Quek Kheng Leong Nicky and Another v Teo Beng Ngoh and Others and Another Appeal [2009] SGCA 33

Case Number	: CA 121/2008, 122/2008
Decision Date	: 21 July 2009
Tribunal/Court	: Court of Appeal
Coram	: Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Murugaiyan Sivakumar Vivekanandan (Madhavan Partnership) for the appellants; Ling Daw Hoang Philip (Wong Tan & Molly Lim LLC) and Fan Kin Ning (David Ong & Partners) for the respondents
Parties	: Quek Kheng Leong Nicky; Lee Pheng — Teo Beng Ngoh; Teo Yeow Khoon; Teo Yeow Hing; Teo Jean Seng Holdings Pte Ltd

Evidence – Admissibility of evidence – "Without prejudice" communications – Negotiations on "without prejudice" basis to delay payment – Whether "without prejudice" communications should be admitted to prove existence and terms of concluded compromise agreement – Whether terms of agreement varied by "without prejudice" communications

21 July 2009

Andrew Phang Boon Leong JA (delivering the grounds of decision of the court):

Introduction

1 These two appeals concern the sale and purchase of a property at 13 Jalan Sindor, Singapore ("the Property"). The appellants were Quek Kheng Leong Nicky and his wife, Lee Pheng ("the Purchasers"). The respondents were Teo Beng Ngoh, Teo Yeow Khoon, Teo Yeow Hing and Teo Jean Seng Holdings Pte Ltd (collectively, "the Vendors").

2 Civil Appeal No 122 of 2008 arose out of Originating Summons No 1833 of 2007, in which the Vendors sued the Purchasers for the repudiatory breach of the sale and purchase agreement for the Property ("the S&P Agreement"). The trial judge ("the Judge") allowed the Vendors' claim but granted the Purchasers relief against forfeiture on terms. Civil Appeal No 121 of 2008 arose out of Originating Summons No 72 of 2008, in which the Purchasers sought specific performance of the S&P Agreement. The Judge dismissed the Purchasers' claim.

3 Having considered carefully the submissions of the parties, we decided to allow both appeals. We now set out the reasons for our decision.

Background facts

4 The facts were not in dispute. The Vendors entered into a joint venture to develop residences at Jalan Sindor ("the Vendors' JV Agreement"). They bought five houses *en bloc* and redeveloped them into seven new houses for resale. The titles of these houses were held individually by each of the Vendors. In the process, the lots of the five houses underwent amalgamation and subdivision in three phases (a more detailed account of the facts can be found at [3]–[7] of the High Court decision in *Teo Beng Ngoh v Quek Kheng Leong Nicky* [2008] SGHC 228 ("the GD")). Only the third phase was relevant here. In this phase, Lots 16275V, 2754V and 16277T of Mukim 18 were to be amalgamated into a single Lot 16841. This Lot 16841 was then to be subdivided into two new lots, Lot 16842T (11 Jalan Sindor) and Lot 16843A (13 Jalan Sindor, *ie*, the Property). A semi-detached

house was to be built on each lot.

5 The Purchasers signed an option dated 28 May 2007 with the first respondent, Teo Beng Ngoh, to purchase the Property ("the Option") for $1.36m ("the purchase price"). The terms of the Option also formed the terms of the S&P Agreement. One per cent of the purchase price was paid to secure the Option.

6 On 11 June 2007, the Purchasers exercised the Option by paying a further 4% of the purchase price. Clause 1 of the Option provided as follows:

> The balance of the purchase price shall be payable as follows:-
>
> a. within twelve (12) weeks from the date of exercise of the Option, a sum representing 94% of the purchase price shall be given to the Vendor in exchange for vacant possession of the Property to be delivered by the Vendor to the Purchaser;
>
> b the balance 1% shall be on legal completion in accordance with clause 3 hereof.

7 After the Purchasers exercised the Option, they took vacant possession of the Property on 22 July 2007 in order to carry out renovation works. They were later given permission by the Vendors to occupy the Property on 28 August 2007. The Vendors did not request the payment of 94% of the purchase price as required under cl 1 of the Option at this particular point in time.

