Eng Hui Cheh David v Opera Gallery Pte Ltd
[2009] SGCA 49

Case Number : CA 69/2009

Decision Date : 16 October 2009

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA

Counsel Name(s) : Quek Mong Hua, Tay Wei Loong Julian and Lim Ke Xiu (Lee & Lee) for the appellant; Harpreet Singh Nehal SC and Albert Loo Sai Fung (Drew & Napier LLC) for the respondent

Parties : Eng Hui Cheh David — Opera Gallery Pte Ltd

Contract

16 October 2009 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 This is an appeal against the decision of the judge ("the Judge") in *Eng Hui Cheh David v Opera Gallery Pte Ltd* [2009] SGHC 121 ("the Judgment").

2 The facts have been set out by the Judge in detail in the Judgment and there is no need to rehearse them here, save to observe that this appeal raised two main issues, *viz*, whether the respondent had (through its director, Stephane Le Pelletier ("Pelletier")) made misrepresentations to the appellant and whether, alternatively, the respondent had been guilty of a breach of contract. The appellant contends that either ground would have entitled him to rescind the contract with the respondent for the purchase of a limited edition of a bronze sculpture that constitutes the crux of the present litigation. This particular sculpture was, in fact, the fourth out of 25 pieces commissioned by the Sayegh Gallery with the Rodin Museum's permission, from an original mould of one of the famous sculptor, Auguste Rodin's, most famous sculptures – "The Thinker" (we will refer to this particular sculpture as "4/25"). It should also be noted that the respondent did deliver the appellant another piece in that particular series (which we will refer to as "12/25") in substitution for 4/25. The respondent contended that this was done out of goodwill as the appellant had expressed dissatisfaction with the alleged natural imperfection on 4/25, although the respondent did also offer to deliver 4/25 to the appellant instead if the latter was not satisfied with 12/25.

"Purchasing exclusivity"

The issue

3 After examining closely the entire record of the proceedings in the court below as well as the Judgment itself, and having heard counsel, we find no reason to disturb the findings of fact as well as the decision of the Judge. There is, however, one issue which we found of some concern to us as it seemed to us to represent the true *raison d'être* for this particular transaction (at least as viewed from the appellant's perspective). This is reflected in the appellant's Statement of Claim, in particular, paragraph 7(1)(iii) thereof, where it was stated as follows:

> Sometime in early November 2005, the Defendants [the respondent] made the following representations to the Plaintiff [the appellant] about the 4/25 Edition:
>
> …
>
> the 4/25 Edition is *the only edition that is in a private collection and therefore available for sale*.
>
> [emphasis added]

4 Although the Judge did not make an express finding as to the appellant's state of mind in this particular regard, such a finding appears to be implicit within the following observation (see the Judgment at [112]):

> It was clear from the evidence that the plaintiff was very eager to buy 4/25 because he thought he was getting the only reproduction available, of 25 limited editions of the sculpture.

5 Unfortunately, the Judge did *not* make – expressly, at least – a *further* finding as to whether the appellant was under this impression because this was self-induced *or* whether this was due to a misrepresentation made by the respondent to him (as alleged at [3] above). This is, as we will elaborate upon below (at [8]–[11]), a vital issue that impacts on the liability (if any) on the part of the respondent.

6 However, before proceeding to consider the aforementioned issue, we pause to note that the further observations by the Judge as to *why* the appellant purchased 4/25 were, with respect, not justified on the facts; the Judge had, in this regard, observed thus (see the Judgment at [112]–[113]):

> 112 … That [*ie*, the finding of fact that the appellant was very eager to purchase 4/25 because he thought that he was obtaining the only reproduction available, of the 25 limited editions produced] would mean 4/25 was a good investment. He did not pay any or much attention to what Pelletier said nor was he interested in the newspaper cuttings and articles even though he was told amongst other snippets of information, that the provenance arose from the Sayegh Gallery having discovered a lost mould and it had obtained permission from the Rodin Museum to cast 25 pieces from it. In his mind, the plaintiff thought he had secured a good deal after discounting the price by a massive US$800,000 (amounting to 44% of US$1.8m). He even tried (albeit unsuccessfully) to change the currency of the price from American to local dollars despite knowing full well, as Pelletier said, that the defendant's price was not quoted in Singapore dollars; he attempted to "get an advantage" (in Pelletier's words) but did not pursue it when he realized Pelletier was not going to budge on the issue.
>
> 113 However, when 12/25 was delivered to his residence, the plaintiff realised that his good fortune was mistaken. Lo and behold, there was another copy of the 25 limited editions of the sculpture that was available. His investment in 4/25 no longer seemed so attractive and the plaintiff looked for ways to get out of the sale. Hence, his various reasons for rejecting 4/25 at various times as set out in Pelletier's testimony …

