Ong Hien Yeow and another *v* Central Chambers LLC and another [2010] SGHC 305

Case Number	: Suit No 461 of 2007 (Registrar's Appeal No 79 of 2009 & Registrar's Appeal No 82 of 2009)
Decision Date	: 15 October 2010
Tribunal/Court	: High Court
Coram	: Kan Ting Chiu J
Counsel Name(s)	: Vinodh S Coomaraswamy SC, Arvind Daas Naaidu, Terence Seah and Koh Wei Ming Ivan (Shook Lin & Bok) for the plaintiffs; Imran H Khwaja and Renu Menon (Tan Rajah & Cheah) for the defendants.
Parties	: Ong Hien Yeow and another — Central Chambers LLC and another

Damages

15 October 2010 Judgment reserved.

Kan Ting Chiu J:

1 The plaintiffs wanted to buy a unit in a condominium development known as The Seafront on Meyer along Meyer Road. The developer was CRL Realty Pte Ltd. The plaintiffs selected unit #20-13 ("the Unit") and had intended it to be their matrimonial home.

2 The plaintiffs secured an option from the developer to buy the Unit at the price of $3,538,000, and under the terms of the option they must exercise the option by 17 April 2007 if they wanted to purchase the Unit.

3 The plaintiffs appointed the defendants to act for them in the proposed purchase. The first defendant was the law corporation they instructed, and the second defendant was the solicitor who dealt with them.

4 For reasons that are not relevant now, the defendants failed to discharge their duties to the plaintiffs. Although they were instructed in time to tender the exercise of option, it was only received by the developer's solicitors Rodyk & Davidson LLP ("R&D") on 18 April 2007. R&D wrote to the defendants on 24 April 2007 to inform them that the late exercise of the option was rejected and that:

> Our clients shall proceed to re-offer the Property for sale with immediate effect in such manner as they deem fit without further reference to your clients.

The Unit was, however, not put back into the market with immediate effect.

5 The plaintiffs took prompt and adequate measures to try to mitigate their loss. They instructed Shook Lin & Bok LLP ("SL&B") to act for them in the place of the defendants. On 2 May 2007 SL&B wrote to R&D to persuade the developer to accept the late exercise, but the developer was unmoved. When that failed, SL&B wrote to R&D on 17 May 2007 stating, *inter alia*, that:

> ... our clients ask that your client considers (*sic*) permitting them a right of first refusal on the

> Unit if and when it is next placed on the market.
>
> In this connection, our client will be grateful if your client is able to provide an indication when the Unit will be put back on the market and the likely asking price.

but that also met with a negative response. (Subsequently the developer released the Unit for sale again on 16 May 2008 at the price of $5,388,000 without giving the plaintiffs prior notice of it.)

6 The plaintiffs did not confine their efforts to the Unit. They extended their search to other units in the same development. By a letter dated 20 June 2007 SL&B informed the defendants that the plaintiffs had found another unit in the development of the same size of the Unit, but one floor above it, being offered for sale at $4,814,697.13. On 29 June 2007, SL&B wrote again to Tan Rajah & Cheah ("TR&C"), the solicitors of the defendants' insurers, to inform them that the plaintiffs had found two alternative units, the one on the higher floor priced at $4,814,697.13 and another similar one located a floor below the Unit which was offered for $4,585,425.84. In the second letter, SL&B stated that the plaintiffs needed the defendants or the insurers to confirm that they will bear the increase in the price before the plaintiffs committed themselves to a purchase because the plaintiffs were not able to commit themselves financially to a purchase at the prevailing market price (the price had increased by more than $1m). No confirmation was received. Instead, TR&C's reply pointedly stated that "Our client cannot ... oblige or compel your client (sic) to act in any particular manner or that they purchase any particular unit". As a result, the plaintiffs did not buy either unit.

7 The plaintiffs filed their claim against the defendants on 24 July 2007. Their claim was for the difference between $3,538,000 (the original price at which the Unit was offered to the plaintiffs) and the "current market price of equivalent units in the same development". The defendants filed a defence in which they denied liability. However, on 23 November 2007, interlocutory judgment was entered against the defendants with their consent, with damages to be assessed.

8 The hearing for the assessment of damages took place over the period of April to September 2008 before an Assistant Registrar ("AR"). At the hearing, the plaintiffs claimed for the difference between the original price and the price of $5,388,000 at which the developer re-released the Unit for sale on 16 May 2008. (Damages were awarded on this basis by another AR in another case, *Chee Peng Kwan and Another v Toh Swee Hwee Thomas and Others* [2009] SGHC 141, which arose from another solicitor's mishandling of the purchase of another unit in the development. In that case, however, the plaintiffs had bought again at the re-release price).

