

Ong Kai Hian v Tan Hong Suan Cecilia and Others
[2009] SGHC 58

Case Number : Suit 653/2007, SUM 4763/2008
Decision Date : 09 March 2009
Tribunal/Court : High Court
Coram : Judith Prakash J
Counsel Name(s) : Andy Chiok (instructed), Loy Wee Sun (Loy & Company) for the plaintiff; Sean Lim and Gong Chin Nam (Hin Tat Augustine & Partners) for the defendants
Parties : Ong Kai Hian — Tan Hong Suan Cecilia; Yap Mei Li Patricia; Yap Hock Hin Gerald; Veronica Siah Hua Li nee Yap Hua Li; Jennifer Yap Beng Choo; Yap Keng Siang Gerald; Yap Josephine; Yap Beng Sek Jerene @ Mrs William Henry Hernstadt

Civil Procedure – Pleadings – Amendment – Purchaser of property amending statement of claim and reply to include new cause of action and new relief – Whether amendments would allow real issue between parties to be tried – Whether amendments would cause prejudice to opposing party

9 March 2009

Judith Prakash J:

Background

1 These grounds concern an application by the plaintiff for amendment of his statement of claim and his reply which application was made after the trial had ended and all the evidence had been taken. I allowed the application in part but disallowed certain of the proposed amendments. The plaintiff is not satisfied with this decision.

2 The eight defendants are the owners, in varying shares, of the property known as Lot 99690K TS21 which is sited along Devonshire Road (“the Property”). The plaintiff was desirous of purchasing the Property and his father, Ong Boon Chuan (in effect the actual purchaser, the plaintiff being a nominee, though nothing turns on this), had discussions about the purchase with a housing agent named Tan Jit Kin of the property firm HSR International Realtors Pte Ltd (“HSR”) and these discussions resulted in certain documentation, the effect of which was in issue at the trial.

The original statement of claim and reply

3 The action was started on 11 October 2007. The original statement of claim was endorsed on the writ and the material (for present purposes) paragraphs of the same read as follows:

3. By an agreement dated sometime in April 2006 made between the Plaintiff through Ong Boon Chuan and the Defendants, the Defendants agreed to grant to the Plaintiff an option to purchase the Property at the price of \$580,000.00.

Particulars
of
the
Agreement

- a. On or about April 2006, a banner hung outside the said Property stated that it was for sale. The said banner, *inter alia* stated that the estate agents handling any enquiry on the sale is HSR International Realtors Pte Ltd.
 - b. Ong Boon Chuan contacted HSR International Realtors Pte Ltd and spoke to one Tan Jit Kin regarding the sale of the said Property, and who confirmed that he was handling the sale of the Property on behalf of its owners.
 - c. After discussions between Tan Jit Kin and Ong Boon Chuan, they agreed that the owners of the Property will sell the same at a price of \$580,000, and further that they will grant an option for the purchase of the Property upon the payment of 1% or \$5,800 being the requisite fee ("the Option Fee") for the Defendants to grant the Plaintiff an Option to Purchase.
 - d. The Plaintiff decided to purchase the said Property at the said price of \$580,000.
4. Pursuant to the aforesaid Agreement, on or about 22 April 2006, the Plaintiff made payment of the Option Fee of \$5,800.00 by way of an United Overseas Union Bank cheque No. 573784 made payable to the Third Defendant. The said cheque was duly presented for payment and honoured upon presentation.
 5. At all material times, the Plaintiff had been ready willing and able to exercise the said option to be granted and perform his obligations under the said Agreement i.e. the payment of the Option Fee of \$5,800.00.
 6. On or about 4 August 2006, an Option to Purchase the Property granted by the Defendants to the Plaintiff was delivered to Ong Boon Chuan. However, by that date of the delivery of the said Option to Purchase, it could not be exercised by the Plaintiff because the expiry date contained therein for the exercise of the Option was 8 June 2006 which had passed. Upon receiving the said Option to Purchase, Ong Boon Chuan noted the expiry date and asked Tan Jit Kin to annotate the date of delivery i.e. "4/8/06" on the said Option to Purchase, which he did.
 7. The Plaintiff will at the trial of this action refer to the said Option to Purchase for its full terms and effects.
 8. By reason of the matters aforesaid, the Defendants had breached the Agreement to grant the Plaintiff an option to purchase the said Property.

