Pontiac Land Pte Ltd *v* P-Zone Services Pte Ltd
[2010] SGHC 171

Case Number : Suit No 507 of 2008

Decision Date : 02 June 2010

Tribunal/Court : High Court

Coram : Lee Seiu Kin J

Counsel Name(s) : Yeo Soo Mong Tony, DK Rozalynne PG Dato Asmali and Low Jiawei (Drew & Napier LLC) for the plaintiff; Spencer Gwee Hak Theng (Spencer Gwee & Co) for the defendant.

Parties : Pontiac Land Pte Ltd — P-Zone Services Pte Ltd

Landlord and tenant – Agreements for leases

2 June 2010 Judgment reserved.

Lee Seiu Kin J:

Introduction

1 The plaintiff is a property development company incorporated in Singapore. In 1976 the plaintiff, through a joint venture company, co-developed the Parklane Shopping Mall ("Parklane") at 35 Selegie Road. The defendant, also a Singapore company, has as its principal business the management and operation of car parks. It is the owner, manager and operator of the car park at Parklane.

2 In 1997, the plaintiff sold to Rockingham Investment Pte Ltd ("Rockingham") its interest in the following units in Parklane:

(a) Car park levels 1 to 7 ("the Property"); and

(b) Units #01-30 and #01-31.

However the plaintiff wanted to retain a space of about 300 sq ft at level 5 of the car park ("the Premises") for 75 years, which was the remainder of the leasehold of the land occupied by Parklane. The plaintiff's solicitors advised that this could be achieved by incorporating a term in the option to purchase requiring the purchaser to execute 11 consecutive tenancy agreements ("TA"), ten of which were for a duration of seven years less one day, and the 11th for a duration of five years. All the TAs were identical save for the commencement dates, and consecutive TAs were separated by a break of one day. This meant that the first lease, which ran from 17 March 1998 to 16 March 2005, would be followed by the second, running from 18 March 2005 (after a one day break on 17 March 2005) to 17 March 2012, and so forth until the 11th TA commences on 27 March 2068. As for the one day gap between consecutive TAs, the purchaser would grant a licence to the plaintiff for that day, free of any fee. All the TAs provided that the plaintiff would pay an annual rent of $1.00 for the Premises, which was payable in advance on the first day of each year. The sale and purchase was completed sometime in 1998 and on 5 November 1998, Rockingham executed 11 TAs granting the plaintiff the tenancies described above. It should be noted that the price paid by Rockingham to the plaintiff took into account the fact that these 11 TAs were granted in respect of the Premises for peppercorn rent.

The plaintiff used the Premises as a storeroom and its staff went there only sporadically.

3 The plaintiff's senior vice president of marketing, Teh Hwee Chuan ("Teh"), gave evidence on the background to the suit. When property prices surged in 2007, he made a check of properties owned or occupied by the plaintiff. He was unable to find any record which showed that the plaintiff had been paying the annual rent for the Premises, and he could not be sure if the rent for the entire 75 years had been paid in one lump sum. Teh said that it was out of an abundance of caution when, on 4 April 2007, he sent a letter to Rockingham together with payment for the entire duration of the 11 TAs. Rockingham replied on 11 April 2007 through its solicitors, Robert Wang & Woo LLC, to inform the plaintiff that it had sold the Property to Eng Soon Hin Construction Pte Ltd ("ESH") and that the transfer was effected on 7 February 2001. In response to a subsequent request for clarification by the plaintiff, Robert Wang & Woo LLC advised on 9 July 2007 that the terms of the sale to ESH included a clause stating that ESH acknowledged that the sale was subject to the TAs. The solicitors added that they understood that ESH had since sold the Property to the defendant.

