Bonsel Development Pte Ltd v Tan Kong Kar and Another
[2000] SGCA 45

Case Number : CA 201/1999

Decision Date : 24 August 2000

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; L P Thean JA; Yong Pung How CJ

Counsel Name(s) : CR Rajah SC and George Pereira (Pereira & Tan) for the appellants; Shankar Kumar and N Sreenivasan (Rajah & Tann) for the respondents

Parties : Bonsel Development Pte Ltd — Tan Kong Kar; Another

Contract – Contractual terms – Conditions precedent – Difference between condition precedent to formation of contract and condition precedent to performance of contractual obligations – Option to purchase property – Option clause that sale "subject to" sellers removing caveat lodged by original purchasers – Sellers failing to remove caveat after taking all reasonable steps – Sale not completed – Whether clause imposes absolute obligation on sellers to remove caveat – Whether other clause requiring seller to convey property free of encumbrances germane to construction of 'subject to' clause

(delivering the grounds of judgment of the court): This appeal pertained to the construction of a clause in a sale and purchase agreement of a real property as to whether the sellers were entitled in the circumstances that occurred to be excused from the performance of the contract. At the conclusion of the hearing we agreed with the contention of the sellers and allowed the appeal. We now give our reasons.

Background

The sellers (the appellants) were the developers of a property known as No 53 Mariam Walk, Singapore (`the property`). The property was initially sold by the appellants to Ong Puay Guan and Quan Cher Lee (`the original purchasers`) by an agreement dated 2 September 1994 (`the original agreement`). The original purchasers lodged a caveat against the property as purchasers. However, they failed to make payment in accordance with the original agreement. On 5 January 1998, the appellants gave the original purchasers 21 days` notice to pay up the outstanding instalments, failing which the original agreement would be terminated. The notice was not complied with. It would appear that on 12 May 1998, the original purchasers wrote to the appellants explaining their predicament and asking that the original agreement be terminated. However, on 20 May 1998, the appellants replied insisting that the original purchasers fulfil their obligations under the original agreement.

Early in 1999, the respondents who were husband and wife, expressed their interest in buying one of the appellants` houses. On 11 January 1999, the appellants granted to the respondents an option to purchase the property (`the option`) at the price of $1,015,000, which option was valid for 14 days. As at the time the caveat lodged by the original purchasers was still on the register, cl 10 was inserted by the appellants in the option. This clause which lay at the very heart of the action, and this appeal, read as follows:

> *The sale of the property is **subject** to us [the appellants] removing the existing caveats lodged against the property and in the event we are unable to do so by the completion date, completion shall take place two (2) weeks from the date the said caveats are removed.` [Emphasis added.]*

However, on 23 January 1999, two days before the expiry of the option, the appellants` solicitors wrote to the respondents` solicitors, stating as follows:

> *As we informed you, the caveat referred to in cl 10 of the option is the caveat lodged by the previous purchasers of the property. Their sale and purchase agreement with our clients was annulled after the expiration of the 21 days` notice. We have written to the solicitors to withdraw their clients` caveat. We have now been informed by them that their clients wish to proceed with the purchase. We have informed them that it is not possible and have given them notice that if their clients` caveat is not withdrawn, we will commence legal proceedings against their clients to have the caveat removed.* ***Please take note that the sale is subject to the said caveat being removed****. [Emphasis added.]*

Notwithstanding the appellants` solicitors` letter of 23 January 1999, the respondents nevertheless exercised the option and paid the deposit of 10% of the purchase price (less the option sum) to the appellants` solicitors on 25 January 1999. As provided in the option, the sale was scheduled for completion on 5 April 1999, but it was never completed. In the meantime, on 24 February 1999, the appellants instituted proceedings against the original purchasers to have their caveat removed as they refused to do so voluntarily. Unfortunately, the action failed. Thus on 18 May 1999, the appellants` solicitors informed the respondents that the appellants could not proceed with the sale of the property to them. In the light of this turn of events, the respondents ended up purchasing an identical property at No 49 Mariam Walk, but at a higher price of $1,290,000.