4 The defendants' response to this portion of the statement of claim was to deny paras 3 to 8 of the same and to put forward their own account of what had happened. Briefly, the defendants' story was that they had appointed a property agent named Wylliam Tan (this is a separate person from Tan Jit Kin) from HSR to market the Property and Wylliam Tan had informed them that a potential buyer was interested in purchasing it for \$580,000. On or about 22 April 2006, the third defendant received a photocopy of a cheque dated the same date for the sum of \$5,800 made payable to the third defendant which contained an endorsement on the back reading "Ong Kai Hian and/or nominee; Purchase price \$580,000.00; 1% option monies for TS21-99690K; subject to building 2½ storey house". The defendants subsequently agreed to sell the Property to the plaintiff at the offered price but on the basis that there would be no condition providing for the sale to be subject to the construction of a 2½ storey house on the Property.

5 According to paras 6 to 12 of the defence, on 25 May 2006, the defendants handed an option to Tan Jit Kin in favour of the plaintiff or his nominee. This option was signed by all the defendants and provided that it was to expire at 4pm on 8 June 2006 and would be null and void if not exercised in the manner stipulated therein on or before that date and time. The defendants proceeded to bank in the cheque they had been given for the option fee. This option was delivered to Ong Boon Chuan on 25 May 2006 but Ong Boon Chuan said that the option was not acceptable to the plaintiff as it did not contain a condition providing that a 2½ storey house could be constructed on the Property and he returned it to Tan Jit Kin. Wylliam Tan informed the defendants that the buyer wanted to insert the condition about the house in the option but the defendants were not agreeable to amending the option to include such a term. The plaintiff did not accept the option by the stipulated time and, therefore, the defendants averred that no valid or binding contract had been made between them and the plaintiff for the sale of the Property.

6 The defendants also pleaded, in the alternative, that there never was any agreement between them and the plaintiff whereby they had agreed to sell the Property to the plaintiff at the price of \$580,000 subject to the condition that a 2½ storey building could be constructed on the Property, and there was no or no sufficient memorandum or note in writing of such an alleged agreement to satisfy s 6 of the Civil Law Act (Cap 43, 1999 Rev Ed) ("the CLA").

7 In his reply (Amendment No. 1) filed on 28 August 2008, the plaintiff averred, *inter alia*, that the first time the original option containing the exercise expiry date of 8 June 2006 with all of the signatures of the defendants was given to him was on 4 August 2006 when the said option was duly returned by Ong Boon Chuan on the ground that the exercise date of 8 June 2006 had expired.

8 In para 6 of the reply (Amendment No. 1), the plaintiff pleaded that there was sufficient memorandum of the agreement between the parties as was evidenced by the "undated Option to Purchase (8 signatures) referred to in paragraph 6 of the Statement of Claim and the undated Option to Purchase (5 signatures) referred to in paragraph 9 of the Statement of Claim". Further or in the alternative, the plaintiff said that there was part performance of the agreement and that the plaintiff had issued a cheque and made payment of the option fee. In para 7 of the reply, the plaintiff pleaded that the defendants were estopped from relying on s 6 of the CLA and gave particulars of the alleged estoppel.

9 The above was the state of the pleadings when the trial started before me on 20 October 2008. In the plaintiff's opening statement, counsel for the plaintiff gave a brief account of the facts and then laid down the list of issues to be determined. In the plaintiff's view, the primary issue was whether there was an agreement between the plaintiff and the defendants that the latter would grant the plaintiff an option to purchase the Property. In order to resolve this issue, the plaintiff said, the court would have to make findings of fact on *inter alia* the following questions:

- (a) were the terms of the option agreed between Tan Jit Kin and Ong Boon Chuan?
- (b) what was the effect of the encashing of the cheque handed to Tan Jit Kin?
- (c) did Tan Jit Kin deliver the option to Ong Boon Chuan at any time before 4 August 2006?