4 On 19 July 2007, the plaintiff wrote a letter to ESH which was accompanied by a tender of payment of rent for the entire 75 years. However this letter was returned as the address on it was an outdated one. The plaintiff sent a second letter dated 23 July 2007, to another address obtained from the Registry of Companies, but it was also returned undelivered. The plaintiff then sent, by courier, a letter dated 3 August 2007 addressed to the three directors of ESH jointly to each of them at their residential addresses. Each of the letters forwarded copies of the 19 July 2007 letter to ESH and requested them, as directors of ESH, to procure the response of ESH to the 23 July 2007 letter. ESH replied by letter dated 5 September 2007 in which it stated as follows:

> Pursuant to the leases between [Rockingham] and you, you have breached the lease agreement by failing to pay rent in advance on the first day of each year. Therefore, we hereby return you your cheque … [for] $75.00.
>
> As you are the Defaulting Party in breach of the said lease agreement, we are giving you written notice once again that the said lease agreement is terminated.
>
> We noticed that you have not vacated the premises and please vacate and hand over the keys of the premises by 11 September 2007 … If you do not vacate by the stipulated date we shall, without further notice to you, take all necessary actions such as to dispose away all your items and you shall be fully liable for all our expenses and costs.

5 The plaintiff, through its solicitors, replied on 11 September 2007 pointing out that it had tendered rent to ESH which was rejected and that it was entitled to apply for relief from forfeiture against eviction for non-payment of rent under s 18A of the Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed) ("CLPA"). On 5 November 2007, ESH replied to deny that the plaintiff was entitled to relief against forfeiture and claimed that the plaintiff had abandoned the tenancy. In the letter, ESH pointed out that it had written to the plaintiff on 17 March 2005 ("the 2005 Termination Letter") terminating the "First Tenancy Agreement" and that it had not heard from the plaintiff thereafter. In the same letter, ESH advised, for the first time, that it had sold and transferred the Property to the defendant. It should be noted that the transfer was in fact effected on 15 September 2006, some ten months before the first of the plaintiff's letters to ESH. The plaintiff asked for and obtained a copy of the 2005 Termination Letter, after which it wrote to ESH to deny that it had ever received it and asked for evidence that it had been sent.

6 On 27 November 2007, the plaintiff wrote to the defendant for the first time. The letter explained the background to the matter and stated that the plaintiff was recently informed by

Rockingham that it had sold the Property to ESH, who in turn advised that it had sold the Property to the defendant. The plaintiff explained that rent was not tendered earlier as it had only just been notified of the change in ownership, and tendered payment of rent for the years 2006 to 2008 by way of cheques attached to the letter. The defendant's solicitors replied on 17 December 2007, rejecting payment of rent on the basis that the defendant had no knowledge of the plaintiff's interest and had therefore purchased the Property free of encumbrances. Subsequent communications are not particularly material to the issue of liability. Suffice it to say that parties exchanged further letters setting out their positions and reserving their rights on the matter.

7 The agreed documents established that the following took place. On 22 June 2000 Rockingham granted ESH an option to purchase the Property, which ESH accepted on 2 January 2001. The option expressly provided that the sale was subject to, *inter alia*, the tenancies of the Premises held by the plaintiff. This sale was completed on 7 February 2001. Five years later, on 21 July 2006, ESH and the defendant executed a sale and purchase agreement for the Property. However, although cl 5 provided that the sale was subject to "all existing tenancies and licences", there was no specific mention in the sale and purchase agreement of the TAs nor the plaintiff.

The Witnesses

8 While there were three witnesses in the trial, significant evidence came from only one of them. The plaintiff's witnesses were Teh and one of its employees, Woo Siew Kiong. Their evidence did not pertain to anything of great controversy between the parties. The defendant's sole witness was its director, Liew Ming Nyuk ("Liew"). Her evidence on two important issues of fact was very much in dispute. These were (a) whether ESH had written and served the 2005 Termination Letter; and (b) whether the defendant had knowledge of the plaintiff's interest in the Property prior to its purchase of the same.

9 I had a poor impression of the credibility of Liew as a witness. She had changed her positions several times in the course of her testimony when the questions became awkward for her. I had noted this in the following instances:

(a) When Rockingham granted ESH the option to purchase the property in 2000, that option expressly provided that it was to be sold subject to the plaintiff's tenancy. In para 12 of her affidavit evidence-in-chief ("AEIC"), Liew said that "ESH were obviously under the wrong impression that the Purported Tenancies were valid and enforceable and thus agreed to acknowledge their existence" in the option. When asked in cross-examination as to why she was speaking on behalf of ESH, Liew acknowledged that she was appointed a director of ESH only in 2005 and that she would not know most of the affairs of ESH before that. She asked to withdraw para 12 of her AEIC.