8 Subsequently, the solicitors for the Central Provident Fund Board ("CPFB"), Aptus Law Corporation ("Aptus"), wrote to the Purchasers' original lawyers, M/s Heng, Leong & Srinivasan ("HLS"), on 16 August 2007 requesting the child lot/individual subdivided lot number for the Property in accordance with s 54A of the Land Titles Act (Cap 157, 2004 Rev Ed) ("the Act"). HLS forwarded this request to the Vendors' original lawyers, M/s David Ong & Partners ("DOP"). DOP replied that they could not obtain the subdivided lot number until the Purchasers consented to certain cross-transfers enabling the Vendors to amalgamate the parent lots, *ie*, Lots 16275V, 2754V and 16277T. The consents to the cross-transfers were signed by HLS sometime on or before 30 August 2007.

9 On 20 August 2007, HLS wrote to DOP[note: 1] stating that it was "impossible" for the Purchasers to obtain the release of the housing loan and the money from the CPFB without the resolution of certain "irregularities", namely that:[note: 2]

> (a) the Vendors had failed to procure an individual subdivided lot number for the Property, thus violating s 54A of the Act ("the First Issue");
>
> (b) because the Vendors held the title to each of the parent lots individually, there was no assurance or documentation to verify that title to the Property would be duly conveyed to the Purchasers ("the Second Issue"); and
>
> (c) there were caveats lodged against the Property which conflicted with the Purchasers' rights to the Property ("the Third Issue").

10 On the same day, HLS also wrote another letter to DOP marked "without prejudice" ("the First Letter") that stated:

> WITHOUT PREJUDICE

Dear Sirs,

PURCHASE OF 13 JALAN SINDOR SINGAPORE

We refer to your letter today and the telephone conversation between your Mr David Ong and our Amy Cheah this afternoon. We would reiterate the following irregularities as at today:-

(a) despite Section 54A Land Titles Act, your clients issued an option to our clients;

(b) you have asked our clients to consent to a transfer to a third party without any assurance or documentation to verify that the title which relates to the above property will be duly conveyed to our clients. Please let us have the same as soon as possible; and

(c) there are Caveats lodged against the property which conflict with our clients' rights as purchasers. Please procure their withdrawal immediately.

We understand from your office that if the 'cross-transfers' mentioned in your letter are duly registered then the lots will be made available. We stress that these lots numbers should have been made before the issue of the Option and are, in any event, still obtainable immediately by your client's surveyor from the Chief Surveyor, based on the approved building plans and WP.

Without resolving the above, it is impossible for our clients to obtain the release of the housing loan as well as the CPF [Central Provident Fund] funds, which are required for financing the payment under Clause 1(a) of the option i.e. 94% of the purchase price, in exchange for vacant possession. This is currently due on 3 September 2007.

Without prejudice to our clients' rights, we are instructed to propose that the payment under Clause 1(a) be postponed to a date falling three (3) weeks from the resolution of all the above issues and, pending the same, that our clients be granted vacant possession forthwith so as not to be unduly prejudiced by the present predicament.

Your early reply would be appreciated.

[emphasis added]

DOP replied to HLS on 27 August 2007 in a letter that was not marked "without prejudice" ("the Second Letter"), stating as follows:[note: 3]

Dear Sirs,

13 JALAN SINDOR SINGAPORE

We refer to your letter dated 20 August 2007 marked without prejudice.

Please be informed that our clients had since 22 July 2007 handed vacant possession of the above property to your clients. A copy of your clients' undertaking addressed to our clients is enclosed for your information.

We are instructed that our clients are prepared to postpone the payment under clause 1(a) to *2 weeks instead of 3 weeks* as proposed in paragraph 4 of your said letter.

[emphasis added]

HLS wrote back to DOP on 28 August 2007 ("HLS's 28 August Letter"):[note: 4]

> Thank you for your letter dated 27 August 2007.
>
> Notwithstanding the postponement we trust that the vendor is attending to all matters necessary to regularize all outstanding issues expeditiously.
>
> Further, we note from your letter that our clients were granted vacant possession with effect from 22 July 2007. However the enclosed letter of undertaking refers specifically to possession for the purposes of renovation works only. Please confirm as soon as possible that our clients may occupy the property henceforth.

As we shall see (below at [25]), these letters were of pivotal importance in the context of the resolution of the present appeal.

11 DOP proceeded to resolve these alleged "irregularities", although they maintained that they did so out of goodwill and without prejudice to their clients' rights. The First Issue was resolved when the Vendors obtained the individual subdivided lot number, Lot 16843A, for the Property. When this lot number was made "live" in the lot base system, DOP made the first request for payment to the Purchasers via HLS on 15 October 2007 ("DOP's request of 15 October 2007").

