company because he did not represent all the beneficiaries of the estate. He added that he would not have paid Abdurrachman any money had he known the truth.

8 JAK did not give up its plans to acquire and resell the estate's 29 properties. On 12 February 1996, it entered into a series of agreements with a number of persons, who claimed to be the sole beneficiaries under the Will, for the sale and purchase of the estate's 29 properties at \$12m. Two Indonesians, Musa Said Wachdin ("Musa") and Salim Hasan Wachdin ("Salim"), claimed to have the authority to act on behalf of all the members of this group (collectively referred to as the "M & S group").

9 Confident that it had the 29 properties in its bag, JAK started to market the said properties once again. On 10 January 1996, it entered into an agreement to sell four of these properties to BP for \$4m. These four properties were Nos 515, 517, 519 and 521 Serangoon Road. BP lodged a caveat with respect to these properties on 12 August 1998.

10 On 19 March 1996, JAK concluded seven agreements to sell 21 of the properties it was purchasing from the M & S group to Broadley for \$14.8m ("the 1996 agreements"). These properties were Nos 32, 34, 36, 38 and 40 Kinta Road, No 25 Koon Seng Road, Nos 144, 146, 148, 150, 273 and 275 Joo Chiat Road, Nos 18, 19, 20, 21, 22, 23 and 24 Pahang Street, No 46 Clive Street and No 61 Dickson Road. As has been mentioned, Broadley entered into an earlier agreement in November 1994 to purchase from JAK the estate's 29 properties ("the 1994 agreement"). This earlier agreement was rescinded and a large sum of money that was paid as a deposit under the 1994 agreement was treated as Broadley's initial deposit under the 1996 agreements.

11 JAK then entered into an agreement to sell the remaining four properties for \$3.5m to one Mr Mohamed Ayoob s/o Meera Hussian ("Ayoob"), who is not a party to the present proceedings.

12 While JAK may have been pleased to have entered into agreements to sell the 29 properties it was purchasing from the M & S group to BP, Broadley and Ayoob for \$22.3m, its attempt to acquire the estate's 29 properties from the M & S group for \$12m did not proceed smoothly as the members of this group were not the only persons who claimed to be beneficiaries under the Will. In fact, on 12 August 1993, long before the M & S group dealt with JAK, another rival group, whose members also claimed to be beneficiaries under the Will, had sold the same 29 properties to another Singapore company, Beng Tiong Trading Import and Export (1988) Pte Ltd ("BTT") for \$8.26m. BTT duly placed a

caveat on the properties it purchased. On 11 July 1996, BTT instituted Suit No 1255 of 1996 against the vendors and the Public Trustee. On 19 July 1996, it obtained a declaration that it was entitled to the rights, interests, benefits and entitlements of the persons from whom it purchased the 29 properties. BTT also obtained an order that the Public Trustee take "such steps as are necessary in cognisance of the [said] declaration".

13 In the meantime, JAK tried to safeguard its interest in the estate's 29 properties by pacifying the rival groups of claimants of the estate's properties. On 18 October 1999, JAK undertook to pay the M & S group and the rival group of claimants a total of 38.5bn rupiahs on completion of the sale of the estate's 29 properties to it. The completion date was to be not later than the end of March 2000. That date passed by without a resolution of JAK's problems being in sight.

14 On 11 July 2000, the picture altered dramatically when the Public Trustee and one Mr Quraisj Wahidin ("Quraisj"), the attorney of a number of persons claiming to be beneficiaries under the Will, instituted Originating Summons No 1030 of 2000 to obtain an order to sell the estate's 29 properties. Musa and Salim, who sold the 29 properties to JAK, objected to the proposed sale by the Public Trustee and filed Originating Summons No 600626 of 2001, in which the Public Trustee and Quraisj were named as defendants. Musa and Salim alleged that the persons whom they represented were the only beneficiaries under the Will and that the persons whom Quraisj represented were not beneficiaries under the Will. In their suit, they sought a determination of "the true and lawful beneficiaries of the Estate of [Shaik Ahmad] and their respective shares and proportions".

15 BTT, the plaintiffs and JAK took steps to protect their own interests by applying to be added as respondents in the proceedings initiated by the Public Trustee and Quraisj. BTT, the plaintiffs and JAK also entered into negotiations to present a common front to thwart the proposed sale. What transpired during these negotiations was disputed and serious allegations of misconduct were levelled by the plaintiffs and JAK against each other. More will be said about this and the positions taken by BTT and the plaintiffs in Originating Summons No 1030 of 2000 later on.

