

Chiam Toon Hong v Ong Soo Yong
[2004] SGHC 138

Case Number : OS 1333/2003
Decision Date : 28 June 2004
Tribunal/Court : High Court
Coram : Tan Lee Meng J
Counsel Name(s) : Aziz Tayabali and Rajan Supramaniam (Aziz Tayabali and Associates) for plaintiff;
Hoon Tai Meng and Nandakumar (T M Hoon and Co) for defendant
Parties : Chiam Toon Hong — Ong Soo Yong

Land – Sale of land – Contract – Whether contract to sell share in property rescinded.

Land – Sale of land – Contract – Whether contract to sell share in property annulled – Condition 5 of Law Society of Singapore's Conditions of Sale 1999.

28 June 2004

Judgment reserved.

Tan Lee Meng J:

1 The plaintiff, Mr Chiam Toon Hong ("Chiam"), sought a declaration that his contract dated 2 April 2002 to sell his five per cent share of 145 Killiney Road to the defendant, Mr Ong Soo Yong ("Ong"), had been rescinded. He also sought an order that the caveat lodged against the said property by Ong on 5 April 2002 be removed. Ong asserted that Chiam's application should be dismissed as it was the latter who delayed the completion of the sale and purchase of the property.

Background

2 The property known as 145 Killiney Road ("the Killiney property") is owned by Chiam and several other tenants-in-common. Each tenant-in-common has a separate certificate of title for his or her respective share of the property.

3 A rent-controlled building stands on the Killiney property. It houses a hotel. Some of the co-owners of the Killiney property are in the partnership that runs the hotel. In 1996, two co-owners who had a 40% share of the Killiney property instituted Originating Summons No 582 of 1996 to obtain an order that the property be sold. By an order of court dated 21 August 2002 and varied on 18 September 1996 ("the Order of Court"), Kan Ting Chiu J directed that the Killiney property be sold by public tender with or without vacant possession at a reserve price to be determined by the court. In view of the fractious relationship between the parties, Kan J required all the co-owners to execute all documents necessary for the sale of the property, failing which the Registrar of the Supreme Court should execute any such document or documents on behalf of any defaulting party.

4 The Killiney property was put up for sale by tender, but the contemplated sale did not materialise because the partnership that ran the hotel demanded \$21m as compensation for vacating the premises. An application in 1997 to compel the surrender of the premises to the owners did not succeed. To date, the Killiney property has not been sold.

5 On 2 April 2002, Chiam entered into an agreement to sell his share of the Killiney property to Ong without revealing to the latter that he was required by the Order of Court to act in unison with his co-owners to effect a sale of the property by public tender. The sale to Ong was subject to the

Law Society of Singapore's Conditions of Sale 1999 and the completion date was 2 June 2002.

6 Both Chiam and Ong were represented by the same solicitor, Mr Ang Gek Peng ("Ang") of M/s Ang Jeffrey & Partners, and Ong paid Chiam a deposit of \$20,000. What ought to be noted at this juncture is that one Mr Yap Pow Fook ("Yap") was instrumental in arranging the sale of Chiam's share of the Killiney property to Ong and that Ong agreed to pay him a commission of two per cent of the purchase price, which amounted to \$4,000, because the vendor, Chiam, did not want to pay the commission that vendors usually pay to estate agents. For unexplained reasons, Yap became one of Chiam's two representatives in his dealings with Ang and Ong regarding the Killiney property. Chiam's other representative was his brother-in-law, Mr Oh Chin Hock ("Oh").

7 After the sale and purchase agreement was signed, Ang discovered that the Killiney property was affected by the Order of Court. On 17 May 2002, he wrote to the Singapore Land Authority as follows:

Our client has entered into an agreement to purchase from Chiam Toon Hong his 1/20 share of the [Killiney property]. We note that in the Certificate of Title issued to Chiam Toon Hong, the entry for Order of Court is "Nil". However, our search revealed that an Order of Court dated 21 August 1996 relating to the property was registered on 18 October 1996 in Volume 2740 No 143. In this regard, we shall be grateful if you could clarify.

8 On 24 May 2002, the Singapore Land Authority replied as follows:

The Order of Court ... was omitted ... on the abovementioned qualified Certificate and on the other Certificates of Title issued for the lot.

We thank you for bringing this to our attention and apologise for the inconvenience caused in the matter.

Meanwhile, please arrange to forward us the Certificate of Title Vol 560 Fol 176 in exchange for the amended one.