12 There was, however, a dispute as to when the Second and Third Issues were resolved. In so far as the Second Issue was concerned, DOP forwarded a copy of the Vendors' JV Agreement to the Purchasers on 7 September 2007. This proved unsatisfactory to the Purchasers. On 18 October 2007, the Purchasers requested the certificate of adjudication and stamp duty on the Vendors' JV Agreement as well as a transfer in-escrow pending the issuance of the certificate of title for the Property ("the Transfer In-Escrow"). DOP provided the certificate of adjudication and stamp duty on 18 October 2007. On 19 October 2007, the Purchasers requested that the Vendors provide an undertaking that they would be bound by the Vendors' JV Agreement ("the Vendors' Undertaking"). Draft copies of the Transfer In-Escrow and the Vendors' Undertaking were exchanged on 22 October 2007. The executed copies were given to the Purchasers on 31 October 2007.

13 In so far as the Third Issue was concerned, HLS, in their letter of 19 October 2007 to DOP, also requested that DOP procure the withdrawal of caveats relating to Lot 2754V ("the 2754V Caveats"). These caveats were held by the owners of 11 Jalan Sindor, their mortgagee bank and the CPFB. This request was presumably prompted by Aptus, who wrote to HLS on 18 October asking for the same. Both HLS and DOP then wrote to Lawhub LLC, the lawyers for the owners of 11 Jalan Sindor, requesting the withdrawal of the 2754V Caveats.

14 In the meantime, DOP wrote to HLS on 24 October 2007, demanding that the Purchasers reinstate the Property to its original condition and deliver vacant possession by 29 October 2007 if payment was not made in accordance with DOP's request of 15 October 2007 (see [11] above). That same day, HLS replied that the Purchasers intended to make payment, but could not do so because they could not confirm to the CPFB and their bank that title was in order.

15 On 31 October 2007, DOP sent to HLS copies of the partial withdrawal of the 2754V Caveats along with the executed Vendors' Undertaking and the Transfer In-Escrow. On 1 November 2007, DOP again wrote to HLS confirming that the partial withdrawal of the 2754V Caveats had been registered and accepted by the Singapore Land Authority. HLS then wrote to DOP on 1 November 2007 stating

that payment would be made as soon as possible; however, HLS later sent another letter to DOP on 7 November 2007 stating that there were caveats against Lot 16275V ("the 16275V Caveats") that would affect the title for the Property, *ie*, Lot 16843A, since Lot 16275V was the parent lot.

16 On 9 November 2007, DOP wrote to HLS stating that payment of 94% of the purchase price had to be made by Monday 12.00pm, 12 November 2007, or else the Vendors would treat the Purchasers as having repudiated the S&P Agreement. DOP stated that the Vendors would not accede to any further requests from the Purchasers and that good title to the Property would be provided on completion. HLS replied on the same day and denied that the Purchasers were in breach or that liability for payment had arisen. The deadline of 12 November 2007 imposed by the Vendors was not met.

17 Eventually, on 19 November 2007, Aptus released the Purchasers' funds with the CPFB to HLS. They explained that the cashier's orders had, in fact, been purchased on 7 November 2007 but the funds were not released because Aptus needed time to consider the implications of a title search conducted that day. That same day, HLS wrote to the Vendors' current solicitors, M/s Wong Tan and Molly Lim ("WTML"), enclosing cashier's orders for 94% of the purchase price. On 21 November 2007, WTML returned the cashier's orders, stating that the S&P Agreement had been terminated by the Vendors' acceptance of the Purchasers' breach and demanded that the Property be reinstated and delivered back to the Vendors.

18 As it turned out, the certificate of title for the Property when issued showed that the 16275V Caveats did not encumber the lot at all. The sale and purchase of the Property was completed after the High Court suit.

The decision below

19 The First Letter and the Second Letter were not taken into account by the Judge below. She found that the First Letter was marked "without prejudice", and the Second Letter was a reply to the former which was "written in the same vein" (see the GD at [39]).

20 The Judge found that the Purchasers were in repudiatory breach of contract because they had insisted that their liability for payment had not arisen, thereby evincing an intention not to be bound by the terms of the Option. She accepted the opinion of the expert witness, Miss Phyllis Tan, that the Purchasers' objections to the existence of the 16275V Caveats were "premature". The Purchasers were ordered to pay the Vendors damages on the difference between the price of the Property under the Option and the market value of the Property as at 16 November 2007 (the date when the Vendors accepted the Purchasers' repudiatory breach). However, the Judge dismissed the Vendors' claim that the Property be reinstated to its original condition and returned to the Vendors. Although the Judge found that the Purchasers had been unreasonable in their conduct, she nonetheless granted them relief against forfeiture on the following terms:

(a) that the Purchasers pay the Vendors all outgoings for the Property including property tax from 22 July 2007 to 16 November 2007;

(b) that the Purchasers pay the Vendors rent from 16 November 2007 until the completion of the sale and purchase of the Property; and

(c) that the Vendors give notice to complete on 4 August 2008.

