

Attorney General v Tye Kheng (Pte) Ltd
[2002] SGHC 212

Case Number : Suit 1400/2001
Decision Date : 13 September 2002
Tribunal/Court : High Court
Coram : Lai Kew Chai J
Counsel Name(s) : Leong Wing Tuck and Wilson Hue (State Counsel) for the plaintiff; Cheong Yuen Hee and Patrick Chee Teck Kwong (Chee & Teo) for the defendants
Parties : Attorney General — Tye Kheng (Pte) Ltd

Contract – Contractual terms – Sale and purchase of property – Construction of clause in sale agreement providing for adjustment of sale price

Land – Sale of land – Doctrine of merger – Construction of s 66 of Land Titles Act (Cap 157, 1994 Ed) – Whether buyer's obligation to pay adjusted price extinguishes upon registration of transfer – s 66 Land Titles Act (Cap 157, 1994 Ed)

Limitation of Actions – Equity and limitation of actions – Accrual of cause of action – s 6(1)(a) Limitation Act (Cap 163, 1996 Ed)

Judgment

Cur Adv Vult

GROUND OF DECISION

By this action filed on 7 November 2001 the plaintiff is claiming under the terms of an agreement in writing dated 20 November 1995 against the defendants the sum of \$588,983.10, interest thereon at 6% per annum from the date of the writ to judgment and costs.

The Facts

2 The Urban Redevelopment Authority ("the URA") offered on behalf of the Government 18 parcels of conservation shophouses at Pagoda Street, Singapore which are prominently within the Chinatown vicinage, as part of the Government Land Sales Programme. It was marketed as "an excellent investment opportunity for those who recognise the potential of these historic shophouses to participate in their restoration."

3 The tender documents were contained in a Developer's Packet made available to all interested parties, including the defendants. Enquiry Forms were supplied in each Developer's Packet to facilitate the process of clarification in response to any queries, doubts or uncertainties before the close of the tender in respect of the terms of the tender. The tender documents included the Particulars of Tender, Conditions of Tender, the draft Building Agreement, the draft Lease, Technical Conditions of Sale/Tender, Conditions and Requirements of Relevant Competent Authorities, Structural Report, Conservation Guide Plans, Planimetric Survey "Topographical Plan", Form of Tender and the Tender Brief.

4 6 of these 18 parcels of conservation shophouses along Pagoda Street were put up for public auction. The remaining 12 land parcels, including the subject properties (No. 32 and No. 34), were put up for public tender for leases to be granted to the successful tenders for 99 years upon completion of the restoration works in accordance with the building agreement. The defendants were the successful tenderers of No 32 and No. 34 Pagoda Street ("the Shophouses") and were awarded the tender on 22 August 1995. They signed the building agreement ("the agreement") dated 20 November 1995. It can be seen from the photograph in the Tender Brief that No. 34 Pagoda Street, was a 3-storey corner shophouse and that No. 32 Pagoda Street was an adjacent 2-storey shophouse. The defendants agreed to restore those buildings in accordance with the technical specifications. The intention was to restore them as far as practicable to their pristine condition. In the event, the defendants invested about \$1 million for the restoration works.

5 Under the agreement the sale price for the said land was \$3,080,000.00. The First Schedule to the agreement specified the area of the

Shophouses as 179.9 square metres (which, as described in the contractual documents, will hereinafter be referred to as "the scheduled area"). The provisional and estimated nature of the scheduled area of 179.9 square metres for the Shophouses is very clearly set out in the First Schedule to the Building Agreement and it reads:

"All those pieces of land known as Lots 261pt and 262pt TS 6 and situated in the REPUBLIC OF SINGAPORE as delineated in red on the Plan annexed hereto and also marked as Parcel (422) and estimated to contain an area of 179.9 square metres more or less subject to survey or resurvey, together with the building/buildings erected thereon known as No. 32 and 34 Pagoda Street."

6 Clause 9 of the agreement is central in this case and the entire clause is reproduced below. It is also mirrored in clause 12 of the Conditions of Tender. Clause 9 reads:

"(a) The land parcel is believed and shall be taken to be *correctly described* "except as to its area which shall be subject to Government survey or resurvey." The land parcel is open to inspection and may be viewed by Tenderers on application.