9 On 24 May 2002, Ang met Chiam's representatives, Oh and Yap, for discussions. What transpired at this meeting was disputed by the parties. According to Chiam, who did not attend the meeting, Ang told Oh and Yap that Ong was no longer interested in buying the property because of the Order of Court. However, Ang denied that he said these words and Ong denied ever indicating to Ang that he had second thoughts about the purchase of Chiam's share of the Killiney property. Whatever may have transpired at the meeting on 24 May 2002, it was common ground that on that day Ang handed Yap a letter to be delivered to Chiam. In the letter, Ang stated as follows:

Our title search revealed that an Order of Court dated 21 August 1996 relating to the property was registered on 18 October 1996 in Volume 2740 No 143. It would appear from the order that you are not allowed to sell your share individually. As such, we would suggest that you appoint another solicitor to act for you and have the Order rescinded.

10 On 28 May 2002, Ang wrote to Chiam to ask whether or not the latter wanted the certificate of title to be forwarded to the Singapore Land Authority in exchange for an amended certificate of title. Chiam did not respond to Ang's letter. Neither did he take any action to rescind or vary the Order of Court. He also made no effort at that time to return the \$20,000 deposit to Ong.

11 Although the date fixed for completion was 2 June 2002, nothing was done by either party

until April of the following year. It is pertinent to note that until the end of April or the beginning of May 2003, both parties were apparently still represented by Ang, who did not write a single letter to Chiam or Ong after the date fixed for completion, namely 2 June 2002, had passed.

12 Chiam, who had not returned Ong his \$20,000 deposit, claimed to have saved up enough money by April 2003 to refund the deposit. Chiam's representatives, Oh and Yap, met Ong on 21 April 2003. What was discussed at this meeting was disputed. However, it was common ground that the issue of the Order of Court was raised and that the talks broke down because Chiam refused to bear the legal costs for varying the Order of Court while the latter insisted that it was not his responsibility to have the Order of Court varied.

13 On 24 April 2003, Chiam instructed another law firm, M/s Koh Ong & Partners ("KOP"), to take over his file from Ang. In the meantime, Ong also appointed another firm of solicitors, M/s T M Hoon & Co ("TMH"), to represent him. On 9 May 2003, TMH wrote to KOP to propose that Chiam apply for a variation of the Order of Court so that he could sell his interest separately from the other tenants-in-common. It was further proposed that the completion date be one month from the date Chiam sorted out the problem of the Order of Court. On the same day, KOP replied to put on record that Ong had terminated the sale and purchase agreement on 24 May 2002. KOP added that Chiam has raised enough money to refund Ong his deposit of \$20,000 and would do so in due course. TMH replied on 12 May 2003 and denied that Ong had aborted the transaction. On 20 May 2003, KOP sent a cheque for the \$20,000 deposit to TMH, who promptly returned the cheque.

14 On 22 May 2003, KOP again sent a cheque for the \$20,000 deposit to TMH and reiterated that the sale and purchase agreement for Chiam's share of the Killiney property had been rescinded. On 27 May 2003, TMH returned the cheque and warned that if Chiam failed to obtain the permission of the court to sell his share of the Killiney property to Ong within ten days, legal proceedings would be instituted to seek the necessary relief.

15 On 30 May 2003, KOP informed TMH that Chiam remained ready, able and willing to return Ong's deposit and demanded that Ong withdraw his caveat on the property by 7 June 2002. On the very same day, KOP served on Ong a notice under cl 5 of the Law Society of Singapore's Conditions of Sale 1999 that the sale and purchase would be annulled in ten days. On 5 June 2003, TMH objected to the notice to annul the sale and purchase agreement and returned the cheque for the \$20,000 deposit. TMH also stated that Ong was now willing to bear the cost of an application to the court for approval of the sale and that Chiam was required to sign the necessary papers in relation to the application. Chiam did not accept Ong's offer to pay for the cost of an application to vary the Order of Court.

16 In due course, Chiam filed this originating summons for a declaration that the sale and purchase agreement between him and Ong for his share of the Killiney property had been rescinded and for an order that the caveat lodged by Ong against his property on 5 April 2002 be removed.

Whether the contract was terminated in May 2002

17 Chiam's assertion that the sale and purchase agreement was orally terminated by Ong on 22 May 2002 at a meeting between his representatives, Oh and Yap, and his lawyer, Ang, who also acted for Ong in the transaction, will first be considered. At the outset, it should be noted that where a contract is required to be evidenced in writing, the discharge of such a contract need not be in writing. This is clear from *Morris v Baron & Co* [1918] AC 1, where the House of Lords held that an oral contract to discharge a contract for the sale of cloth, which was then required to be evidenced in writing, was binding.

18 Chiam's assertion that the contract was orally discharged on 24 May 2002 when Ang met Oh and Yap is untenable for a number of reasons. Ang categorically denied that he had told Oh or Yap that Ong was no longer interested in buying a share of the said property. In any case, Ong could not unilaterally pull out of the contract and Ang rightly pointed out in a letter to Chiam dated 23 May 2003 that if Ong wanted to abort the transaction, he would have sought Chiam's consent for the discharge of the contract. The unchallenged evidence is that Chiam was not asked whether he agreed to the termination of the contract.