The respondents instituted an originating summons for a declaration that the appellants were in breach of contract and an order for damages to be assessed. Their claim was allowed by the court below, which made a declaration that the option became a valid binding contract as of the date of its exercise by the respondents (ie 25 January 1999), and that the contract was breached by the appellants` notice of 18 May 1999. It also ordered that the damages suffered by the respondents be assessed.

In coming to its decision the court took the following considerations into account. First, cl 10 was not a condition precedent to the formation of a binding contract. Second, cl 10 provided for postponement of completion if the caveat could not be removed in time; it did not provide what would follow if the caveat could not be removed at all. Third, the appellants were to give title to the property free from encumbrances and the object of cl 10 was to give the appellants more time to remove the caveat. Fourth, the factual matrix at the time the option was granted was consistent with the obligation of the appellants of removing the caveat as being absolute as the appellants were then of the impression that the original sale had been cancelled and all that needed to be done was to have the caveat removed. Thus, the only thing which the parties anticipated could upset the completion was a possible delay in getting the caveat removed on time. Finally, as the agreement was drawn by the appellants, the contra proferentum rule should be applied.

Meaning of `subject to`

It will be noted that cl 10 can clearly be divided into two parts. The crucial element in the first part are the words `subject to`. The learned judge is quite correct to observe that this does not constitute a condition precedent to the formation of a contract. Indeed, upon the respondents accepting the option a contract had come into being. However, a distinction should be drawn between clauses which are conditions precedent to the existence of the contract and those which

are conditions precedent to the performance of the obligations under the contract.

This important distinction came up for consideration in this court in **Lim Hwee Meng v Citadel Investment Pte Ltd** [1998] 3 SLR 601 . There the vendor purported to grant an option to purchase a piece of land to the purchaser. Clause 5 of the option provided as follows:

> *The purchase herein by a company is subject to the company obtaining the approval of the Land Dealings Unit or other government approval for the purchase on or before completion.*

The purchaser failed to complete the purchase, and the vendor, after serving 21 days` notice to complete, forfeited the purchaser`s deposit. As the approval of the Land Dealings Unit had yet to be obtained at the date of the option, one of the issues considered was whether cl 5 of the option prevented a binding contract from coming into existence between the parties. Lai Kew Chai J, delivering the judgment of the court, said (at p 616):

> *The clause was a condition precedent, not to the existence of a contract, but to the performance of the principal obligations under the contract ... If the Land Dealings Unit gave the requisite approval, the principal obligations under the contract, namely, the sale and purchase of the property, would then accrue. If not, the parties would be released from their obligations under the contract. Pending the application to and the decision of the Land Dealings Unit, there remained in existence a contract which bound both parties and which neither party could disavow, notwithstanding that the principal obligations under the contract, namely the sale and purchase of the property would not accrue until the requisite approval was obtained.* ***Clause 5 did not therefore preclude the formation of a contract between the appellant and the respondent*** *... [Emphasis added.]*

In coming to its decision, the court in ***Lim Hwee Meng*** adopted the approach taken in **Smallman v Smallman** [1972] Fam 25 where a husband and wife entered into an agreement with regard to their matrimonial property, subject to the approval of the court. The husband sought to resile from the agreement arguing that until the approval of the court was obtained there was no binding agreement between the parties. The argument was rejected by the English Court of Appeal. Lord Denning MR said (at p 31):

> *In my opinion, if the parties have reached an agreement on all essential matters, then the clause `subject to the approval of the court` does not mean there is no agreement at all. There is an agreement, but the operation of it is suspended until the court approves it. It is the duty of one party or the other to bring the agreement before the court for approval. If the court approves, it is binding on the parties. If the court does not approve, it is not binding. But, pending the application to the court, it remains a binding agreement which neither party can disavow. Orr LJ has drawn my attention to a useful analogy. Many contracts for the sale of goods are made subject to an export or import licence being obtained. Such a condition does not mean that there is no contract at all. It is the duty of the seller of the buyer, as the case may be, to take reasonable steps to obtain a licence. If he applies for a licence and gets it, the contract operates. If he takes all reasonable steps to obtain it and it is refused, he is released from his obligation. If he fails to apply for it or to do what is reasonable to obtain it, he is in breach and liable to damages.*