21 Further, the Judge ordered that, should the Purchasers fail to accept the relief against

forfeiture on the terms set out above and fail to complete the sale and purchase of the Property, the Vendors could resell the Property.

Our decision

The "without prejudice" communications

22 Generally, communications between parties which are made on a "without prejudice" basis in the course of negotiations for a settlement are not admissible. As between parties to the negotiations, s 23 of the Evidence Act (Cap 97, 1997 Rev Ed) ("the EA") applies (see the decision of this court in *Mariwu Industrial Co (S) Pte Ltd v Dextra Asia Co Ltd* [2006] 4 SLR 807 ("*Mariwu*") (which also held that the common law as embodied in the House of Lords decision of *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280 ("*Rush & Tompkins*") governs the situation in relation to third parties)). Section 23 of the EA provides that in civil cases, "no admission is relevant if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given". Even though a piece of correspondence is not marked "without prejudice", it may still be excluded if it is made in the course of negotiations to settle a dispute (see *Mariwu* as well as the decision of this court in *Greenline-Onyx Envirotech Phils, Inc v Otto Systems Singapore Pte Ltd* [2007] 3 SLR 40). However, where the correspondence concerned is in fact marked "without prejudice", "the presence of [these] words would place the burden of persuasion on the party who contended that [these] words should be ignored" (see the Singapore High Court decision of *Sin Lian Heng Construction Pte Ltd v Singapore Telecommunications Ltd* [2007] 2 SLR 433 at [60]).

23 The rule against the admission of "without prejudice" communications is, however, subject to a number of exceptions. The most important instances were set out by Robert Walker LJ in the English Court of Appeal decision of *Unilever Plc v The Procter & Gamble Co* [2000] 1 WLR 2436 at 2444–2445 ("*Unilever*") (where the comprehensive article by David Vaver, "'Without Prejudice' Communications – Their Admissibility and Effect" (1974) 9 UBC Law Rev 85 (which was justly described by Lord Mance in the House of Lords decision of *Bradford & Bingley plc v Rashid* [2006] 1 WLR 2066 at [84] as being "an article of great learning and continuing value") was cited; see also the House of Lords decision of *Ofulue v Bossert* [2009] 2 WLR 749 at [86]).

24 One key exception (which is crucial to the determination of the present appeal) is where "without prejudice" communications are admitted to determine whether there was a compromise reached and, if so, what the terms of that concluded compromise agreement were (see, in particular, the oft-cited English Court of Appeal decision of *Tomlin v Standard Telephones and Cables Ltd* [1969] 1 WLR 1378 ("*Tomlin*"), where Danckwerts LJ endorsed (at 1382–1383) the important *dicta* by Lindley LJ in the (also) English Court of Appeal decision of *Walker v Wilsher* (1889) 23 QBD 335). In *Walker v Wilsher*, Lindley LJ had observed as follows (at 337):

> What is the meaning of the words "without prejudice"? I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms proposed in the letter are accepted a complete contract is established, and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one.

Danckwerts LJ went on to hold in *Tomlin* (at 1383) that:

> That statement of Lindley L.J. is of great authority and seems to me to apply exactly to the present case if, in fact, there was a binding agreement, or an agreement intended to be binding, reached between the parties, and, accordingly, it seems to me that not only was the court

entitled to look at the letters, though they were described as "without prejudice," but it is quite possible (and, in fact, the intention of the parties was) that there was a binding agreement contained in that correspondence.

It should be mentioned that, although Ormrod J dissented in *Tomlin*, this was only on the issue of application and not principle. *Tomlin* has, in fact, been cited and applied in numerous English decisions (including *Rush & Tompkins* at 1300 and *Unilever* at 2444). Indeed, this particular exception is firmly established in the local context (see, *eg*, Jeffrey Pinsler, *Singapore Court Practice 2006* (LexisNexis, 2006) at para 24/3/10 (and the authorities cited therein) and *Halsbury's Laws of Singapore* vol 10(2) (LexisNexis, 2006 Reissue, 2006) at para 120.430; general reference may also be made, in the context of this particular exception, to Vaver ([23] *supra*) at 143–147).