7 With respect, although (as we have mentioned) we agree with the Judge that the appellant purchased 4/25 because he thought that it was the only one available for sale (out of the 25 in that particular series of reproductions), we respectfully disagree with the Judge's reasons as to why the appellant purchased 4/25, as set out in the preceding paragraph. We accept the appellant's explanation that he had purchased 4/25 in order to display it in his garden. More than that, it is clear,

in our view, that the appellant had purchased 4/25 as he thought that it was an exclusive piece; put simply, he thought that, in purchasing 4/25, he was "purchasing exclusivity". That – and not the finding of the Judge that the appellant had purchased 4/25 for the purpose of investment, still less that he had sought to take advantage of the respondent – was why the appellant was taken aback when he discovered the existence of 12/25 (which was, of course, offered to him in substitution for 4/25).

The applicable legal principles

8 Returning to the legal issue at hand, it is insufficient, for the purposes of claiming legal redress, that the appellant was *unilaterally* of the view that 4/25 was the only reproduction available on the open market. Apart from the appellant, that would *not* have been the concern of anyone (including the respondent), for there is no such legal concept of a self-induced misrepresentation, which would, in substance, be a contradiction in terms. Indeed, it has been clearly established that mere silence *per se* cannot (absent exceptional circumstances which are clearly not present on the facts of the present proceedings) constitute misrepresentation (see generally *Cheshire, Fifoot and Furmston's Law of Contract – Second Singapore and Malaysian Edition* (Butterworths Asia, 1998) ("*Cheshire, Fifoot and Furmston – Second Singapore and Malaysian Edition*") at pp 448–450 and 498–505).

9 *If*, on the other hand, the *respondent had represented to the appellant* that 4/25 was the only reproduction available for sale in the open market, and on the assumption that reliance could be proved, this would have constituted an actionable misrepresentation which would have entitled the appellant to legal redress (for the general principles as to what constitutes an operative misrepresentation, see *Cheshire, Fifoot and Furmston – Second Singapore and Malaysian Edition* at pp 440–456). The precise remedies which would accrue to the appellant would, of course, depend upon the precise nature of the misrepresentation concerned (*viz*, whether it was a fraudulent, negligent or wholly innocent misrepresentation, or one falling within the purview of s 2 of the Misrepresentation Act (Cap 390, 1994 Rev Ed) ("the Act"); see generally *Cheshire, Fifoot and Furmston – Second Singapore and Malaysian Edition* at pp 456–471).

10 It is, of course, only in the event that an operative misrepresentation of fact is established that the plaintiff can obtain the appropriate remedies. In this regard, in so far as, *inter alia*, the nature as well as measure of *damages* awardable under the common law as well as under both s 2(1) and (2) of the Act are concerned, reference may be made to *Cheshire, Fifoot and Furmston – Second Singapore and Malaysian Edition* at pp 482–494 and the recent decision of this court in *Wishing Star Ltd v Jurong Town Corp* [2008] 2 SLR 909 at [21]–[28] (with regard to the award of damages in the context of fraudulent misrepresentation or deceit). There are, of course, *other* methods of obtaining *damages* – for example, by way of an action for *breach of contract* (where the misrepresentation has itself become a term of the contract) and/or for *breach of a collateral contract* (should the factual matrix warrant such a finding).

11 It should also be noted that *rescission* is always available to the victim of a misrepresentation (subject to any bars against rescission, and the court's discretion under s 2(2) of the Act to declare the contract as subsisting and award damages in lieu of rescission) (see generally *Cheshire, Fifoot and Furmston – Second Singapore and Malaysian Edition* at pp 472–482).