The plaintiff also said that the court would have to make findings on the following issues of law:

- (a) whether s 6 of the CLA was applicable to bar the plaintiff's claim of specific performance of an agreement by the defendants to grant an option;

(b) if s 6 was applicable, whether on the facts there was part performance by the plaintiff such that the doctrine of part performance would operate to defeat the defendants' reliance on s 6; and

(c) further, if s 6 was applicable, whether on the facts the defendants were estopped from relying on that section by the plaintiff's part performance.

10 In para 16 of the opening statement, counsel informed me that the plaintiff would adduce the evidence necessary to show that there was a concluded agreement for the defendants to grant to the plaintiff an option to purchase the Property. It was a case where, notwithstanding the agreement, the formalities were not perfected and the defendants were using this omission as a basis to avoid their obligations.

11 It was clear from the pleadings and the opening statement that the plaintiff's case at this stage was that the defendants had agreed to grant him an option containing certain agreed terms and that they had breached this agreement by purporting to tender an option which omitted those terms. This understanding was reinforced by the relief claimed by the plaintiff in the original statement of claim which was that the following orders be made against the defendants:

(a) an order that the defendants specifically perform the agreement to grant the plaintiff an option to purchase the Property; and

(b) an order that the defendants do within such reasonable time as the court may determine, grant and deliver to the plaintiff an option to purchase the Property, such option to be exercised within seven days of its grant.

The proposed amended pleadings

12 The trial then took place and occupied five days. The plaintiff, Ong Boon Chuan, Tan Jit Kin, Wylliam Tan and some of the defendants gave evidence. On the final day of the trial after all the evidence had been taken, counsel for the plaintiff informed me that arising from the evidence that had emerged from cross-examination, it might be necessary for the plaintiff to "tweak" his statement of claim and reply. He stated that a formal application would be filed. This application was filed on 29 October 2008 and heard on 20 November 2008.

13 In respect of the statement of claim, the plaintiff asked for the following changes to be made:

(a) some minor changes in the language of paras 3 and 4;

(b) a major amendment to para 5;

(c) a new para 5A to be inserted;

(d) a major amendment to para 6; and

(e) consequential amendments to paras 8 and 10 and the insertion of a new alternative relief.

14 In respect of the reply, the plaintiff wanted to make minor amendments to paras 7(a) and 10

and a fairly major amendment to para 6.

15 In respect of the statement of claim, I allowed the proposed amendments to paras 3, 4 and 6 and also the insertion of the new paragraph 5A. I did not, however, allow the plaintiff to amend paras 5, 8 and 10 or to add the new alternative relief. In respect of the reply, I allowed the amendment to para 7 only.

16 The amendments which were not allowed are reproduced below.

Statement of claim

5 . At all material times, the Plaintiff had been ready willing and able to exercise the said option to be granted and perform his obligations under the said Agreement i.e. the payment of the Option Fee of \$5,800.00. Further and in the alternative, the Plaintiff repeats paragraphs 3(a) and 3(b) above, and further avers that:

(a) On or about 22 April 2006, by way of a pro-forma Option to Purchase by HSR as completed by Tan Jit Kin, the Plaintiff offered to purchase the said Property from the Defendants at a price of \$580,000.

(b) There was, *inter alia* a term in the Option that "the sale and purchase of the property shall be completed within 3 months from the date of planning approval for the building of 2½ storey house".

(c) A United Overseas Bank cheque No. 573784 for the option fee of \$5,800 payable to the Third Defendant was handed by Ong Boon Chuan to Tan Jit Kin on 22 April 2006. The fact that the purchaser was to be the Plaintiff and/or nominee and the words "subject to building 2½ storey house" were also written at the back of the said cheque.

(d) The said Tan Jit Kin was to procure the Defendants' execution of the said pro-forma Option to Purchase in favour of the Plaintiff and/or his nominee.

(e) On or about 26 May 2006, by way of conduct the Defendants accepted the Plaintiff's offer to purchase on the term that it was subject to the building of a 2½ storey house by presenting the aforesaid cheque for payment on 26 May 2006, which was duly honoured upon presentation.

...