16 Lee Seiu Kin JC heard Originating Summonses Nos 1030 of 2000 and 600626 of 2001 at the same time. Quraisj accepted that the persons represented by Musa and Salim were beneficiaries under the Will but denied that they were the only beneficiaries. He filed an affidavit which set out the testator's family history and the names of 14 principal beneficiaries as well as a list of secondary beneficiaries. Neither Musa nor Salim filed an affidavit to challenge Quraisj's evidence regarding the family tree. On 30 July 2002, Lee JC ruled that there were 14 principal beneficiaries of the estate and made an order empowering the Public Trustee to sell the estate's 29 properties at a price not less than \$17,970,000.00. The order further provided that the properties were freed from all encumbrances, including the equitable interests of the beneficiaries under the Will and the interest claimed by the caveators against the properties, and that all the claims of the beneficiaries and the caveators who had lodged caveats against the properties in question should be deemed to be cancelled or withdrawn.

17 With these developments, the members of the M & S group were in no position to transfer the 29 properties that they had agreed to sell to JAK. It followed that JAK was in no position to transfer 25 of the said 29 properties that it had agreed to sell to the plaintiffs. All 29 of the estate's properties were subsequently sold by the Public Trustee to parties unconnected with the present proceedings.

18 JAK instituted Suit No 1497 of 2002 against Musa and Salim, the representatives of the M & S group and on 14 January 2003, it obtained judgment in default of appearance for \$4,270,096.00 against them. Apparently, the judgment has not been satisfied. In the same year, JAK instituted

Originating Summons No 567 of 2003 against BTT and the Public Trustee for a declaration that it is entitled to the equitable or beneficial interest of the M & S group in the estate and that BTT's contract to purchase the 29 properties is null and void. An order requiring the Public Trustee to take JAK's interest in the properties when making payments of the proceeds of sale pursuant to the order of court made in Originating Summons No 1030 of 2000 by Lee JC was also sought. However, on 6 September 2004, JAK's application in Originating Summons No 567 of 2003 was dismissed for failure to prosecute the proceedings with due dispatch under O 28 r 10 of the Rules of Court (Cap 322, R 5, 2004 Rev Ed).

19 As for the plaintiffs, they initiated the present proceedings to recover the deposits that they had paid to JAK for 25 of the estate's 29 properties on the ground that the latter had failed to perform its obligations under the contracts in question. Subsequently, the plaintiffs amended their pleadings to include an assertion that JAK had misrepresented to them that the members of the M & S group were the only beneficiaries of the Will. JAK filed a counterclaim for losses suffered as a result of the plaintiffs' alleged breach of contract.

Whether the deposits paid by the plaintiffs to JAK are recoverable

20 Following the order of court of 30 July 2002 empowering the Public Trustee to sell the estate's 29 properties on the basis that the said properties were freed from all encumbrances, including the equitable interests of the beneficiaries under the Will and the interest of the caveators, including JAK, against the said properties, there was no longer any subject matter under the contracts of sale and purchase between JAK and the plaintiffs to be transferred to the latter. As JAK could no longer fulfil its contractual obligations to the plaintiffs, the deposits paid by the plaintiffs should, without more, be refunded.

21 JAK alleged that the deposits that it collected from the plaintiffs need not be refunded to them because the latter committed an anticipatory breach by repudiating the contract before the completion date. Its case was put in para 10 of the Defence and Counterclaim as follows:

The Defendants aver that the 1st and 2nd Plaintiffs have, sometime on or about September 2001 ... by their conduct of joining hands as tenants-in-common with [BTT] to the detriment of the Defendants, repudiated their contracts with the Defendants, and such Notice of Acceptance of Repudiation was made and served to the Plaintiffs respectively.