We may add that this court in **Chip Thye Enterprises Pte Ltd v Development Bank of Singapore Ltd** [1994] 3 SLR 613 , also had the occasion to consider such a `subject to` clause. There the clause in the option for the purchase of land read:

> *The sale and purchase is subject to the purchaser obtaining an extension of the written permission for planning approval for the development of two pairs of semi-detached bungalows on the property ...*

LP Thean JA, delivering the judgment of this court, said that the clause (at p 621):

> *certainly does not operate as a condition precedent to the formation of a binding agreement for the sale and purchase of the property. It is a term or condition of the sale agreement and until the term or condition is fulfilled or waived, the parties are under no obligation to complete the sale and purchase of the property.*

Therefore, what such a `subject to` clause means (like cl 10 herein) is that while a binding contract has come into being its performance is postponed until the occurrence of the specified event. And if the event requires action by one party, then that party must take all reasonable steps to achieving that end. Such a party cannot do nothing and claim that the condition has not materialized, thus exonerating himself from fulfilling the contractual obligation. Such a duty was alluded to by Denning MR in ***Smallman*** and we have quoted what he said above. In ***Lim Hwee Meng*** (at p 616) this court made the point in these terms:

> *There was an implied promise by the purchasers, in this case the respondents, to take reasonable steps to obtain the requisite approval from the Land Dealings Unit before the completion date. If the respondents failed to take reasonable steps to obtain the requisite approval, they would be in breach of contract and liable for damages.*

This distinction between the two types of condition precedent as mentioned above, was also adopted by the courts in Australia: see **Lombardo v Morgan** [1957] VR 153 and **Perri & Anor v Coolangatta Investment Pty Ltd** [1982] 149 CLR 537, the latter being a decision of the Australian High Court. In the latter case, Gibbs CJ said (at p 541):

> *In my opinion special condition 6 made the completion of the sale of the property at Lilli Pilli a condition precedent to the performance of certain of the obligations of the parties under the contract, including the obligation of the respondent to complete a sale ... The condition in the present case was not a condition precedent to the formation of a binding contract. It is clear that binding contract came into existence immediately upon signature, and that the parties to it were from that moment subject to certain obligations.*

Later in his judgment Gibbs CJ then went on to explain how the special condition, albeit not preventing the coming into being of a binding contract, was capable of excusing both parties from further performance (at p 546):

> *In the present case no doubt the appellants might have been given a notice requiring them to make reasonable efforts to sell, but they could not have been required to make a sale,* ***for that was beyond their power*** *... For these reasons I consider that when the time has elapsed for performance of a condition which is not a promissory condition, but a condition precedent to the obligation to complete a contract of sale, either party, if not in default, can elect to treat the contract as at an end if the condition has not been fulfilled or waived ... [Emphasis added.]*

We think, with respect, that the learned judge below did not appear to appreciate the distinction between a condition precedent to the formation of a contract and a condition precedent to the fulfilment of the obligations under the contract. She seemed to think that once a binding contract had come into being, with the acceptance of the option, that was it. This can be seen from the following comment of hers:

> *A consequence of this is that there is no necessity to read into cl 10 a duty on the defendants (the appellants) to co-operate by taking reasonable steps to procure fulfilment of the condition.*

Second limb of cl 10

If cl 10 had consisted entirely of the first limb, it would have been clear beyond argument that as the caveat could not be removed after the appellants had taken all reasonable steps in relation thereto, both parties would be released from their contractual obligations. So the question that remains is whether the fact that the clause goes on to provide that in the event the caveat is not removed by the completion date, completion of the transaction would be postponed and would take place two week from the date the caveat is removed, alters the position.

