

Boey Tien Seng and Another v Saw Chee Kian and Another (Sadique Marican & Z M Amin (a firm) and Another, Third Parties)
[2008] SGHC 204

Case Number : Suit 696/2007
Decision Date : 12 November 2008
Tribunal/Court : High Court
Coram : Kan Ting Chiu J
Counsel Name(s) : Oon Thian Seng and Poonaam Bai (T S Oon & Bazul) for defendants; Brown Anthony Pereira (Brown Pereira & Co) for second third party
Parties : Boey Tien Seng; Neo Aik Geok — Saw Chee Kian; Gean Saw alias Ong Yee Chin — Sadique Marican & Z M Amin (a firm); Lim Eng Kiat

Contract – Misrepresentation

Equity – Fiduciary relationships

12 November 2008

Judgment reserved.

Kan Ting Chiu J:

1 In this action there are two plaintiffs, two defendants and two third parties. The plaintiffs are the purchasers of a flat at Block 63 Choa Chu Kang Loop, #01-05, Singapore, and the defendants are the owners of the flat. The plaintiffs sued the defendants for specific performance of an agreement for the sale of the flat. The two defendants, Saw Chee Kian and Gean Saw @ Ong Yee Chin, brought in the two third parties. The first third party is the firm of solicitors which acted for them in the sale (until the defendants appointed another firm to act in their place), and the second third party, Lim Eng Kiat @ Dean ("Dean Lim"), is the housing agent who dealt with the defendants (particularly the second defendant) in the sale of the flat.

2 When the action came on for hearing before me, the action between the plaintiffs and the defendants had been settled and the defendants had completed the sale and agreed to pay damages for late completion as well as costs. The first third party had also come to a settlement with the defendants whereby it was to contribute towards the defendants' payments to the plaintiffs.

3 The outstanding claim is the defendants' claim against Dean Lim for damages for:

- a. Negligently and/or fraudulently making representations to the Defendants, in reliance of which the Defendants were induced grant [*sic*] the Plaintiffs an Option to Purchase the Property.
- b. Breaching his fiduciary duties to the Defendants, as an agent of the Defendants in putting himself, without the informed consent of the Defendants in a position whereby his duty to the Defendants would be conflicted.[\[note: 1\]](#)

They will be referred to as the representations claim and the fiduciary duties claim respectively.

4 For the representations claim, the defendants alleged that Dean Lim made three representations (representations (a), (b) and (c)) that:

- a. [T]he market value of the Property as at 5 April 2007 was S\$550,000.00 and that there

was no need for a further valuation of the Property.

b. [T]he market value of the Property and the rental value of the Property would not rise within the year.

c. [The second defendant] would not need to top up [her] CPF account, despite the fact [she] was making a huge loss if [she] were to sell the Property at S\$550,000.00.[\[note: 2\]](#)

The 'CPF account' referred to the second defendant's account with the Central Provident Fund. The term 'top up' was used to describe the necessity for the second defendant to use her own funds to pay back into her CPF account a part of the amount that she had withdrawn from the account to buy the flat.

The background

5 The defendants were married to one another when they bought the flat in 1993 for about \$813,000. By the time the flat was put up for sale, they were divorced, and the second defendant was solely involved in attending to the sale of the flat.

6 To this end, she issued to a housing agency PN Realty Pte Ltd ("PN"), an "Exclusive Authorisation to Sell" dated 5 December 2006 ("the authorisation"). The salient part of the authorisation read:

The undersigned Owner hereby irrevocably grants M/s PN Realty Pte Ltd (hereinafter known as "the Broker") the sole and exclusive right to sell the property at 63 Choa Chu Kang Loop #01-05 (Northvale) Singapore (689669) for a period of (3) months commencing from 04/12/06 to 03/03/07 (hereinafter known as the "said period") and upon the expiration of the said period the exclusive authorisation and right to sell shall continue until and revoked by the Owner(s) giving two weeks written notice to the Broker in advance. The expected selling price is S\$550,000.

7 The defendants acknowledged they appointed PN as their agents and that Dean Lim was an agent of PN. It was not the defendants' case that they had entered into any agreement with Dean Lim.

8 Dean Lim was an employee of PN. He was PN's representative whom the second defendant dealt with. In dealing with the second defendant and the flat, he worked together with a colleague Ong Chee Khoon @ Chavez ("Chavez Ong").

9 After the authorisation was issued, Dean Lim and Chavez Ong made efforts to sell the flat, but were unable to find a buyer for several months. It was not until early April 2007 that they secured an offer from the plaintiffs to buy the flat for \$550,000.