22 JAK's complaint relates to the plaintiffs' support for BTT's position in the latter's Summons in Chambers No 602190 of 2001 filed on 25 September 2001, which was primarily for the purpose of having BTT added as the seventh respondent in Originating Summons No 1030 of 2000. What irked JAK was that in the said summons in chambers, there was also a prayer that the Public Trustee be ordered to transfer the legal title to the 29 properties to BTT, the plaintiffs and Ayoob as tenants-in-common after payment by them of \$10,130,000.00. Ms Chang Siew Chee, who filed an affidavit in support of this application, explained that as BTT, the plaintiffs and Ayoob had a beneficial interest in the said 29 properties "by way of various sale and purchase transactions", they were the only persons beneficially interested in the 29 properties. This was of course untrue, for until Lee JC had ruled on the number of beneficiaries under the Will almost a year later, no one, and certainly not the Public Trustee, knew who all the beneficiaries of the estate were and one would be foolish to expect a court to order a sale of the estate's properties to BTT and its partners. That BTT's application for the purchase of the property at \$10,130,000.00 was doomed from the very start was also evident because the amount offered for the properties was way below the Public Trustee's own valuation of the properties. As has been mentioned, Lee JC ordered the properties be sold at a price of not less than \$17,970,000.00. It was thus not surprising that nothing came out of BTT's ill-advised prayer to

take over the 29 properties for \$10,130,000.00.

23 When considering whether JAK is entitled to regard the plaintiffs' support for BTT's application in Originating Summons No 1030 of 2000 as repudiatory conduct, it is worth noting that in *Universal Cargo Carriers Corporation v Citati* [1957] 2 QB 401 at 436, Devlin J, as he then was, explained that:

The test of whether an intention is sufficiently evinced by conduct is whether the party renouncing has acted in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfil his part of the contract.

Admittedly, if X has agreed to sell a specific thing to Y, he breaches his contract by selling the same thing to Z. An example of such a breach is afforded by *Lovelock v Franklyn* (1846) 8 QB 371; 115 ER 916. In that case, the defendant promised to assign to the plaintiff all his interest in a lease for a specified sum of money within seven years from the time of his promise. It was held that he was in breach when he assigned his interest in the lease to another person before the end of the agreed period of seven years. However, the circumstances in the present case are distinguishable as it does not concern a situation where a vendor has sold a property twice and to two separate parties. A person who intends to buy a property may, without more, in the face of claims by two or more persons to that property, offer to buy the said property in separate contracts with the different claimants. Of course, he must perform his obligations when one of those he has contracted with establishes that he is the real owner and is ready to transfer the legal title to the property to him and he runs the risk that when it has been determined that only one of the sellers is the real owner, the other sellers may abscond with the deposit that has been paid to them. In the present case, it cannot be overlooked that JAK had no agreement with the plaintiffs that prevented them from dealing with other claimants of the estate's properties. Several years had passed since JAK entered into agreements with the plaintiffs in 1996 to sell them the properties that it was purchasing from the M & S group and despite repeated assurances that the matter would be completed, it was obvious that the members of the M & S group were not the only ones claiming to be beneficiaries under the Will and that unlike JAK, BTT already had an order of court recognising that it had taken over the interest of the group that sold it the 29 properties. It cannot be overlooked that when JAK accused the plaintiffs of repudiatory conduct, the latter emphatically denied having breached their contracts with JAK and made it clear that they still intended to purchase the properties from JAK if the M & S group could prove to the satisfaction of the court that its members were the sole beneficiaries under the Will. On 1 October 2001, the plaintiffs' solicitors, M/s Choo Hin & Partners, sent the following letter to JAK's solicitors:

Your clients' allegation that our clients have repudiated the agreement is baseless. Our client did not commit any breach thereunder ...

Your clients and [the M & S group] now have a further 3 months as a result to prove (a) that their vendors represented all beneficiaries to the exclusion of others (b) their cause and contention in (a) under Mohamedan law ...

Our clients did not commit any breach nor repudiated the agreement in any way, and accordingly there is nothing for your clients to accept.

24 Undoubtedly, it cannot be said in the circumstances of the case that the plaintiffs repudiated their contracts with JAK merely because they joined BTT in attempting, with no realistic chance of success, to purchase the said properties at a price that would not have been accepted by the Public Trustee.