8. By reason of the matters aforesaid, the Defendants had breached the Agreement to grant the Plaintiff an option to purchase the said Property and/or the agreement to sell the property set out in paragraph 5 above.

...

10. To date, despite the demands of the Plaintiff and/or his solicitors, the Defendants had, in breach of the Agreement, and/or the agreement in paragraph 5 above, failed, neglected or refused to grant to the Plaintiff any option to purchase the Property or at all.

AND the Plaintiff claims:

(1) the Defendants' specific performance of the said Agreement to grant the Plaintiff an

option to purchase the Property,

(2) alternatively, the Defendants' specific performance of the aforesaid agreement to sell the Plaintiff the Property as pleaded in paragraph 5 above,

...

Reply

6. In respect of the averment that the Plaintiff is not entitled to bring this action by virtue of Section 6 of the Civil Law Act (Cap 43), the Plaintiff says that there is sufficient memorandum of the agreement as evidenced by the undated Option to Purchase of HSR International Pte Ltd dated 22 April 2006 that was filled in by Tan Jit Kin, the words written at the back of UOB cheque no. 573784 dated 22 April 2006, the undated Option to Purchase (8 signatures) referred to in paragraph 6 of the Statement of Claim and the undated Option to Purchase (5 signatures) referred to in paragraph 9(c) of the Statement of Claim. Further and/or in the alternative, the Plaintiff says that there is part performance of the agreement in the Plaintiff issuing the cheque and making payment of the option fee of \$5,800.00 as stated in paragraph 4 of the Statement of Claim.

17 It can be seen from the foregoing that the proposed amendments were more than a simple tweaking of the pleadings: they in fact amounted to the introduction of a new and alternative cause of action from that proceeded on at the beginning of the trial. This was because the plaintiff was alleging that by the events that occurred on 22 April 2006, he had made an offer to purchase the Property and that this offer was accepted when the defendants banked in the cheque that he had given to Tan Jit Kin for the sum of \$5,800. Thus, as an alternative to the contract for the issue of an option which was his original case, the plaintiff was boldly alleging that instead an actual sale and purchase agreement had been concluded.

The plaintiff's submissions

18 The plaintiff took the position that, following *Wright Norman v OCBC Ltd* [1994] 1 SLR 513, the matters that had to be considered by the court in connection with an application for amendment of pleadings were:

- (a) whether the amendment would enable the real issue between the parties to be tried as if so the amendment would be allowed unless matter (b) applied; and
- (b) whether the amendment would cause injustice or injury to the opposing party.

19 In relation to the first matter, the submission was that the amendments were necessary to enable the real issue to be tried. The plaintiff submitted that he was not taking a different stance by putting forward the proposed amendments. This was because the facts on which the plaintiff's alternative case was based were all the same facts as supported his original case. In the plaintiff's view, no further evidence needed to be led in respect of the new case, but even if the defendants could demonstrate prejudice, the court would be able to make an order for witnesses to be recalled. As for the amendments to the reply, the additional language had been put in to bring in the issue of the signed option and part performance. According to the plaintiff, the matters stated in the amended paragraph 6 would support the contention that there had been part performance of the agreement to grant an option.

20 The plaintiff alleged that based on the evidence presented before the court, the following facts were not in dispute:

- (a) that on 22 April 2006, Tan Jit Kin met the plaintiff's representative, Ong Boon Chuan and received the latter's conditions of the purchase on the HSR pro-forma option to purchase document;
- (b) Tan Jit Kin also received on 22 April 2006 a cheque for the 1% option fee with the conditions handwritten at the back of it; and
- (c) on or about 26 May 2006, the cheque was presented by the third defendant and honoured.

The plaintiff said that these facts gave rise to the following issues:

- (a) whether these facts bore out the existence of a binding agreement between the parties or, in other words, what the effect of the defendants presenting the cheque for payment with knowledge of the terms written at the back of it?
- (b) whether the HSR pro-forma option to purchase, the cheque and/or the undated options could satisfy the requirement of "writing" under s 6(d) of the CLA?