19 Secondly, if Ong wanted to terminate the agreement on the ground that it was not possible for him to purchase the Killiney property without a variation of the Order of Court, he would have asked for a refund of his \$20,000 deposit. Chiam took the rather strange position that as he had already spent the money, he would return the deposit only when he had saved up enough money to do so. His evidence as to whether Ong knew about his unusual arrangement was not very satisfactory. When cross-examined as to what his representative, Oh, told him about the meeting with Ang on 24 May 2002, Chiam did not refer to this arrangement at all. He said as follows:

Q What did Oh say?

A He told me that there were problems with the certificate of title and the transaction could not go through.

Q *Was that all?*

A Yes.

[emphasis added]

20 When further cross-examined, Chiam changed his evidence and said that Oh mentioned his financial problems to Ang. However, his answers did not make sense as he said as follows:

Q I put it to you that Oh did not mention anything about the refund of the deposit of \$20,000 to the defendant [at the meeting on 24 May 2002].

A I asked Oh. He said that he asked Jeffrey Ang about this but Ang kept quiet.

Q Was it on the evening of 24 May 2002 [when Oh was telling you about his meeting with Ang] that you told Oh that you had problems refunding the deposit to the defendant?

A Yes.

Q *Not before that date?*

A *That is right.*

[emphasis added]

21 As Chiam claimed that he told Oh about his financial problems only on the evening of 24 May 2002 and not earlier, Oh could not have told Ang earlier on in the day during their meeting that Chiam could not refund the deposit immediately because he was short of cash.

22 Thirdly, Yap said in para 11 of his affidavit as follows:

.... We were unhappy therefore that the ball was being thrown back into our court in that [Chiam] was being asked to engage another lawyer to solve the problem of the Order of Court.

23 If Ong was not interested in the property any more, there would have been no reason for Yap to say that the ball was thrown back in Chiam's court. Yap and Oh were obviously unhappy because Chiam had to do something to complete the transaction with Ong.

24 Chiam's counsel submitted that as Ong did not call Ang as a witness, an adverse inference should be drawn. It should be borne in mind that both parties to this originating summons were quite happy to have the issues determined on the basis of affidavit evidence. When I asked counsel who they would like to question because there were disputed facts, no one suggested calling Ang. Had Chiam's counsel indicated that he would like to question Ang, the latter would have been asked to appear at the hearing. In any case, Ang's letter to Chiam dated 28 May 2002 and his response to the affidavits of Chiam, Oh and Yap were exhibited in Chiam's affidavit. In these circumstances, the question of an adverse inference does not arise.

25 After listening to the witnesses and evaluating their testimony, I prefer Ong's version of events to that offered by Chiam, Oh and Yap. I thus hold that Ong did not terminate the contract for the sale and purchase of Chiam's share of the Killiney property on 24 May 2002.

Clause 5 of the Law Society of Singapore's Conditions of Sale 1999

26 Chiam next asserted that the contract for the sale and purchase of his share of the Killiney property was annulled by his solicitor's notice under cl 5 of the Law Society of Singapore's Conditions of Sale 1999 ("cl 5"), which provides as follows:

5.1 Where the Vendor is:

(a) unable, or

(b) unwilling, because of difficulty, delay or expense or for other reasonable cause,

to remove or to comply with any objection or requisition of the Purchaser as to title, contract, sale plan and these Conditions, the Vendor has the right to annul the sale, notwithstanding any previous negotiation or litigation.

5.2 The Vendor must give the Purchaser not less than 10 days' written notice to annul the sale.

27 Chiam contended that he was entitled to serve a notice of annulment under cl 5 because Ong had no right to insist on a variation of the Order of Court before the completion of the sale and purchase of his share of the Killiney property.

28 The circumstances under which cl 5 may be relied on by a vendor were considered by the Court of Appeal in *Chay Chong Hwa v Seah Mary* [1984–1985] SLR 183, which was upheld on appeal to the Privy Council in [1986] SLR 48. L P Thean J, as he then was, who delivered the judgment of the court, emphasised at 190, [16] that "condition 5 does not confer on the vendor a wide and unfettered right to annul the contract". He added at 189–190, [12] and [16] as follows:

It is obviously a condition for the benefit of a vendor giving him a right in certain circumstances to rescind the contract which has been validly made. Such a condition is undoubtedly of a very

drastic nature, and understandably the courts in exercise of their equitable jurisdiction have evolved certain principles qualifying such right of the vendor....