Our decision

12 The key question before us is therefore this: Did the respondent represent to the appellant that 4/25 was the only edition of the Rodin Sculpture (among the 25 produced in that particular series) available on the open market? Such a representation of fact would, of course, have been untrue and

would have amounted to a misrepresentation, not least because 12/25 had, in fact, been offered by the respondent to the appellant (in substitution for 4/25). *Or* did the respondent, instead, *unilaterally* assume that 4/25 was the only reproduction available for sale (in which case there would, as explained above, have, *ex hypothesi*, been *no* operative misrepresentation)?

13 Unfortunately, there was little by way of relevant evidence touching on the said issue. Let us elaborate.

14 In the Affidavit of Evidence-in-Chief ("AEIC") of the appellant, it was asserted, as follows:[note: 1]

> To further enhance the attractiveness and exclusivity of the said sculpture, I was also told that it was the only piece that was in a private collection and available for sale because the other pieces were either in museums or other public institutions and were not available for sale.

A similar assertion was also alluded to in a subsequent AEIC of the appellant.[note: 2]

15 At trial, the appellant claimed, under cross-examination, that it was represented to him that 4/25 was the only piece available in the market. His basis for such a claim was the fact that Pelletier had shown him the newspaper cuttings and photographs of 4/25 although he claimed that he did not look at the newspaper cuttings and photographs in detail but merely relied on what Pelletier had to say about them; the relevant excerpts of the cross-examination were as follows:[note: 3]

> Q … So you had already cancelled the contract. What was there for you to go and see an expert or consult somebody for?
>
> A You know, there are two issues that I wanted to – out of this contract. And the one – the first issue was that I bought 4/25, they delivered me 12/25. You know, this is a big no-no in the art world, you know, that when you buy an art piece, you don't get a substitute. Because an art piece is not like a Rolls Royce, where it is mass produced.
>
> Q Mr Eng, you are diverting. We will come to 12/25; I'll confirm that. What is your second reason? What is the second issue you are saying?
>
> A The second reason is that this 4/25 is the only one in existence –
>
> Q Ah, good –
>
> A - that is available in the market. The rest, that is why he showed me all the newspaper cutting and all that, to convince me that all the other 24 are either in museums or universities and that there is none in the market available.
>
> Q Pause there. That means you were shown the photographs in that bundle, and you thought at least he had showed you 24; is that what you are saying?
>
> A No, he just said that – "Look, it's all in – you see, it's in the university, and" – and I didn't bother to look at it.
>
> Q Apart from what he said, in the university, where else were the rest?
>
> A In the museums.

Q And doesn't that bundle I showed you show exactly that?

A I didn't look at it in detail.

The newspaper cuttings and photographs do not state, in fact, that 4/25 is the only piece available for sale. The only English article amongst the documents that Pelletier had shown to the appellant at the respondent's gallery[note: 4] merely states that "[t]he Gallerie Sayegh discovered a lost plaster of Rodin's famous *Thinker* and obtained permission to cast it again". The English translation of one of the articles, which was in the French language, makes it clear that *prior to* the Sayegh Gallery reproductions, all the Rodin sculptures belonged to museums or towns: [note: 5]

> A Hundred and twenty years after it was mold, the statute starts a new life. Made of raw clay and 72 centimeters high, the original was turned into dust and the colossal bronzes that were extract from it all belong to museums or towns. All except one, kept selfishly in a private collection. But the Sayegh gallery (2 avenue Matigon, in Paris) found a plaster cast that was used for their executions. Out of the plaster cast, the gallery produced 25 new bronzes …
>
> In 1880, the original measured 72 centimeters. Rodin worked later on a two meters high bronze. There are 22 of them. Today, a gallery produces new ones with the original mold.