21 The plaintiff said that he was not seeking to set up a new case for the first time. All along it had been the plaintiff's case that there was an agreement between the parties. The proposed amendments to the statement of claim sought to bring into issue the exact point when such an agreement (if not on 22 April 2006 as originally pleaded) had come into existence.

22 I did not accept this argument that there was no new case presented by the amendments. The agreement that had been relied upon from the time the action started was the alleged agreement by the defendants to grant an option in respect of the Property to the plaintiff. When the statement of claim was originally filed, the plaintiff had no doubt that this agreement had been made in April 2006. Now having heard the evidence, the plaintiff not only wanted to change the nature of the agreement to one that was an actual contract for the purchase and sale of the Property but also wanted to change the date on which the agreement came into existence. The plaintiff was not attempting to change the date on which the alleged agreement to grant an option had been made. He was only asserting the new date in respect of the new contract for sale and purchase.

23 I considered that the plaintiff's application to make these changes was made too late and was based on facts *ie* those recited in [20(a), (b) and (c)] above that had been known to the plaintiff from the very beginning. There was no explanation as to why this case could not have been presented at the beginning or why the amendments could not have been made earlier (and at the latest, before the start of the trial). The amendment sought to introduce a new cause of action and a new relief. The plaintiff was seeking to plead that a different contract had been made by the defendants. This stand was also contrary to the earlier position taken by the plaintiff which was that s 6 of the CLA did not apply because the contract was made for the grant of an option and was not a contract for the transfer of an interest in land.

24 The defendants submitted that the proposed amendment was ambiguous and inconsistent with the evidence and did not provide the plaintiff with a viable claim. By the proposed new sub-paras 5(a)

to (e), the plaintiff was alleging that he had made an offer to the defendants by what he described as the "pro-forma" HSR option form completed by Tan Jit Kin. It was not clear as to what the word "pro-forma" implied and, more importantly, the plaintiff was alleging that the offer was made by way of the standard form option document used by HSR. Sub-paragraph 5(b) reinforced this point by describing one of the terms stated in the HSR option form and sub-para (b) then alleged that Tan Jit Kin was to procure the defendants' execution of the HSR option. In other words, the plaintiff was alleging that his alleged offer by way of the HSR option was to be accepted by the defendants by executing that document. That was a peculiar stand to take because the HSR option form was clearly a document providing for an option contract and therefore even if the plaintiff had tried to make an offer of purchase via that document, if the defendants had accepted that offer by executing the document, what they would have given the plaintiff would have been an option and not an agreement to buy and sell the Property. An agreement to buy and sell the property would only have arisen after the exercise of the option in accordance with its terms. Hence, the facts as pleaded did not support the proposed new claim. This argument was a forceful one and I accepted it.

25 The defendants further argued that even if the plaintiff attempted to rely on the cheque to argue that there was an agreement to buy and sell the Property, a perusal of the cheque would indicate that the wording thereon written by Ong Boon Chuan made reference to "nominee" and "option". These words showed that the cheque was to be given in exchange for an option rather than an exchange for a sale and purchase agreement. Thus, again, there was no way that an alleged acceptance of the alleged offer could give rise to an agreement between the plaintiff and the defendants for the sale and purchase of the Property which was the proposed alternative relief claimed. I accepted this submission as well.

26 I was also of the view that the proposed alternative case put forward by the plaintiff was not consistent with the behaviour of his representative Ong Boon Chuan after 22 April 2006. If I were to accept Ong Boon Chuan's story in full (which I had to for the purpose of the amendment application, notwithstanding that the defendants' witnesses contradicted parts of it), it would appear that all along Ong Boon Chuan was insisting that the defendants issue a valid option which could be accepted by him on behalf of the plaintiff. His objection to the option document signed by all the defendants was two-fold: the first objection was that he maintained that it was only given to him long after the date for the exercise of the option had passed and the second objection was that it did not contain the condition relating to the construction of the 2½ storey house. Having put forward those objections to Tan Jit Kin, Ong Boon Chuan continued, he said, to insist on a new option being given to him which he could exercise and which contained the necessary condition. He did not, either in August 2006 when he alleged that he first saw the "expired" option or at any time thereafter up to the time the action was filed, assert to Tan Jit Kin or any of the defendants that the plaintiff had made an offer to purchase the Property. Nor did he say that that offer had been accepted by the banking in of the cheque for \$5,800 and that, accordingly, there was a subsisting sale and purchase agreement which had to be complied with by the defendants. It should also be noted that the new case was inconsistent with the evidence of Tan Jit Kin that on 22 April 2006, he had suggested to Ong Boon Chuan that the plaintiff make an offer to purchase the Property using the HSR form for that purpose but that Ong Boon Chuan had rejected that course and insisted that the HSR option form be used and presented to the defendants for signature. Ong Boon Chuan had gone to the extent of ensuring that Tan Jit Kin made certain amendments to the HSR option form to reflect his requirements.