(b) Liew had maintained that there was only one tenancy agreement involved. However her evidence on this began to shift when confronted with the 2005 Termination Letter which mentioned "First Tenancy Agreement". When it was pointed to her that she had referred to tenancies in the plural in para 18 of her AEIC, she replied that "I do not agree to this, we had only one tenancy agreement". She also said that since the "First Tenancy Agreement" had been terminated, it followed that subsequent TAs were also terminated and this was what she told her lawyer. She said that she would not know what the lawyer had written in her AEIC; the best that can be made of an allegation like this would be that her AEIC should be given little weight.

(c) Much time was spent on the issue of whether Liew had viewed the Premises. She said she had not viewed it but had instructed her employee, a car park attendant to look for it. She added

that the said employee reverted to her and told her that it could not be found. However from the photograph, the Premises is located at the ramp, is walled up with windows, a door and has a window unit air-conditioner sticking out. It seemed to me to be a rather difficult task to miss such a feature as it is located in a prominent position in the Property. It was apparent that Liew felt that she had to deny knowledge of the existence of the Premises and went to great lengths to do so.

Findings of Fact

10 The first important fact was whether ESH had served the 2005 Termination Letter. I find that ESH had not served the 2005 Termination Letter for the following reasons:

(a) The plaintiff's evidence was that it did not receive the 2005 Termination Letter. The plaintiff pointed out that if it had received the same, it would have acted on it. This is a reasonable inference from the fact that the plaintiff had not done anything until 2007.

(b) Liew's evidence was that she signed the 2005 Termination Letter and told her "girl" to send it by ordinary mail. She said that she had no knowledge as to whether her instructions were carried out and only assumed that it was done as was ordinarily the case.

(c) The defendant did not adduce evidence that the 2005 Termination Letter was received, or even mailed as the "girl" was not called to give evidence; indeed Liew did not even disclose her identity. The defendant had therefore given no evidence of despatch of the 2005 Termination Letter.

(d) In any event, even if Liew's claim were true, despatch by ordinary mail was not in accordance with the service provision in cl 11(B) of the TA which deems receipt if delivered by hand, sent by facsimile or sent by registered post.

11 The second important fact was whether the defendant had notice of the 11 TAs when it purchased the Property from ESH. I find that the defendant had notice of the 11 TAs for the following reasons:

(a) ESH had notice, as this was specifically provided for in the sale and purchase agreement between Rockingham and ESH, as well as in the notice of transfer.

(b) Liew was a director and majority shareholder of both ESH and the defendant.

(c) Liew was involved in the management of ESH. I base this on the fact that she was the person who signed the 2005 Termination Letter and on the assertions in paras 17 and 18 of her AEIC.

(d) I find that Liew was aware of the 11 TAs, despite her claims to the contrary, on the basis of her letters and AEIC in which she had referred to tenancies in the plural.

(e) The sale and purchase agreement between ESH and the defendant was signed by Liew on behalf of the defendant and Liew's stepson, Simon Koh, on behalf of ESH. This showed they were both in charge of both companies. More importantly the document effecting the transfer by ESH to the defendant was executed by Liew and Simon Koh as directors of ESH.

(f) ESH had close links with the defendant. Indeed, ESH had acted as owner of the Property

even after the sale to the defendant was completed on 15 September 2006. This is manifested in a number of letters by ESH to the plaintiff or to its solicitors dated 5 September, 5 November, 18 December and 31 December 2007. Liew in fact admitted that ESH had stepped in to help the defendant evict the plaintiff from the Premises.

(g) I disbelieved Liew's evidence in this regard, for reasons stated in [9].

12 The plaintiff had put its case at a higher level. The plaintiff submitted that the evidence showed that the 2005 Termination Letter was not written in 2005 but was manufactured in 2007. I did not find it necessary to determine this question in view of my finding that ESH had not served the 2005 Termination Letter on the plaintiff. But were it necessary to do so, I would have found that the plaintiff had failed to discharge the burden on it to prove this allegation, which is essentially an allegation of fraud, and the plaintiff had not crossed the high standard of proof required. I should add that the defence based on the validity of the TAs, as a matter of law, is not affected by a finding of fraud or otherwise. This is because if the TAs were invalid, the fact that the defendant had fraudulently manufactured the 2005 Termination Letter does not render them valid.