25 In our view, both the First Letter and the Second Letter should be admitted as they were necessary to establish (when read together with HLS's 28 August Letter): (a) whether the parties had reached an agreement to vary the terms of the original S&P Agreement; and (b) the terms of the said agreement. The First Letter demonstrated that the Purchasers had offered to make payment of 94% of the purchase price three weeks after the resolution of the "irregularities" (see above at [10]). The Vendors' counter-offer (contained in the Second Letter) that payment was to be made within two weeks of the resolution of the outstanding issues was clearly accepted by HLS in its letter to DOP (HLS's 28 August Letter (see above at [10])). There was accordingly a variation of cl 1 of the S&P Agreement (which adopted the terms of the Option (see [5] above)) in the manner just mentioned.

26 On appeal before this court, the Vendors argued that even if there had been a variation of the S&P Agreement such that payment would be due two weeks from the resolution of the "irregularities", these "irregularities" did not include the Third Issue, namely, that there were caveats lodged against the Property which conflicted with the Purchasers' rights. This was because, they argued, a vendor was only required to deliver good title to the purchaser on the date of completion and therefore there was "absolutely no reason nor basis" for the Vendors to agree to resolve the Third Issue by procuring the withdrawal of the conflicting caveats.[note: 5]

27 We could not accept this argument. The S&P Agreement, as varied (see above at [25]), should be interpreted in accordance with what was contained in the First Letter and the Second Letter. These letters did not contain the qualifying interpretation which the Vendors sought to insert, *ex post facto*, into the (varied) agreement (as set out in the preceding paragraph). The original S&P Agreement was, in fact, varied such that the Purchasers would have to make payment two weeks after the resolution of *all three* issues, including the withdrawal of any caveats affecting the Purchasers' rights to the Property.

Whether the Purchasers were in repudiatory breach of contract

28 The Vendors procured the partial withdrawal of the 2754V Caveats on 31 October 2007 and informed the Purchasers of this on 1 November 2007, thus resolving the Third Issue. Even though there was some dispute as to when precisely the Second Issue was resolved, there was no doubt that by 31 October 2007, this particular issue was also settled. Since there had been a variation of the S&P Agreement such that payment of 94% of the purchase price was only due two weeks after the resolution of *all three* issues, the earliest date on which payment would have been due would be 15 November 2007, *viz*, two weeks after 1 November 2007. Notwithstanding the Vendors' partial withdrawal of the 2754V Caveats, HLS wrote to DOP on 7 November 2007, alleging that the 16275V Caveats interfered with the Purchasers' rights and requested for their removal.

29 The Vendors subsequently gave notice to the Purchasers on 9 November 2007, asking for payment to be made by 12 November 2007. Notably, this date was *before* 15 November 2007, the date on which actual payment was due according to the varied terms of the S&P Agreement. In the circumstances, the Purchasers' failure to make payment by 12 November 2007 did *not* constitute a repudiatory breach of the S&P Agreement. A further issue remains as to whether HLS's letter of 7 November 2007 ("the 7 November Letter") evinced an intention to repudiate the S&P Agreement.

30 We did not think that the 7 November Letter clearly evinced the Purchasers' intention not to be bound by the S&P Agreement. The Purchasers had repeatedly stated that they were willing to pay the purchase price once the remaining issues in relation to the caveats had been resolved. That did not, in our view, evince an intention on the part of the Purchasers *not* to pay the purchase price. The 7 November Letter did not expressly state that the Purchasers no longer wished to be bound by the S&P Agreement; it only asked for the removal of the 16275V Caveats because HLS thought, mistakenly as it turned out, that those caveats would affect the title of the Property.

31 Counsel for the Vendors submitted that the Purchasers' demands in the 7 November Letter were impossible to meet and therefore constituted an intention to revoke. However, the S&P Agreement incorporated the terms of the Law Society Conditions of Sale 1999 ("the Conditions of Sale"). Even if the request was indeed impossible to fulfil, under Condition 5.2 of the Conditions of Sale the Vendors could only rescind the contract upon giving the Purchasers no fewer than ten days' notice to annul the sale. This was not done.

Conclusion

32 For the above reasons, we allowed both appeals. Costs shall also be awarded to the appellants, with the usual consequential orders.

[note: 1] See the Appellant's Core Bundle, vol 2 ("2ACB"), p 154

[note: 2] 2ACB, p 155

[note: 3] 2ACB, p 157

[note: 4] 2ACB, p 158

[note: 5] See the Respondent's Case, p 39, para 72