10 Together with the offer, they also received from the plaintiffs a cheque for \$5,500 as payment of the option fee. Armed with the cheque, Dean Lim and Chavez Ong went to the second defendant's residence. By their account, the meeting was on 6 April 2007, while the second defendant deposed in her affidavit of evidence-in-chief that it was on 5 April 2007, but when her attention was drawn to the fact that the option was dated 6 April 2007, she conceded that the meeting may have been on the later date.[\[note: 3\]](#)

11 The second defendant deposed in her affidavit of evidence-in-chief that[\[note: 4\]](#):

16. At my place, [Dean Lim] informed me that he had found a buyer for the Property at S\$550,000.00. I informed him that I did not wish to sell the Property and had already informed him that I wished to rent out the Property instead.

17. [Dean Lim] and his colleague informed me that the market for rental of Property was bad and that I would only be able to earn less than S\$2,000.00 a month from renting out the Property.

18. I then asked [Dean Lim] if it was possible to do another valuation of the Property as the last valuation was done sometime in or about December 2007 and the value of the Property may have risen in the interim.

19. [Dean Lim] refused. He stated that the expected selling price of S\$550,000.00 for the Property was an accurate reflection of the price of the Property as of 5th April 2007. He repeatedly stated that I would not be able to obtain a better price for the Property even if I was to wait for a further year.

Dean Lim denied the above allegations^[note: 5] and Chavez Ong corroborated.^[note: 6]

12 I shall consider the evidence relating to these representations.

Representations (a) and (b)

13 The price of \$550,000 was fixed before the second defendant met Dean Lim and Chavez Ong. Before issuing the authorisation to PN, the second defendant had appointed another agent to sell the flat for \$550,000. After that agent failed to find a buyer after three months, she met with Dean Lim and Chavez Ong on 5 December 2006. She told them that the price was \$550,000, and it was inserted into the authorisation.

14 Dean Lim recounted in [11] and [12] of his affidavit of evidence-in-chief that:

11. At the end of our presentation, the 2nd Defendant decided that she would engage our company as the exclusive agents to market the Property. She said that she would give our company exclusive rights for three (3) months to market the Property but only if we could seek her asking price of \$550,000.00 and she further instructed that she would not accept anything below that price. She then set a further condition that the commission payable be fixed at only 1.5% of the selling price even though the market practice of our company was 2%. She seemed like a very astute seller who had done much of her homework and hence setting the many conditions for us to comply.

12. The sale price of \$550,000.00 was fixed by the Defendants themselves and the 2nd Defendant informed me that she had arrived at this figure after cross referencing with her bankers.

15 This part of Dean Lim's evidence was not disputed, and it confirmed that the second defendant was not relying on Dean Lim's advice to fix the price on 5 December 2006.

16 After the price was fixed again at \$550,000 on 5 December 2006, the second defendant did not receive any offers until 6 April 2007. This was not a situation where offers were coming in, and the second defendant was undecided on the price to hold out for. To the contrary, she was unable to get an offer of \$550,000 for the three months when the first agent was acting, and for another four

months after the exclusive authorisation was given to PN.

17 In these circumstances, it was not likely that the second defendant thought that the market value of the flat may have been higher than \$550,000 on 6 April 2007, or that the property values and rental of the flat would rise within a year. It was more probable that she was relieved and contented to accept the offer that finally came from the plaintiffs.

18 For this reason, I accept the evidence of Dean Lim that he had not informed the second defendant that the market value of the flat was \$550,000, that there was no need for a further valuation and that property and rental values would not rise within a year.

19 There is a further point to be noted. While the defendants' case was that Dean Lim had made the representations, they did not adduce any evidence that the alleged representations were wrong.

20 Counsel for the defendants applied at the opening of the trial for leave to introduce the affidavit of evidence-in-chief of an additional witness, a valuer, that the market price of the flat had increased between 5 December 2006 and 6 April 2007.

21 I refused leave for the evidence to be adduced. The defendants had the opportunity during the pre-trial conferences to give notice of the witnesses they intended to call and obtain directions for the filing and exchange of affidavits of evidence-in-chief. If they had felt that expert evidence was necessary, they should have provided for it. They cannot come at the last minute and put in the evidence. If they were allowed to do that, they would have secured an unfair advantage in that Dean Lim would not have time to instruct his own expert to examine and to respond to the defendants' expert evidence.

22 Without expert evidence (or any other evidence), there was no basis for the defendants to allege that the alleged representations were false or wrong, and this was a fatal shortcoming for this part of the defendants' case.

Representaion (c)

23 The second defendant's evidence was that she was very concerned that she would have to top up her CPF account when the flat is sold. She deposed in her affidavit of evidence-in-chief:

20. I told [Dean Lim] that if I needed to top-up my Central Provident Fund ("CPF") account before I could sell the Property, I would not sell the Property. I was very insistent on not having to top-up my CPF and made it very clear to him that I would not sell the Property if I was required to do so.