(b) If on completion of Government survey or resurvey, it is found that the area of the land parcel ascertained by such survey or resurvey ("the surveyed area") is either more than or less than the area mentioned in the *foregoing Particulars* ("the scheduled area") by more than 1% of the scheduled area, there shall be a corresponding adjustment of the tendered sale price for the land parcel (hereinafter referred to as "the said sale price") for the difference between the scheduled area and the surveyed area at the rate the successful Tenderer tendered for each square metre of the land parcel as defined below in Condition 12 (e) hereof.

(c) If on completion of Government survey or resurvey, it is found that the *difference between the surveyed area and the scheduled area* of the land parcel is *not more than 1% of the scheduled area*, there shall be no adjustment of the said sale price for the difference between the surveyed area and the scheduled area of the land parcel.

(d) If Government survey or resurvey of the land parcel is *completed only after the said sale price is paid in full to the Authority*, any refund to be made by the Authority as a result of an adjustment of the sale price shall be made in one lump sum without any interest whatsoever and any amount of additional sale price attributable to an adjustment of the said sale price shall be paid in one lump sum without any interest whatsoever by the successful Tenderer within fourteen (14) days of the date of the Authority's notice to such effect. In the event the successful Tenderer shall fail for fourteen (14) days to comply with the Authority's notice as aforesaid, the Authority shall have the right and be entitled to treat the successful Tenderer's aforesaid failure as a breach of these present rights and remedies under Condition 23 hereof or as an event of default which shall entitle the Authority to exercise its rights and remedies set out in Clause 4(ii) of the Building Agreement as the case may be.

(e) The *rate* the successful Tenderer tendered *for each square metre* of the land parcel abovementioned shall be the amount obtained by dividing the said sale price with the scheduled area and rounded off to two decimal points." (Italicised added).

7 On 20 November 1995 the defendants took possession of the Shophouses. They commenced works on 23 August 1996 and the

renovation works were duly and timeously completed. The Government issued the 99 year Lease to the defendants on 27 May 1997 and two days later the Registrar of Titles issued Certificate of Title in which the area of the Shophouses was stated to be 187 square metres.

8 Although legal completion of the agreement had taken place and the Lease was issued, the Government title survey was not completed until the Chief Surveyor had approved the title survey and the Certified Plan on 10 December 1998. On 19 December, 1998 the Chief Surveyor forwarded the title plans and the Certificate of Title Plan to the Land Office and the Registrar of Titles.

9 To understand the disputes which have arisen in this case, I have to dwell on the processes of a survey, the statutory regime governing it and what happened in this particular survey of shophouses.

10 Mr Tan Kok Tiong, Head of Cadastral Survey (East) Section of the Land Survey Department of the Singapore Land Authority provided the relevant evidence. He began his services with the department in 1966. He was formerly the Principal Technical Office of the Survey Department, Ministry of Law until 1 June 2001 when the department merged with three other departments to form the Singapore Land Authority under the Act bearing its name with effect from 1 June 2001.

11 His evidence were substantially as follows. The conduct of cadastral surveys (also previously known as title surveys) by registered surveyors are under the purview of the Chief Surveyor pursuant to the provisions of the Land Surveyors Act and Land Surveyors (Conduct of Cadastral Surveys) Rules. And prior to March 2000, this was pursuant to the Land Surveyors Act and the Land Surveyors (Conduct of Title Surveys) Rules.

12 The creation of a folio for land alienated by the State under the Land Titles Act involves the conduct of cadastral surveys. The conduct of a cadastral survey normally involves a 2-step survey process. The first step requires the registered surveyor to prepare an assurance plan (also known as an RT Plan) which, pursuant to the Land Surveyors Act, is a plan that shows approximate boundaries or dimensions and areas for the purpose of identifying land which has not been surveyed to the satisfaction of the Chief Surveyor but is required to be surveyed under the provisions of any written law. As explained by Mr Tan, this is a provisional plan. In this case, a preliminary survey was carried out. Since there was a party wall and a new substation the provisional plan had to be as close to the proposals as possible.

13 The second step requires a registered surveyor to carry out final title survey and to prepare the Certified Plan. A registered surveyor has to carry out survey field work on the ground. There will be planting of traverses, picking up of boundary marks, refixing of old marks, planting of new marks, checking of the party walls, buildings, encroachments and other details. These field data are recorded in the official Field Book. Next, all field observations and recordings are returned to the office of the registered surveyor for checking and for computations. The aim is to make sure that the survey circuit of the site closes well and that there has been full compliance with the Land Surveyors (Conduct of Title Survey) Rules. In the computations the boundaries of each Lot are set out and from them the final area of the Lot is determined. From them, the registered surveyor produces the Certified Plan.