16 The appellant's assertions in his AEIC and in his evidence at trial did not really add to the claim in the relevant part of the appellant's Statement of Claim (reproduced at [3] above). In fairness, neither was Pelletier's assertion to the contrary in his AEIC, where there is a bare denial of the appellant's allegation.[note: 6] However, it should also be noted that Pelletier also referred to the photographs and newspaper cuttings which he alleges the appellant had viewed and (more importantly) the fact that "[t]here were no such assertions [to the effect that the respondent had misrepresented to the appellant that 4/25 was the only piece that was in a private collection and available for sale] in the many letters issued by the [appellant] and his solicitors over a period of close to a year" and that "[such an] account is manufactured".[note: 7]

17 We find it pertinent that, as between the parties (in relation to the relevant correspondence between them), counsel for the respondent, Mr Harpreet Singh SC, pointed, in fact, to the first response by the appellant to the respondent through his counsel *via* e-mail which made no mention of such a representation whatsoever.[note: 8] What is also significant is that it is also admitted (in that same e-mail) that the appellant had, in fact, purchased 4/25 and it was therefore requested that 12/25 be collected and returned.

18 Mr Singh also pertinently pointed to the fact that Pelletier had been cross-examined on this particular issue and had vehemently denied that such a representation had ever been made, as the following extract from the Notes of Evidence clearly demonstrates:[note: 9]

> Q Mr Stephane, my instructions are of course that this is not what transpired. You know what transpired, because you have read his affidavit. He told you that he was surprised that there is another piece available?
>
> A Yes.
>
> Q Because you had already told him earlier that this 4/25 is the only piece available in a private collection for sale. You agree or disagree? I mean, I can't judge between the two –

A Okay, so I disagree, because it is a 4/25. There is 24 other pieces; how can I tell him it's the only one?

Q You said you told him that 4/25 is the only piece available for sale in a private collection.

A How would I even know that myself?

Q This is what you told him.

A No, it's not true.

This was consistent with paragraphs 8 and 9(iv) of the respondent's Defence and Counterclaim,[note: 10] which denied the appellant's allegation, in paragraph 7(1)(iii) of his Statement of Claim (which has been reproduced above at [3]), that such a representation had been made.

19 In summary, there is no evidence before the court to prove, on a balance of probabilities, that the respondent had, in fact, misrepresented to the appellant that 4/25 was the only reproduction available on the open market. In the final analysis, the decision therefore turns on the credibility of the witnesses. Here, although it appears to us that some of the criticisms by the Judge of the appellant might have been too strong (see also [33] below), we see no basis to interfere with her finding that Pelletier was, overall, the more credible witness.

20 We turn next to the remaining issues which require a decision by this court.

Other remaining issues

The claim for breach of contract

21 As for the claim for breach of contract, the appellant was not entitled to terminate the contract immediately upon delivery of 12/25. The delivery of 4/25 *on 20 February 2006* was *not* an essential term of the contract between the parties. As time was not of the essence of the contract and the respondent had made it clear to the appellant (at the latest by 27 February 2006) that it was always willing, able and ready to reinstate sculpture 4/25 to the appellant, the respondent's delivery of 12/25 to the appellant on 20 February 2006 did not entitle the appellant to rescind the contract.

The alleged defects

22 There were two defects in 4/25 which were alleged by the appellant. The first related to discolouration in the patina and the second was an alleged hairline crack at the elbow of the sculpture.

23 In so far as the first alleged defect is concerned, the Judge held as follows (see the Judgment at [124]):

> I accept Pelletier's testimony that the plaintiff first raised his complaint on the discoloration in the patina only in December 2005 and not on 9 or 10 November 2005. Consequently, Pelletier's alleged promise to rectify the supposed defect even if given (which I doubt) could not amount to a condition of or a condition precedent to, the sale.

24 We respectfully agree with this finding of the Judge and therefore find no merit in the

appellant's argument with respect to the first alleged defect.