21. [Dean Lim] then assured me that I would not have to top-up my CPF account. I had highlighted to [Dean Lim] that if I were to sell the Property at the expected asking price of US\$550,000.00 [sic] I would be making a huge loss, having initially purchased the Property for S\$813,000.00. As such, I was of the view I would be required to top-up my CPF account. However, [Dean Lim] assured me that this was not the case and I would definitely not need to top up my CPF account.

[Emphasis added]

24 The second defendant is a certified financial planner by profession, and to obtain her certification, she studied cash flows and assets liability. [\[note: 7\]](#) She believed that money withdrawn

from her CPF account for the purchase of the flat may have to be paid back into the account when she sold the property.

25 In addition to their CPF funds, the defendants also took a housing loan from the DBS Bank for the purchase of the flat. This loan was subsequently refinanced by Keppel TatLee Bank which gave the defendants two loans, a housing loan and a term loan, secured on the flat.

26 The second defendant had not informed Dean Lim about these loans.[\[note: 8\]](#) She ought to have done that because Cl 5 of the authorisation stated that:

The Owner warrants that he has made full and frank disclosure in respect of all facts pertaining to the property and agrees to furnish the Broker's prospective buyers all data, records and documents pertaining to the said property.

The term loan taken had a material bearing on the CPF top up that the second defendant had to make.

27 Dean Lim deposed in his affidavit of evidence-in-chief:

47. The Defendants had utilized CPF funds for the purchase of the property and it is a condition of the use of CPF funds that mortgagee's (bank's) ranking for the purchase of the property will only be accorded priority for the initial housing loan taken at the material time of purchase. Any subsequent increase in facilities taken by a Mortgagor of the property will be ranked priority after the CPF Board's Statutory Charge.

28 This was explained further during the trial and the position appeared to be that the second defendant would not have to top up her CPF account if she had taken only a housing loan on the security of the flat. But when she took the additional term loan, she had to top up her CPF account if she wanted to sell the flat.

29 A review of the second defendant's conduct raised doubts as to whether she was really concerned about having to top up her CPF account. When she issued the authorisation on 5 December 2006 to sell the flat at \$550,000, she did not discuss that with Dean Lim. Why did she become anxious over that on 6 April 2007 when she issued the option to purchase the flat at the same price? If she was concerned, why did she fail to inform Dean Lim about the two loans? As a professional financial planner, she should have known that proper advice can be made only if all the relevant facts are taken into consideration.

30 When she was asked to explain why she believed Dean Lim's assurance that no top up was required when he did not have the necessary information, she could only say that she had been stupid to do that,[\[note: 9\]](#) but during the trial she did not come across as stupid.

31 The second defendant's lack of concern in December 2006, and the non-disclosure of the two loans even up to 6 April 2007 were inconsistent with her professed anxiety and decision not to sell the flat if a CPF top up was necessary.

32 To support this part of their case, the defendants also relied on the evidence of Kelvin Lee Ming Hui ("Kelvin Lee"), the lawyer who acted for them when they completed the sale of the flat to the plaintiffs. Kelvin Lee's evidence was that in a telephone conversation in September 2007, Dean Lim had admitted that he had assured the second defendant that no CPF top up was needed. Kelvin Lee deposed in [8] of his affidavit of evidence-in-chief that Dean Lim had informed him that he:

... had represented to the 2nd Defendant that there was no need for her to top up her Central Provident Fund ("CPF") account for the sale of her property at 63 Choa Chu Kang Road #01-05 Singapore 689669 ("the Property").

33 When he was cross-examined by counsel for Dean Lim, Kelvin Lee said that Dean Lim had told him:

Actually, I only told them no need to top up because ... *normally* you don't have to top up.[\[note: 10\]](#)

and

I told them no need to top up because *normally* there's no need to top up.[\[note: 11\]](#)

[Emphasis added]

34 The introduction of the word "normally" qualified the statement that suggested that Dean Lim knew that he did not have all the facts, and that he could not take a conclusive position on the second defendant's case.

35 Looking at all the evidence, I find that the second defendant may have asked on 6 April 2007 whether a CPF top up had to be made, but I do not accept that she informed Dean Lim that she would not sell if she had to top up. As she did not inform Dean Lim of the two bank loans secured on the flat, Dean Lim had only informed her that no top up is necessary in the normal situation.

36 In the final analysis, I find that the second defendant had not asked Dean Lim for a firm assurance that she would not have to top up her CPF account, and that Dean Lim had told her that in a normal case, no topping up was necessary.

The fiduciary duty claim

37 This claim was relied entirely on the evidence of Kelvin Lee. In his affidavit of evidence-in-chief, Kelvin Lee deposed that Dean Lim informed him during a telephone conversation in September 2007 that the plaintiffs were his clients.[\[note: 12\]](#) When he was questioned about Dean Lim's use of the word "clients", Kelvin Lee elaborated that:

A ... So I asked him, "Do you know the - - do you know the plaintiffs?" Then he said, "Oh yah, they are my clients also." That's what he said.