9 The AR did not agree with the plaintiffs and ruled that damages were to be assessed as at the time of the breach, adding that "it would be fair to give the Plaintiffs a reasonable time to re-enter the market, and find a suitable replacement for the unit that was lost" but she found, against the weight of clear evidence, that:

> [T]here is no evidence that the Plaintiffs approached the developer to try to secure the property, or negotiate with the Defendants' insurers to offset the price difference so that he (*sic*) could purchase the property.

and held that they had not done enough to mitigate their losses.

10 The AR then referred to the evidence of prevailing prices as at April and May 2007 and, having found that the price had risen by $418,564 at that time, made her award in that sum. Both parties were not satisfied with the award, hence the appeals before me.

11 In determining the redress for the plaintiffs, the maxim *restitutio in integrum* is to be applied. It provides for the restoration of a party who has suffered loss to the position it was in before it suffered that loss. Where the redress is the payment of money, the party who has suffered loss should receive:

> [T]hat sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

per Lord Blackburn, *Livingstone v Rawyards Coal Company* (1880) 5 App Cas 25 at 39.

12 In determining the quantum of damages, it is necessary to start by setting the time at which the damages are to be measured. As Lord Wilberforce stated in *Johnson and Another v Agnew* [1980] 1 AC 367 at 400–1:

> The general principle for assessment of damages is compensatory, ie, that the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed. Where the contract is one of sale, this principle normally leads to assessment of damages as at the date of the breach ... But this is not an absolute rule: if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances.

13 A question raised before me was whether the general rule should be applied. There are several matters to be considered. The first is whether the plaintiffs' loss of the opportunity to purchase the Unit could be redressed by damages assessed as at the time of the breach. When the loss is the loss of an opportunity to purchase real property, damages assessed as at the time of the breach may not be the appropriate redress. No two pieces of real property are exactly alike and a frustrated purchaser may have to accept an alternative, and issues may arise whether the frustrated purchaser is reasonable in the choice of an alternative property.

14 In the present case, however, this issue did not arise as the plaintiffs were prepared to accept similar units in the same development. The plaintiffs' readiness to accept another unit in the same development meant that they *could have* been adequately compensated by damages quantified as at the time of the breach, or if not, then as at June 2007 when the two units were available. But that would be so only if the substantial additional funds that were needed to buy another unit at the prevailing market price were available. If they had the funds, the plaintiffs should have mitigated their loss by buying another unit without waiting to receive any damages.

15 The plaintiffs had explained that they were not able to buy another unit without receiving the additional funds, and the defendants had not questioned that. The plaintiffs' failure to purchase another unit in these circumstances does not operate against their claim on the grounds of remoteness of damage or failure to mitigate. This follows from the declaration of the Court of Appeal in *Ho Soo Fong and another v Standard Chartered Bank* [2007] 2 SLR(R) 181 that the *Liesbosch* principle established in *Owners of Dredger Liesbosch v Owners of Steamship Edison* [1933] AC 449 that a defendant is not liable, as a matter of law, for any pecuniary loss suffered by the plaintiff if such loss is caused by the plaintiff's lack of financial resources, is no longer applicable in Singapore.

16 Damages quantified as at the time of breach or the time of the re-release of the Unit *would not* effectively restore the plaintiffs to their pre-breach position because prices may have changed by the time the sum awarded is received and that may result in the plaintiffs being under-compensated or over-compensated.

17 A more just and rational time reference can be employed. The damages could be fixed and awarded according to the prices prevailing at the time of the hearing. When that is done, the plaintiffs can combine the damages awarded with their own funds and purchase another unit at the prevailing price, and *restitutio in integrum* is achieved. An assessment of damages at the time of hearing is not only beneficial to the plaintiffs, it may also be advantageous to the defendants if prices which had risen at time of the breach dropped by the time of the hearing, thereby reducing or erasing the price differential. The plaintiffs would be compensated for the actual loss they suffered.

18 The AR's award is set aside. The matter is to be remitted to the AR for the damages to be assessed and quantified as at the time of the assessment hearing (*i.e*. April to September 2008) and the parties are to have liberty to adduce further evidence on the prevailing prices during the period.

19 As both parties had appealed to set aside the AR's award, they have both succeeded. I think it is appropriate that they bear their own costs in the appeals and in the assessment hearing leading to the appeals.