27 All in all, it appeared to me that the amendments were not aimed at clarifying the plaintiff's case but instead were designed to add an additional plank to that case because after the evidence had been assessed, the plaintiff had realised that there were certain difficulties with his original case.

28 As regards the proposed amendments to para 6 of the reply, I disallowed the same because I took the view that they were not legally viable. Section 6 of the CLA required the memorandum in writing to be signed by the party to be changed. None of the defendants had signed the HSR option nor was there evidence that any of them (who all had separate interests in the Property) had authorised any other defendant or, for that matter, Tan Jit Kin, to sign it for them. As for the cheque, the writing and signature that appeared on it had nothing to do with the defendants.

29 As regards the second issue which was whether the defendants would suffer prejudice by reason of the amendments, the plaintiff's submission was that there was no prejudice because the defendants were not caught by surprise by the proposed amendments. Further, even if there was any prejudice, this could be addressed by the grant of leave to recall witnesses or by making a suitable award of costs to compensate for prejudice. The plaintiff further repeated that the evidence on which the proposed amendments was based was not in dispute and insofar as the circumstances in which the cheque was presented were concerned, there was only the evidence offered by the defendants since the plaintiff could not present any evidence on the point.

30 I did not agree that there would be no prejudice caused to the defendants by reason of the amendments. In this respect I accepted the defendants' submission that they would be prejudiced because the new case was not the case that they had prepared to defend. They had prepared their defence on the basis of the plaintiff's original allegation that a contract for the issue of an option had been made by Tan Jit Kin on behalf of the defendants on 22 April 2006. To meet that case, the defendants had concentrated their evidence on the issues of the extent of the authority, if any, given by the defendants to Tan Jit Kin and on what had actually happened between Tan Jit Kin and Ong Boon Chuan on 22 April 2006. The proposed amendments would have put forward a new case that it was the third defendant who entered into a completely different contract on behalf of all the defendants on 26 May 2006. To defend this allegation the defendants would have had to bring evidence on the law and the facts in relation to the authority given to the third defendant by the other defendants and would also have to put in detailed evidence of how the cheque was received and banked in by the third defendant. This evidence was not focussed on in the defendants' affidavits of evidence-in-chief and what emerged of the circumstances came out through cross-examination only. Allowing the amendments would therefore mean allowing the defendants to file further affidavits of evidence-in-chief and being recalled so as to subject themselves to further cross-examination. This would involve time and expense and strain on the individuals concerned. There would also have to be further cross-examination of Ong Boon Chuan and Tan Jit Kin to ascertain exactly what each of them thought he was doing on 22 April 2006 and whether there was any intention on the part of Ong Boon Chuan to make an offer to purchase rather than a contract for an option.

31 I was also mindful of the fact that there were eight defendants, some of whom were elderly, who had been involved in this action since 11 October 2007. They had defended the action on a certain basis and had decided to defend it because of legal advice they had received in regard to the way in which the plaintiff's claim had been framed. They had also all employed the same solicitor. The changes which would be effected by the proposed amendments would necessarily entail a change in the approach of the defence and it might even be that some of the defendants would find that their interests were no longer identical with those of the other defendants and that they had been prejudiced by not having had separate representation. All in all, I thought it was far too late in the day for the plaintiff to add another cause of action and especially one that was never hinted at prior to the start of the trial. In my view, allowing the amendments would have caused prejudice to the defendants which could not have been compensated for by an order for costs.