25 Turning to the second alleged defect, this alleged defect was only first raised in the appellant's Statement of Claim (at paragraph 7(f)), unlike the first alleged defect in 4/25 which had been referred to right at the outset in the appellant's first e-mail to reject 12/25. Prior to the filing of the appellant's Statement of Claim, no express reference to the assertion that the appellant had informed Pelletier of a hairline crack at the elbow of the 4/25 edition and had requested him to fix it had been made in the appellant's solicitors' letters to the respondent. Moreover, the appellant's housekeeper, who had inspected the sculpture at the respondent's warehouse prior to delivery, had written a note to the appellant on 15 February 2006 to update him on his inspection of the sculpture at the warehouse.[note: 11] That note stated that "no more discoloration marked can be seen" but does not mention any hairline crack. The appellant did not produce any proof of a hairline crack at trial and had in fact admitted, under cross-examination, that he did not see any cracks on the sculpture in the photos shown to him at trial.[note: 12] On the other hand, the respondent's witness, Mr Abrahim (Bobby) Mohseni, an art consultant, had issued a report stating that the structural support of 4/25 was in excellent condition and that the overall surface was in good condition.[note: 13] Another of the respondent's witnesses, Mr John Sayegh, had also stated in his AEIC that at the time of production, none of the 25 copyright reproductions had any crack or defect.[note: 14]

26 The Judge had also observed, as follows (see the Judgment at [48]–[49] and [110]):

> 48 There was disagreement between counsel as to whether 4/25 has a hairline crack. Both parties' counsel had viewed 4/25. While counsel for the defendant indicated he saw no hairline crack, counsel for the plaintiff said it was impossible to tell due to the lighting in the warehouse and the fact that the base of the sculpture was at eye level.
>
> 49 In the light of the parties' disagreement, I decided to and did view 4/25 where it was warehoused. At the court's request, the defendant took measurements of the engraved words [at the foot of the sculpture]. The court was informed that the entire engraving of the words "Sayegh Gallery" to "Reproduction 1998" was 13cm in length with a height of 2.5cm while the words "Cire Perdue C Valsuani Paris" were engraved separately with a length of 5.5 cm and a height of 4cm (see 3AB10 and N/E 194-195).
>
> …
>
> 110 It bears remembering too that the plaintiff had deposed in his earlier O 14 affidavits … that he had seen the engravings and inscriptions on 4/25 but asserted they were meaningless to him. His counsel's submission (para 181) that the question whether or not the plaintiff saw the engraving was not a matter with which the O14 application was concerned with is no answer for the plaintiff's inconsistent testimony. Indeed, I take issue with the plaintiff's lame explanation ... At best, it was unconvincing and at worse, it was untrue. It is significant that the plaintiff was *the only one* who detected a hairline crack at the right elbow joint of 4/25. Neither his counsel, the defendant's counsel, Sayegh or even the defendant' consultant Mohseni could detect the crack. Such an acute observation could only have been possible if the plaintiff had scrutinised the sculpture carefully and in great detail as I am certain he did. Therefore, he could not have missed the engraving. Even if the words "Sayegh Gallery" in the engraving were meaningless to the plaintiff (as they did not appear in the catalogue, which omission his counsel made much of), the words "Auguste Rodin Copyright Reproduction 1998" would have/should have alerted any onlooker let alone a buyer who was paying US$1m for the sculpture. I agree with the defendant's submission (para 37) that anyone buying 4/25 would immediately want to know where this edition

came from. Yet, the plaintiff did not ask any questions of Pelletier.

[emphasis in original]

27 It is significant, in our view, that the Judge had, in fact, personally viewed 4/25. Most importantly, in our view, there is no evidence on the record before us that there had, in fact, been a hairline crack in 4/25.

The Order of Court

28 The Judge had, in fact, made, *inter alia*, the following order (see the Judgment at [139]):

> The plaintiff shall take delivery of the sculpture 4/25 from the defendant within 14 days of the date hereof failing which the defendant is at liberty to resell the sculpture at the best market price it can achieve. If the resale price is less than the plaintiff's purchase price of US$1m, the defendant is entitled to recover from the plaintiff the shortfall and all expenses (which shall include the cost of the granite base) relating to and incidental to the resale. If the defendant resells the sculpture at a price higher than US$1m, the defendant is entitled to retain the profit. The defendant shall have the costs of the plaintiff's claim and one-third of the costs of its counterclaim but with full disbursements.

29 The appellant argued that this particular order was misconceived. In this regard, Mr Singh conceded that this was, in fact, the case and that if there was indeed a valid and binding contract between the parties, the appellant was free to keep 4/25 and dispose of it as he wishes.