25 I now turn to JAK's totally misconceived argument that it was in a position to complete the contracts of sale and purchase with the plaintiffs even though the M & S group had to be content with less than a half share of the assets of the estate and not 100%, as had been assumed by JAK and the plaintiffs. In para 7 of her closing submissions, JAK's counsel put her client's case as follows:

[JAK] having agreed to sell to the Plaintiffs their beneficial interest in the properties under the trusts of the Will ... was all along able to deliver the beneficial interest to them. The agreements make it clear that the sale is in respect of "WHATEVER RIGHTS AND INTERESTS TO THE PROPERTIES" of the 6 beneficiaries. It is not disputed that the Defendants were beneficial owners of 43.75% of the properties and had received judgment in Suit No 1497 of 2002 to the effect of \$4,270,000.

26 Such a preposterous argument should not have been advanced to salvage JAK's hopeless position. There are ample reasons why it lacked substance. To begin with, it fails to take into account the effect of the Order of Court of 30 July 2002. Secondly, JAK's position *vis-à-vis* Musa and Salim has always been that it purchased the estate's 29 properties and not merely the M & S group's share of the properties. In Suit No 1497 of 2002 that was instituted against Musa and Salim, JAK pleaded that the defendants breached the "fundamental term of the said Agreements as they are unable to convey and/or assign to the Plaintiffs all 100% of the beneficial interest". Notwithstanding this, JAK asserted that the plaintiffs and Ayoob had agreed to pay \$22.3m for less than a half share of the estate's 29 properties. This was certainly not envisaged in the contracts between JAK and the plaintiffs. More importantly, after reviewing the evidence, I hold that the plaintiffs succeeded in establishing that JAK misrepresented to them that the members of the M & S group were the only beneficiaries of the Will. At the very least, there was an innocent misrepresentation by JAK that induced the plaintiffs to enter into the contracts in question.

27 As JAK had no valid defence to the plaintiffs' claim, the deposits it received from the plaintiffs under their respective agreements of sale and purchase must be refunded. This is so whether one takes the view that JAK had failed to perform its contractual obligations to transfer the properties in question to the plaintiffs or that it had induced the plaintiffs to enter into the contracts by the misrepresentation that the members of the M & S group were the only beneficiaries of the Will.

Amount to be refunded to BP

28 BP's position with respect to the amount to be refunded by JAK will first be considered. JAK accepted that it received \$575,000.00 from BP and that no refund of any part of the deposit has been made. As such, JAK is to refund BP the sum of \$575,000.00.

Amount to be refunded to Broadley

29 Broadley's position will next be considered. He claimed that \$750,000.00 of the deposit under the 1994 agreement remained in the latter's hands after the rescission of the 1994 agreement and that this sum was to be regarded as his initial deposit under the 1996 agreements to purchase 25 of the estate's properties. However, JAK insisted that only \$600,000.00 was in its hands at the material time. To save time, Broadley agreed to reduce his claim for the initial deposit to \$600,000.00 and I hold that this amount is refundable to him.

30 Apart from the initial deposit referred to above, Broadley also claimed to have paid the following other deposits on the stated dates in a statement ("the statement") that was addressed to JAK in March 1997:

(a)	19 March 1996	-	\$100,000.00
(b)	19 March 1996	-	\$900,000.00
(c)	19 April 1996	-	\$850,000.00
(d)	20 April 1996	-	\$150,000.00
(e)	3 July 1996	-	\$50,000.00
(f)	17 July 1996	-	\$12,000.00
(g)	8 November 1996	-	\$50,000.00
(h)	7 January 1997	-	\$50,000.00
(i)	27 March 1997	-	\$150,000.00

31 JAK's Jafar confirmed on the statement that the above amounts had been received by his company. However, he penned the words "will check and reconfirm on accounts received" on the statement and asserted that these words showed that he had not finally accepted the statement as accurate. The plaintiffs countered that during the six years before this trial commenced in October 2004, JAK did not complain about any of the figures in the statement.

32 Whatever may be JAK's position on Jafar's acknowledgment on the statement on 27 March 1997, it could not deny that on 18 April 1996, Jafar acknowledged in writing as follows:

Received from David Reginald Broadley the sum eight hundred fifty thousand cheque 017046 UOB S\$850,000 (Singapore Dollars being the fourth instalment payment

Total [paid] to date

S\$750,000 by previous agreement.

S\$1,000,000 19th March 1996

S\$150,000 8th April 1996

S\$850,000 19th April 1996

Total paid 2,750,000 Two Million Seven Hundred Fifty Thousand Singapore Dollars only

33 As JAK did not allege that the cheque for \$850,000.00 (UOB cheque no 047046), listed in the statement as having been paid by Broadley in March 1996, a copy of which was tendered as evidence, had not been banked in or had bounced, this sum is to be refunded to Broadley.