Q What else did he say about being clients? Did you clarify with him what he mean by "clients"? It's a --- it's a big word.

A No, no, I --- I didn't.

Q Why didn't you?

A Er, I mean, I operated on the assumption that, you know, housing agent has --- has clients and those were his clients, that's all. I mean, I didn't think it was a very complicated issue that needed clarification.

Q So you didn't probe further on the word "client" ---

A No, I didn't.[\[note: 13\]](#)

38 In his affidavit of evidence-in-chief, Dean Lim deposed that:

I had never acted as agent for the Plaintiffs and never did I receive any remuneration fee, commission or other remuneration from the Plaintiffs in any way whatsoever.[\[note: 14\]](#)

39 When he gave evidence, counsel for the defendants put to him:

Q I also put it to you that in that same conversation, you told Mr Kelvin Lee that the plaintiffs were your clients.

A I used the words "your clients" as agents used it oftenly, it is like, you know, anyone called us, we will say, "Okay, this is my client". It's just loosely used as a term. I understand that in --- in law, it's different, after my lawyers tell me that, because any --- because agents just use the term "my client". We just called up, "You know, my client hope to view your place, will you be able --- will you be available"; you know, we just use it "my client".[\[note: 15\]](#)

...

Q --- if a buyer contacts you, any buyer contacts you, you would call that buyer "a client" as well?

A We would take it as they --- after they viewed the place, then we would take it as something like we just called them as "a client", you know, as a client, just --- if not, I don't know what other words to use to, you know, address them as what, you know. I --- we --- we --- usually, we just use the simple word as "client" lah, that's what our understanding.[\[note: 16\]](#)

40 Counsel did not suggest to Dean Lim that he could not have used the word "clients" that way, and counsel did not put to him that there was in fact a relationship between him and the plaintiffs that gave rise to a conflict of interests when he acted for the defendants in selling the house.

41 The defendants did not lead any evidence from other housing agents that the term "clients" is never used by members of the profession in the way Dean Lim described. The defendants also appear not to have made any effort to verify with the plaintiffs their relationship with Dean Lim, or if they had made enquiries, they did not disclose the response.

42 On the evidence, except for Dean Lim's use of the word "clients", there was no basis for the defendants to allege that there was a conflict of interests. Dean Lim's explanation that he had used the term loosely to include potential buyers he showed houses to, and that he had not acted as an agent for the plaintiffs and did not receive any payment was not challenged or contradicted.

43 Nevertheless, in the closing submissions, it was submitted that:

It is clear that the 2nd Third Party was acting both for the Plaintiffs and the Defendants for the transaction of the Property.[\[note: 17\]](#)

without referring to Dean Lim's evidence that he was acting for the defendants and was not acting for the plaintiffs.

44 The defendants' fiduciary duty claim fails because the primary fact that Dean Lim had acted for

the defendants and the plaintiffs was not proved.

Conclusion

45 The defendants' claim against the second third party is dismissed with costs.

[\[note: 1\]](#) Defendants' Statement of Claim (Amendment No. 1) against the Third Parties, para 6

[\[note: 2\]](#) Affidavit of Gean Saw @ Ong Yee Chin dated 16 April 2008, para 25

[\[note: 3\]](#) Notes of Evidence page 49 lines 29-32

[\[note: 4\]](#) Affidavit of Gean Saw @ Ong Yee Chin dated 16 April 2008

[\[note: 5\]](#) Affidavit of evidence-in-chief of Lim Eng Kiat dated 10 April 2008 paras 43 and 45

[\[note: 6\]](#) Affidavit of evidence-in-chief of Ong Chee Khoo dated 10 April 2008 para 24

[\[note: 7\]](#) Notes of Evidence page 23 lines 17-26

[\[note: 8\]](#) Notes of Evidence page 56 line 21 – page 57 line 2

[\[note: 9\]](#) Notes of Evidence page 62 line 26 – page 63 line 16

[\[note: 10\]](#) Notes of Evidence page 110 lines 17-18

[\[note: 11\]](#) Notes of Evidence page 111 lines 20-21

[\[note: 12\]](#) Affidavit of evidence-in-chief of Kelvin Lee para 8b

[\[note: 13\]](#) Notes of Evidence page 112 lines 19-30

[\[note: 14\]](#) Affidavit of evidence-in-chief of Lim Eng Kiat para 75

[\[note: 15\]](#) Notes of Evidence page 155 lines 13-20

[\[note: 16\]](#) Notes of Evidence page 156 lines 6-12

[\[note: 17\]](#) Defendants' Closing Written Submissions para 103

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