Issue of Law

13 The following are the defendant's submissions on the issue of law. The TAs were illegal and void, being contrary to public policy, as they contravened s 53(1) of the CLPA and s 12(3) of the Planning Act (Cap 232, 1998 Rev Ed). The defendant's position is that the TAs are "*de facto* and *de jure*" a 75-year lease and, not being made by deed, is by operation of s 53(1) of the CLPA, void. Further, as it is a 75-year lease, it was necessary to make an application to the competent authority under the Planning Act for approval for the subdivision of a resurveyed lot into a subdivided lot. After obtaining subdivision approval to complete the transaction for a valid 75-year lease the next stage is to apply to the Registrar for the issue of a separate certificate of title to the subdivided lot. This is the combined effect of the Land Titles Act (Cap 157, 2004 Rev Ed) ("LTA") and s 34 of the Land Surveyors Act (Cap 156, 2006 Rev Ed). As no such steps were taken by the plaintiff from the start, the purported 11 TAs were null and void.

14 Insofar as s 53(1) of the CLPA is concerned, I am unable to agree with the defendant's submission, which essentially flowed from the characterisation of the 11 TAs as "*de facto* and *de jure*" a 75-year lease. In my view, such characterisation is misleading. It might be possible to say that the 11 TAs amount to a "*de facto* lease" for 75 years, but this is merely a label; they are what they are, *viz* 11 tenancies separated by a one-day gap between the expiry of one TA and the commencement of the next. There is no provision of law that prohibits this. As for the label, "*de jure* lease", it is not clear what the defendant meant by it. This is because it is anything but a 75-year lease at law (which is what "*de jure* lease" must mean) as s 53(1) of the CLPA provides that "[a] conveyance of any estate or interest in land other than a lease for a period not exceeding 7 years at a rack rent shall be void at law unless it is by deed in the English language". Therefore any argument that the 11 TAs amount to a lease at law for 75 years would be countered by the fact that there is no deed executed and in any event, any such lease, not being in compliance with s 53(1) of the CLPA, would be rendered void by that provision.

15 As for s 12(3) of the Planning Act, it provides that "[n]o person shall without subdivision permission subdivide any land". It was not disputed that there was no subdivision permission relevant to the matter. The question is whether there had been any subdivision of land in respect of the TAs. The definition of "subdivide" is found in s 2(2) of the Planning Act (as it stood in March 1998 when the 11 TAs were executed) ("Planning Act 1990 Rev Ed") which provides as follows:

(2) For the purposes of this Act, a person is said to subdivide land if, by any deed or instrument, he conveys, assigns, demises or otherwise disposes of any part of the land in such a manner that the part so disposed of becomes *capable of* being registered under the Registration of Deeds Act or in the case of registered land *being included in a separate folio of the land-register under the Land Titles Act*, and "subdivide" and "subdivision" shall be construed accordingly:

Provided that a lease for a period not exceeding 7 years without the option of renewal or purchase shall not be deemed to be a disposal within the meaning of this definition.

[emphasis added]

As each of the 11 TAs concerned a tenancy of less than seven years, the proviso in s 2(2) of the Planning Act 1990 Rev Ed operates to deem that each of the TAs was not a disposal within the meaning of the definition. This means that they fall outside the definition of "subdivide" and the execution of the TAs did not result in any subdivision of land under s 12(3) of the Planning Act.

16 Furthermore, even a lease exceeding seven years does not necessarily amount to a "subdivision" within the meaning of s 2(2) of the Planning Act 1990 Rev Ed. In *Golden Village Multiplex Pte Ltd v Marina Centre Holdings Pte Ltd* [2002] 1 SLR(R) 169 ("*Golden Village*"), the defendant had granted a 15-year lease to the plaintiff which was not in the form prescribed under the LTA, which meant that it was not capable of registration with the Registry of Land Titles. More importantly, there had been no application for subdivision under the Planning Act 1990 Rev Ed for the premises in question. This brought into play s 165 of the LTA which, at the relevant time in 1995 ("LTA 1994 Rev Ed), provided as follows:

(1) Except as provided in this section, the Registrar shall not register any instrument affecting part of the land in a folio until he is satisfied that -

(*a*) the authority for the time being charged with the duty of controlling or supervising the subdivision of the land has certified that the lawful requirements of that authority relating to subdivision have been complied with; and

(*b*) the boundaries and dimensions of part of the land in a folio described in an instrument are in accordance with the final boundaries and dimensions shown in the plan lodged with and approved by the Chief Surveyor.