We would now set out the way in which the learned judge below viewed the second half of this clause by quoting her:

> *15 ... In contrast, the sole consequence under cl 10 for the defendants` failure to remove the caveat by completion (and not simply the failure alone) was the postponement of completion pending the removal. Although it might be implied that if there was no such removal, there would be no completion,* ***expressio unius est exclusio alterius*** *: the expression of one thing is the exclusion of another.*
>
> *16 ... In contrast when properly construed cl 10 by reference to the `sale of the property` and `completion date`, as opposed to the agreement in general or some aspect of title, was concerned with the time of performance of the defendants` obligations to complete the sale of the property.*
>
> *17 Thus, construing the defendants` undertaking to remove this caveat as absolute was perfectly consistent with their obligation in any case to give title free from encumbrances. Seen in this light, the objective of cl 10 was to provide the defendants with an extension of time for completion date pending removal, should this take longer than expected. ...*

It is important to bear in mind what precisely does the second limb seek to achieve. It provides that in the event the caveat is not removed by the time of the scheduled date of completion, completion will take place two weeks from the date the caveat is actually removed from the register. Essentially, it fixes the new completion date. In our view, it would be reading too much into that limb to say that it qualifies or narrows down the scope of the first limb. The meaning of the first limb is clear: the sale was subject to the removal of the caveat. It is obvious that no sale can take place unless and until the caveat is removed.

It seems to us that cl 10 should be construed in a manner to give it business efficacy. At the time the option was granted, the caveat was there. It had to be removed. The parties addressed their mind to the possibility of there being some delay in removing the caveat. But this can in no way suggest that the appellants warrant that the caveat would be removed. In the option, the parties did not expressly address the question of the possibility that the caveat could not be removed at all. It may be true that the appellants, and probably the respondents too, were confident of having the caveat removed. But it seems to us obvious that had the parties at the time asked themselves the question what would be the position if the caveat could not be removed, the answer would be an unequivocal `the deal is off`. There could not have been any other sensible answer. We do not think the respondents would, at that point, wish to get entangled in litigation. As we see it, it was the subsequent appreciation of property prices which was the cause of all the problems. In our opinion, cl 10 does not impose an absolute obligation on the part of the appellants to have the caveat removed.

Other reasons

As indicated earlier, in coming to her decision, the learned judge had also relied upon other ancillary reasons. One of them is cl 5 of the option which provides that the appellants are required to convey the property free from encumbrances. She felt that construing the appellants` undertaking to remove the caveat as absolute was consistent with the appellants` obligation to give title free from encumbrances. While we agree that the two are not necessarily inconsistent, we do not think that cl 5, which is a standard clause requiring a seller to give a clean title, is really germane to the construction of cl 10, a provision specially inserted to cater for the particular circumstances in hand.

Another point raised in argument by the respondents was that while the appellants had wanted to rescind the original agreement, it was the appellants themselves who insisted, by their letter of 20 May 1998, that the original purchasers should perform the original agreement. That was the reason why the appellants failed to get the caveat removed. We do not think there is anything in this point. Whether or not the letter of 20 May 1998 could be construed as a waiver of the appellants` right to rescind the original agreement, the indisputable fact is that all these occurred long before the appellants granted the option to the respondents. Nothing was done by the appellants after the option was granted which jeopardized the appellants` efforts to have the caveat removed. The sale to the respondents was subject to that express condition that the caveat be removed. The appellants had taken all reasonable steps to obtain the removal but failed. Thus they had not breached cl 10 of the option.

The present case must be distinguished from that in **Selvadurai Pala Krishnan & Partners v Francis Adrian & Co Pte Ltd** SLR 403 ; [1985] 2 MLJ 182 which was relied upon by the respondents. There the contract was subject to the buyer obtaining JTC`s approval for the use of the property as `manufacturing wooden container sleeves`. The buyer instead of seeking approval only for their purpose also sought approval for the `storage of stuffed containers`. The buyers sought to terminate

the contract on the ground that the approval could not be obtained and asked for a refund of the deposit. The court held that the termination was wrongful as the delay in obtaining JTC`s approval was due wholly to the fact that the buyers sought approval also to use the premises as `storage of stuffed containers`, which was something not provided in the contract.

Judgment

For the above reasons, we differed from the learned trial judge on the construction of cl 10 and allowed the appeal with costs, here and below. The security for costs lodged by the appellants (together with any accrued interest) was ordered to be refunded to the appellants.

Outcome:

Appeal allowed.