30 The appellant submitted (without furnishing any specific reasons as such) that the respondent's claim for warehousing charges should not have been allowed in full even if the appellant was in breach, as the appellant claimed that the respondent had taken no steps to mitigate its loss by selling 4/25.[note: 15] In this regard, the Judge had expressed her view that the respondent could not be faulted for not selling 4/25, given the appellant's unreasonable refusal to, *inter alia*, authorise the respondent to do so (see the Judgment at [125]):

> The final issue that I need to address concerns the argument on whether the defendant should have taken steps to dispose of "4/25" after taking it back from the plaintiff's residence. In this regard the exchange of correspondence in [22] to [23] between the parties' counsel is relevant. As Pelletier pointed out in cross-examination … if the plaintiff wanted the defendant to sell 4/25, he should have requested/authorised the latter to do so, addressed the issue of ownership/title and advised how the sale proceeds should be dealt with pending this trial and its outcome. *He failed to do so and it did not lie in the plaintiff's mouth for his counsel to criticise the defendant during Pelletier's cross-examination for not disposing of 4/25 after 12 June 2006*. [emphasis added]

31 As alluded to in the preceding paragraph, the appellant has not given any reasons why the Judge's reasoning on this issue is wrong. We therefore accept the Judge's finding on this point.

The costs of the counterclaim

32 The appellant also argued that the Judge was wrong to award to the respondent one third of the costs of the latter's counterclaim. However, this argument neglects the fact that the respondent had succeeded in its claim against the appellant for warehousing charges. The counterclaim was, in fact, a double-pronged one – for defamation as well as for the expenses that the respondent had

incurred in making the granite base for 4/25, installation cost, removal expenses of 12/25 from the appellant's residence and warehousing charges for 4/25 at $60 per week. The respondent having succeeded in its counterclaim for warehousing charges, it was within the Judge's discretion to award part of the costs of the counterclaim to the respondent (in this regard see *Singapore Civil Procedure 2007* (G P Selvam chief ed) (Sweet & Maxwell Asia, 2007) at para 59/3/6 as well as the decision of this court in *Tullio v Maoro* [1994] 2 SLR 489 which endorsed the principles set out in the English Court of Appeal decision of *Re Elgindata Ltd (No 2)* [1992] 1 WLR 1207).

Conclusion

33 In fairness to the appellant, perhaps it ought to be said that some of the criticisms made by the Judge about the credibility of his testimony and motives might have been too strong. While he might not have been a perfect witness, we do not think he had attempted to mislead the court in prosecuting this claim.

34 On a more general level, there is a cautionary lesson which arises from the present case and which is perhaps of special significance, given the increased interest in the collection of (especially high-end) art in its various forms (particularly in the local context). Indeed, as was observed by the High Court in *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR 927 (at [86]), parties ought, wherever possible, to reduce their entire agreement into writing or suffer the legal consequences of not doing so. Furthermore, this case exemplifies the axiom, "Act in haste, repent at leisure." The appellant, it appears to us, was too eager to purchase an object which appeared to have a special appeal to him. However, whilst he did not manage to "purchase exclusivity" which he had contemplated, he is nevertheless still entitled to precisely what he had purchased pursuant to the contract between him and the respondent, *viz*, 4/25.

35 In the circumstances, the appeal is dismissed with costs. The usual consequential orders will apply. However, the appellant is free to keep 4/25 and dispose of it as he wishes.

[note: 1]Respondent's Supplemental Core Bundle, p 59.

[note: 2]Record of Appeal ("RA"), vol 3B, p 548.

[note: 3]Notes of Evidence ("NE"), pp 141–142.

[note: 4]RA, vol 3D, p 1108.

[note: 5]RA, vol 3D, p 1110.

[note: 6]RA, vol 3, p 246.

[note: 7]*Id*.

[note: 8]Appellant's Core Bundle, vol 2, p 159.

[note: 9]NE, pp 591–592.

[note: 10]RA, vol 2, pp 79 and 99, respectively.

[note: 11]AEIC of Lau Kay Lee in Record of Appeal, vol 3C, p 972.

[note: 12]NE, p 273.

[note: 13]AEIC of Abrahim Mohseni in RA, vol 3D, p 1315.

[note: 14]AEIC of John Sayegh-Belchatowski in RA, vol 3E, p 1328.

[note: 15]Appellant's case at [251].