(2) Where the Registrar has created a new folio pursuant to a registration of part of the land which is not conclusive as to boundaries and dimensions, he shall enter thereon a caution to that effect, and he shall cancel that caution when the boundaries and dimensions have been shown on the plan lodged with and approved by the Chief Surveyor.

17 The Court of Appeal in *Golden Village* held that as subdivision approval for the premises in question had not been obtained from the relevant authority under the Planning Act 1990 Rev Ed, the 15-year lease was not registrable under s 165(1) of the LTA 1994 Rev Ed. Consequently, that lease was not "capable of being included in a separate folio of the land-register" under the LTA, and therefore it did not amount to a subdivision of land under s 2(2) of the Planning Act 1990 Rev Ed. In the case before me, no application had been made to the relevant authority for subdivision of the Premises.

18 The question really is: what is the nature of the 11 TAs? To understand this, one should firstly consider a single tenancy agreement. There is nothing to prevent a landlord from granting a tenancy

that commences from a future date. Indeed this is done in most tenancy agreements as there is usually an interval between the date of execution of the tenancy agreement and the date of its commencement. That interval may be in terms of days or weeks, or even months. There is no reason why it cannot be in terms of years or, as in the present case, decades. Next, consider two tenancy agreements to the same person. There is nothing in the way of a grant of a first tenancy for three years commencing upon execution, and at the same time the grant of a second three-year tenancy commencing four years from the same date. In effect there is one-year break between the expiry of the first tenancy and the commencement of the second. If, in principle, there is nothing wrong with such an arrangement, then there can be nothing wrong with granting two tenancies separated by a one-day break between the expiry of the first and commencement of the second. Once that is accepted, it is difficult to see how it is not possible, in the absence of any written law prohibiting it, to grant the 11 TAs, the first ten each for a term of seven years less one day and the 11th for five years, each commencing a day after the expiry of the previous one.

19 I therefore cannot agree with the defendant that the TAs are illegal or void or otherwise ineffective in law. I would however make the following observation, although I would limit it as such, because this point is neither required for my decision in the present case nor did I have the opportunity of submissions from counsel on it. As each TA is for a duration of less than seven years, by operation of s 87(2)(a) of the LTA, it is not registrable in the land-register. The tenant therefore does not have the protection that such registration confers under the LTA. In the case of a lease not exceeding seven years, s 46(1)(vi) of the LTA preserves the rights of the tenant in occupation *vis-à-vis* any person who becomes the proprietor of the land during the tenancy. It should be noted that this only pertains to the TA in force at the time of transfer and not the TAs that will come into operation thereafter. However the one-day break between one TA and the next makes it very difficult in practical terms to displace the rights of the tenant. Nevertheless the tenant is at constant risk of the property being sold to a purchaser who has no notice of the TAs; in that situation, only the TA in force would be binding on the purchaser.

Conclusion

20 I have made the finding in [19] above that the TAs were not illegal and therefore not void. In view of my finding of fact in [10] above that the tenancy was not terminated by the 2005 Termination Letter, the tenancy had not been terminated by ESH. In view of my finding of fact in [11] above that the defendant had notice of the TAs when it purchased the Property from ESH, the second to 11th TAs, all dated 5 November 1998, are binding on the defendant.

21 The plaintiff prayed for an order for immediate access by the defendant to the Premises. However after issue of the writ, the plaintiff had obtained an order from me to break the lock at the Premises and have since done so and replaced it with a new lock. Therefore this prayer is no longer necessary.

22 The plaintiff prayed for damages to be assessed and an order for the return of its assets and belongings. I order damages to be assessed by the Registrar, in relation to such periods that the plaintiff is able to prove that the defendant had prevented its rightful access to the Premises. I also order the defendant to return such of its property that the plaintiff is able to prove had been removed by the defendant from the Premises.

23 The defendant's counterclaims are accordingly dismissed.

24 Unless there is any reason to make a different order, I order the defendant to pay the plaintiff the costs of the claim and counterclaim.