14 Both the RT Plan and the Certified Plan are prepared and submitted by the registered surveyor to the Chief Surveyor for approval under s.34 of the Land Surveyors Act.

15 The Chief Surveyor will inspect the RT Plan submitted by the registered surveyor to ensure that the lot numbers of the parcels indicated on the RT Plan correspond with the provisional lot numbers issued to the registered surveyor, the provisional boundaries and areas of the lots are reflected on the RT Plan and such related data are complete. The accuracy of the RT Plan remains the responsibility of the registered surveyor. The boundaries, dimensions and areas of the lots surveyed are still not conclusive at this stage and are subject to final title survey.

16 Once the RT Plan is approved by the Chief Surveyor, copies of the RT Plan will be forwarded to the Commissioner of Lands and the Registrar of Titles by the Chief Surveyor. Where the boundaries and dimensions of the land are not conclusive and are subject to final title survey, the Registrar of Titles will, pursuant to s.16 of the Land Titles Act, enter a caution on the new folio created for the land. This caution is subsequently lifted when the boundaries and dimensions shown in the Certified Plan filed with the Chief Surveyor have been approved as conclusive by the Chief Surveyor.

17 In the present case, on or about the 18 September 1995, the Chief Surveyor received a Requisition for Survey No. 419/95 from the

Commissioner of Lands in respect of Parcels 1 to 18 of Conservation Shophouses at Pagoda Street.

18 Consequently, the Chief Surveyor wrote to inform the Director (Land Administration), Urban Redevelopment Authority to engage a private registered surveyor to conduct the title survey under the provisions of the Land Surveyors Act.

19 On or about 4 July 1996, the Chief Surveyor informed the appointed registered surveyor, Mr Tan Eng Fei of M/s EF Tan & Associates Consulting & Registered Surveyors (the "said registered surveyor") of the allocation of provisional lot numbers for Parcels 1 to 18 of the Conservation Shophouses at Pagoda Street and requested him to submit the RT Plan immediately.

20 The said registered surveyor submitted his RT Plan on 1 August 1996. However, due to some queries raised, he was required to redraw the RT Plan.

21 On or about 24 September 1996, the said registered surveyor was informed that RT Plan 11811 submitted by him for Lots 425N to 446M, Town Subdivision 6 (the "subject lots") being the provisional lot numbers allocated for Parcels 1 to 18 of the Conservation Shophouses at Pagoda Street had been approved by the Chief Surveyor on 23 September 1996. *The provisional area of Lot 444L (being the lot number provisionally assigned to Land Parcel 18 of the Conservation Shophouses at Pagoda Street) under the approved RT Plan was 187 square metres.* The RT Plan also carried a note that the boundaries and areas shown are provisional and subject to alteration on final survey.

22 On or about 8 October 1996, the Chief Surveyor forwarded copies of the approved RT Plan to both the Commissioner of Lands and the Registrar of Titles for them to issue the State leases and the Certificates of Titles respectively for the subject lots. The Certificate of Title in respect of Lot 444L was subsequently issued with a caution "The BOUNDARIES and DIMENSIONS of the within land are inconclusive and are subject to survey" and the provisional area indicated therein was 187 square metres.

23 On or about 5 December 1996, the said registered surveyor notified the Chief Surveyor by letter that he would commence final title survey for the subject lots on 10 December 1996.

24 Under s.35(1) of the Land Surveyors Act, a registered surveyor who prepares and signs an assurance plan has to complete the final title survey within 6 months of the Chief Surveyor's approval of the assurance plan. Under this provision, however, the registered surveyor may apply for extension of time to complete the title survey. The Chief Surveyor may in his discretion grant or refuse extensions.

25 The said registered surveyor applied for extensions of time to complete the title survey. The applications for extension of time were granted.