34 As for the two other cheques, one for \$100,000 (UOB cheque no 047035) and the other for \$900,000.00 (UOB cheque no 047036), that were listed in the statement as having been paid to JAK on 19 March 1996, Jafar acknowledged on 18 April 1996 that \$1m had been received by JAK in addition to the \$850,000.00, which has already been considered. Again, as there was no allegation that the cheques were not banked in or had bounced, this sum of \$1m must be refunded to Broadley.

35 The next item listed in the statement is a cheque for \$150,000.00 (UOB cheque no 047045) that was paid to JAK on 20 April 1996. However, Jafar's written acknowledgment of 18 April 1996 recorded this amount as having been paid on 8 April 1996. Broadley conceded that he might have got the dates mixed up. As the only other amount that Broadley claimed to have paid in April 1996, apart from those sums already dealt with above, is \$150,000.00 and Jafar acknowledged that this exact amount was paid to him in April 1996, it is more probable than not that both Broadley and Jafar were referring to the same payment. As such, this sum of \$150,000.00 is to be refunded to Broadley.

36 As for the \$12,000.00 recorded in the statement as having been paid on 17 July 1996, it need not be further considered as Broadley agreed during the trial to drop his claim for this sum.

37 The next item listed in the statement relates to a cheque (UOB cheque no 337206) for \$50,000.00 paid to JAK on 8 November 1996. A copy of this cheque and Jafar's acknowledgment that it was received was tendered as evidence. As there was no assertion that the cheque was flawed in any way or not banked in, this sum of \$50,000.00 is to be refunded to Broadley.

38 The next item recorded in the statement as having been paid to JAK is another cheque (UOB cheque no 337210) for \$50,000.00 that was paid on 7 January 1997. On that date, Jafar acknowledged in writing that he received this cheque. A copy of the cheque and Jafar's acknowledgement was tendered as evidence. I hold that this \$50,000.00 is refundable to Broadley.

39 As for the \$150,000.00 that Broadley claimed to have paid on 27 March 1997 with a cheque (UOB cheque no 337217), there was an express acknowledgment from Jafar on that date as follows:

Received from Mr David Broadley ... the sum of S\$150,000 Singapore Dollars being the final amount of deposit for the 21 units of shophouses under agreement 1994.

40 Jafar tried to distance himself from the acknowledgment by saying that it referred to the 1994 agreement. As has been mentioned, the 1996 agreements between JAK and Broadley were regarded by them as supplemental to the 1994 agreement and Broadley explained that this was why the acknowledgment referred to that earlier agreement. Jafar also pointed out that in his acknowledgment letter, he noted that he will "check and reconfirm" the position. However, such reconfirmation could only be in relation to cheques that were paid previously and not to the cheque that he received on 27 March 1997. I thus accept that Jafar received \$150,000.00 on 27 March 1997 and this sum is to be refunded to Broadley as part of the deposit paid by him to JAK.

41 Interest on the amounts that are to be refunded to the plaintiffs shall be paid at the rate of 6% per annum as from the date of the writ.

JAK's counterclaim

42 As JAK could not perform its obligation to transfer the 25 properties that it sold to the plaintiffs, its counterclaim with respect to losses suffered as a result of the plaintiffs' alleged breach of contract did not rest on solid ground. The real reason for JAK's losses is that the Indonesians from whom it purchased the estate's 29 properties could not fulfil their contractual obligations. This is evident from the police report lodged by JAK's Jafar on 16 September 1996 against Abdurrachman, the first vendor, and from Suit No 1497 of 2002 that JAK instituted against Musa and Salim. In the police report against Abdurrachman, Jafar stated that he had been cheated by Abdurrachman and that he would not have handed any money to the former had he known that the latter did not represent all the beneficiaries under the Will. As for other losses incurred by JAK, these were the result of the M & S group's failure to deliver the 29 properties to JAK because Lee JC found that the members of

this group were not the only beneficiaries under the Will. JAK cannot expect the plaintiffs to compensate it for its bad business decisions. As such, its counterclaim is dismissed.

Costs

43 The plaintiffs are entitled to costs.

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