In determining whether a vendor can avail himself of such a condition the court will look closely at the conduct of the parties to the contract. In particular, in relation to the matter objected to or required by the purchaser to be complied with, the vendor must not have been guilty of 'recklessness' in entering into the contract, and unwillingness on the part of the vendor to meet the objection or comply with the requirement raised by the purchaser must not in the circumstances be unreasonable. A vendor cannot in reliance on such condition arbitrarily, capriciously or unreasonably rescind the contract, and certainly he cannot do so acting in bad faith.

29 Chiam's counsel relied on *Foo Ah Kim v Koo Chen Lim* [1995] 3 SLR 207. In that case, the appellant purchaser entered into an agreement on 11 June 1993 to purchase 125 Joo Chiat Road for \$890,000 with "vacant possession on completion". The contract, which was subject to the Law Society of Singapore's Conditions of Sale 1981, provided that if any encroachment was found to exist on the property, the purchaser would be entitled to rescind the property. A survey of the property revealed that a wooden store straddled the rear of the property and the neighbouring property. Furthermore, the common wall between 125 and 127 Joo Chiat Road was completely within 127 Joo Chiat Road. On 4 August 1993, the purchaser's solicitors informed the vendors' solicitors that the purchaser required the vendors to give good title to the wooden shed that stood partly on 125 Joo Chiat Road and partly on the adjoining property, and the common boundary wall that stood completely on the adjoining property. The vendors agreed to have the wooden shed demolished but this did not satisfy the purchaser. Why she expected the vendor to give her good title to part of the adjoining property could not be fathomed. After the vendors' solicitors served a notice under cl 5 of the Law Society of Singapore's Conditions of Sale 1981 on 19 October 1993, the purchaser withdrew her demand regarding title to the wooden shed but she continued to insist that she be given title to the common wall. Karthigesu JA, who delivered the judgment of the Court of Appeal, pointed out that the vendors were placed in an impossible position. He added that the purchaser's final demand that there be good title to the wall that stood on the adjoining land was merely a ploy to get a reduction in the purchase price. In these circumstances, the court accepted that the vendors were not acting arbitrarily, capriciously or unreasonably when they invoked cl 5 to annul the contract for the sale and purchase of the terrace shophouse.

30 The above-mentioned case is clearly distinguishable from the present case. When considering whether or not Ong's request for a variation of the Order of Court is unreasonable, it should be noted that Chiam's former solicitor, Ang, advised him and Ong that the sale of the former's share of the Killiney property could not be completed unless the Order of Court was varied. All that Chiam was concerned about until he instructed KOP almost one year later was whether or not he had to pay the legal fees for the variation of the Order of Court. He asserted that he was not responsible for the legal fees because Ong had agreed that he was to receive a net amount of \$200,000 for the sale of his share of the Killiney property. As such, he contended that Ong should bear the costs of varying the Order of Court. Such a term was not provided for in the contract of sale and purchase and I do not believe that Ong agreed to such a term.

31 In my view, it was not unreasonable for Ong to insist that the Order of Court be varied before the transaction is completed and especially so after he offered to pay the legal costs in relation to an application to vary the Order of Court, which was made because of the fractious relationship between the co-owners of the Killiney property. Kan J had required all the co-owners of that property, including Chiam, to act in unison to sell the property by public tender and to distribute the proceeds in the proportions specified in the Order of Court. It was obvious that no party to the Order of Court

should act on his own to sell his share, for such a private sale of a share of the Killiney property could complicate matters and delay compliance with the Order. Even if Chiam took his duties to the court lightly, a purchaser in Ong's shoes, with notice of the Order of Court, was entitled to be cautious enough to seek the approval of the court for the sale and purchase of a share of the Killiney property. Whatever may have been his earlier position, Ong finally offered to pay for the legal costs involved in obtaining a variation of the Order of Court. As such, Chiam should have co-operated with Ong by signing the requisite papers for the variation of the Order of Court. In these circumstances, Chiam's refusal to co-operate with Ong was unreasonable. It follows that he was not entitled to rely on cl 5 to annul the contract for the sale of his share of the Killiney property to Ong.

Whether the contract was abandoned by Ong

32 For the sake of completeness, the question of abandonment will be briefly referred. This question arises only if there has been actual abandonment by both sides or where one side creates a situation in which he is estopped from asserting, as against the other party, that he had not abandoned the contract: see *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* [1983] AC 854. In the present case, there was no evidence that Ong led Chiam to believe that he had no further interest in the contract in question. Neither Chiam nor his witnesses raised the issue of abandonment in their affidavits and KOP specifically relied on the termination of the contract by Ong on 24 May 2002 and on their notice under cl 5 of the Law Society of Singapore's Conditions of Sale when they were acting on his behalf. As such, the issue of abandonment need not be discussed further.

Costs

33 As Chiam did not succeed in his application, Ong is entitled to costs.