26 On or about 26 January 1998, the said registered surveyor submitted the final title survey to the Chief Surveyor for approval but this was rejected on or about 27 January 1998 on the grounds that the fees payable were not fully paid and their calculations were incorrect. On or about 3 February 1998, the said registered surveyor re-submitted the final title survey to the Chief Surveyor. In the course of inspecting the final title survey submitted by the said registered surveyor, various queries were raised by the Chief Surveyor. The said registered surveyor attended to the queries raised and re-submitted the final title survey on 6 November 1998.

27 The final title survey submitted in respect of the subject lots (as shown on Certified Plan CP 31200) was finally approved by the Chief Surveyor on 10 December 1998.

28 Following this, on or about 19 December 1998, the Chief Surveyor forwarded the title plans and Certificate of Title plans (both of which were reproduced from the Certified Plan submitted by the said registered surveyor) to the Commissioner of Lands and the Registrar of Titles.

29 The Registrar of Titles subsequently lifted the caution on the subject lots and entered the area of 213.3 square metres on the Certificate of Title to Lot 444L.

30 On 18 October 1999 URA notified the defendants that the final surveyed area is 213.3 square metres and that under clause 9 the sum payable was \$588,983.10. Although the sum was payable within 14 days, URA offered the defendants payment of the same by 12 monthly

instalments. The defendants in reply stated that they were surprised by the increase of 18.6% . As this sum was out with their budget, they offered to pay \$250,000 in settlement. This offer was not accepted. As no payment was made this action was commenced.

31 In these proceedings, counsel for the defendants raised 3 defences and a submission about the defendants' liability to pay the GST. I turn to them in that order.

32 First, as a matter of interpretation of the phrase "Government survey or resurvey" in clause 9(b) of the agreement refers only to one survey, namely the Title Survey and not necessarily to the final survey. If this submission is valid, then it must follow that the provisional area of 187 square metres as highlighted in paragraph 21 of this judgment would apply. There would therefore be no adjustment of the tendered sale price and the plaintiff's claims must fail. Counsel in support of his contention made the following points. He asked the court to construe the phrase in a commercial setting as this was after all a commercial bargain. He submitted that the plaintiff is seeking to add the word "final" to the phrase. That is wholly unnecessary. He pointed out that this was a State alienation after the building agreement had been complied with by the defendants. They were issued a Lease under section 11(2) of the State Lands Act, Cap 314. Counsel for the defendants further pointed out that there were in fact two surveys, namely the assurance survey and the final survey. The former usually would be completed by a registered surveyor within 8 weeks and the latter within 6 months. He submitted that "for all practical purposes there were two surveys to be done." The evidence I have heard to the effect that there was one continuous survey, according to counsel for the defendants, satisfies only the technical people. It had no commercial meaning. He noted that section 35 of the Land Surveyors Act required a registered surveyor who signs the assurance plan to go on inexorably and complete the final survey. But that he submitted was no reason to incorporate statutory provisions into the agreement to support the view that only the final survey is meant. He submitted, by way of summary, that neither the statutory regime governing surveys nor the provisions in the Land Titles Act which regulate the issue of Certificates of Title have any bearing on the meaning of the phrase "Government survey or resurvey".

33 I find myself, with respect, unable to accept these submissions. The basic weakness running through all these submissions is the failure to look at the text and context of the phrase in the entire agreement. The aim and purpose of the entire clause is to ascertain the final and not any provisional area of the Shophouses for the adjustment of the tendered sale price. It is made abundantly clear that the scheduled area is an estimate. It is known to all, and it was cautioned time and again, that the RT Plan only showed the estimated area. In practice and under the Land Surveyors Act, the final area is the one submitted by a professional registered surveyor and approved by the Chief Surveyor whose statutory duty is to ensure the accuracy of the relevant survey data. I am satisfied that the intention behind the phrase as expressed in clause 9 is to ascertain the final area of the Shophouses for the purpose of any upward or downward adjustment of the price. The provisional area stated in the RT Plan is just as provisional as that stated in the planimetric plan and it does not make any commercial sense for businessman to determine an adjustment on what is essentially the same estimate. With respect to counsel for the defendants, I have to say that there can only be a sensible interpretation of the phrase in any context if reference is made to the Land Surveyors Act and, on most occasions, to the Land Titles Act.

34 The next submission was that the defendants' obligations to pay the adjusted price was extinguished upon the registration of the transfer by virtue of section 66 of the Land Titles Act. That section reads as follows:

"66. All obligations created by a contract for the sale of registered land shall, upon registration of the transfer giving effect to the contract, be deemed to have merged in that transfer unless express provision in writing is made to the contrary."

35 As pointed out by the State Counsel, section 66, which preserves the common law rule on merger, is not an absolute rule. This has been held in *ACS Computer Pte Ltd v Rubina Watch Co.* [1998] 1 SLR 72 which was approved by the Court of Appeal in *Woon Wee Hao v Coastland Realty Pte Ltd* [1998] 3 SLR 885. I agree with him that a convenient point for consideration would be the case of *Knight Sugar Company Ltd v The Alberta Railway & Irrigation Company* [1938] 1 All ER 266, 269E:

"But it is well settled that, where parties enter into an executory agreement which is to be carried out by a deed afterwards to be executed, the real completed contract is to be found in the deed...The most common instance, perhaps, of this merger is a contract for sale of land followed by a conveyance on completion. All the provisions of the contract which the parties intend should be performed by the

conveyance are merged in the conveyance, and all rights of the purchaser in relation thereto are thereby satisfied. There may, no doubt, be provisions of the contract which, from their nature, or from the terms of the contract, survive after completion. An instance may be found in *Palmer v Johnson*, in which it was held that a purchaser could, after conveyance, rely upon a provision of the contract and obtain compensation. The foundation of this decision was that, upon the construction of the contract, the provision for compensation applied after completion. In other words, the parties did not intend it to be performed by the subsequent deed, and it was therefore not satisfied by, or merged in, that deed".

36 In the present case, the parties intended, upon the construction of the agreement, that the adjustment of the sale price shall take place after the final survey is carried out and the final area is determined and that the adjustment shall take place even if the Lease and the Certificate of Title with the caution are issued. The Certificate of title contained the caution to the effect that the area stated in it was provisional and that instrument, apart from stating that the area was provisional, did nothing else to extinguish the rights of the parties under clause 9 of the agreement.

37 The third submission is the plea of time bar and the defendants rely on section 6(1)(a) of the Limitation Act Cap. 163 which provides that an action founded on a contract shall not be brought after the expiration of 6 years from the date on which the cause of action accrued. Counsel for the defendants submitted that the right of the plaintiff to make a claim for adjustment arose at the date of the contract, i.e. on 22 August 1995 or soon thereafter. He submitted that the plaintiff could have surveyed the site within a week or two from that date. According to him, the action was therefore barred by mid-September 2001, which was over two months before the writ in the present case was filed on 7 November 2001. As noted earlier, the period for a final survey, which has the two stages of the RT Plan survey and the final survey, can straddle more than 6 months under the Land Surveyors Act. On that basis, the defendants' reliance on the plea of time bar has no prospects at all.

38 For the proposition that time began to run from the date of the contract on 22 August, 1995 counsel for the defendants rely on *Donaldson v Hemmant* [1901] 11 Q.L.R. 35. In that case, there was a sale at an auction for certain allotments of land which, prior to the sale, had been marked on the ground with corner pegs bearing identifications and showing the position of the roads laid out. The conditions of sale contained a provision for compensation for errors in description or particulars. It appeared that the plan alleged to be referred to in the sale note did not accurately delineate the allotments as marked on the ground by the pegs. 9 years after the sale, but before the transfer, the plaintiff in that case brought an action against the defendant claiming rescission or damages on the ground of misdescription which resulted in a deficiency in the area. But, not unexpectedly, the claim was held to be time-barred because the vendor's misdescription occurred at the time of the sale. Therefore the cause of action arose from the date of the contract. In my view, *Donaldson v Hemmant* is of no authority for the proposition that in a sale of land where compensation is sought time runs from the date of the contract. The present case contemplates an adjustment in the price, either upwards or downwards, and respectively in favour of the plaintiff or the defendants, and if there is no payment or refund then there is a breach, which would only thereupon give rise to a cause of action.

39 Finally, I turn the question whether the defendants are liable to pay the GST. Under clause 25 (c) of the Conditions of Tender, the defendants agree that they shall "forthwith pay on demand ... whatever amount(s) of GST charged or chargeable in relation to the lease of the land parcel ... by the Authority to the (defendants)". The defendants' liability to pay is therefore clear beyond argument.

40 Accordingly, there will be judgment for the plaintiff as claimed with costs.

Sgd:

Lai Kew Chai

Judge

