New Dennis Arthur and another *v* Greesh Ghai Monty and another [2012] SGHC 122

Case Number : Suit No 408 of 2011

Decision Date : 06 June 2012

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Lim Tong Chuan and Cai Jianyi Edwin (Tan Peng Chin LLC) for the plaintiffs; Seah Zhen Wei Paul and Loh Khian Chung (Tan Kok Quan Partnership) for the defendants.

Parties : New Dennis Arthur and another — Greesh Ghai Monty and another

Land

6 June 2012 Judgment reserved.

Choo Han Teck J:

1 18 Ipoh Lane #18-02 Emery Point ("the Emery Point Property" or "the property") was the Singapore holiday home of Dennis Arthur New and his wife, Karen Maria New ("the plaintiffs"). In 2010, the plaintiffs were looking to sell their holiday home. Meanwhile, another expatriate couple, Mr Ghai Monty Greesh and Ms Espadas Arevalo Amparo Maria ("the defendants") were in search of a home of their own. Having already been once bitten with water leakage problems in their previous Hong Kong rental apartment, the defendants were twice shy when considering the purchase of the Emery Point Property. In fact, by their own account, the defendants made a total of three inspections of the property during the day and night – twice jointly and once by the second defendant alone but at all times accompanied by their housing agent, Azman Haron ("Azman"), and the plainitffs' housing agent, Tommi Loy ("Loy"). The couple liked what they saw and made an offer to purchase the Emery Point Property on 30 November 2010. The plaintiffs issued the defendants an Option to Purchase ("OTP") on 2 December 2010 which was to be exercised by 16 December 2010 with completion to take place on 31 January 2011. Pertinent to the present dispute, paragraph 9 of the OTP reads:

> [T]he Purchaser shall be deemed to have full notice of the actual state and condition of the property in all aspects and shall not be entitled to raise any objection or requisition whatsoever in respect thereof.

Paragraph 1 of the OTP reads:

> The sale is subject to "The Law Society's Conditions of Sale 1999" insofar as they are applicable to a sale by private treaty and are not varied by or inconsistent with any of the following terms and conditions.

In this regard, Condition 9 of the Law Society's Conditions of Sale 1999 reads:

> [T]he Purchaser is stated as having notice of the actual state and condition of the property as regards access, repair, light, air drainage and in all other respect.

2 The defendants, who were legally advised during the purchase, exercised the OTP on

16 December 2011. In the period before the proposed completion on 31 January 2011, the second defendant stated that she visited the Emery Point Property on three occasions. During the second visit on 25 January 2011, the second defendant (who was accompanied by Loy, Azman and Kelvin, a contractor) was shocked to find that there was a huge puddle of water in the master bedroom on the first floor. By this stage, the plaintiffs had removed their furniture and so the second defendant noticed, for the first time, other stain marks in the other bedrooms that had previously been concealed by the furniture. Even more alarming, according to the second defendant's testimony, was the water running down the wall of a bedroom on the first floor. Thereafter, the second defendant met with the building manager, McCoy Young ("McCoy") on 27 January 2011. He informed her that the Management Committee of Emery Point and many owners of the building were suing the building developer for various defects such as water leakage, malfunction of the intercom system and problems with the swimming pool. According to the second defendant, McCoy was shocked to hear that the property agents had not told the defendants about the pending lawsuits.

3 As a result of the discovery of the water leakage, the defendants refused to complete the purchase of the property. Consequently, the plaintiffs commenced an action against the defendants seeking:

(a) Specific performance of the sale of the property and payment of $1,957,000.00, being the balance of the purchase price, by the defendants to the plaintiffs within 14 days from the date of Judgment;

(b) Specific damages flowing from the defendants' alleged breach;

(c) Further and/or in the alternative, general damages to be assessed;

(d) Interest on the purchase price of $2,060,000.00 pursuant to Condition 8.1 of the Law Society's Conditions of Sale 1999, at the rate of 10% per annum from 1 February 2011 to the day of actual completion; and

(e) Further and/or in the alternative interest on the specific and general damages at the rate of 5.33% from the date of the filing of the writ to the date of actual realisation.

The defendants, in their counterclaim, seek to rescind the contract on the basis that they were induced to enter into the contract due to Loy's misrepresentations concerning the condition of the property.

4 This claim turns on the factual question of what transpired between Loy and the defendants during the viewings of the property prior to the signing of the OTP. In this regard, it is incumbent on the defendants to establish that:

(a) Loy had made a false statement of fact to the defendants concerning the Emery Point Property; and

(b) This false statement induced the defendants to enter into the contract.

With respect to the first proposition, Loy categorically denied telling the defendants that there were no leaks in the Emery Point Property. On his account the defendants had inspected the property at least four times before the OTP was signed. Although his recollection of the dates of these visits was muddled, he was clear that during two viewings, the defendants brought along a few people whom Loy believed were building specialists, who would advise on renovation and structural works, and

interior decorators. These building specialists would inspect the property during the viewing. For the viewing on 23 November 2010, Loy's position was that the defendants did not ask any questions about the leakage. They did however ask Loy why some of the wallpaper was peeling. Loy's reply was that he suspected that it could be due to poor workmanship. For the viewing on 28 November 2010, the defendants noticed that the floor near the opened window was wet. Loy informed them that this could have been caused by a window that he had opened to ventilate the place – it was raining at the time. The defendants asked Loy about whether there were any leaks in the property to which Loy replied that he did not know the answer.

5 Under cross-examination, Loy's attention was brought to a number of photos of the property that were annexed to the affidavit of evidence in-chief ("AEIC") of Derek Mills, the defendants' expert. In particular, photograph number EP 30 of bedroom 3 showed what defendants' counsel, Mr Paul Seah, characterised as water stains, on the timber flooring. It should be noted that these photographs were taken between 2 to 3 March 2011, long after the date set for completion. In this respect, Loy denied that there were water stains as severe as those in the photograph when he had accompanied the defendants on the 23 and 28 November 2010 visits. He also denied that the defendants (either individually or collectively) had specifically asked him about the water stains. However, Loy admitted that the defendants had pointed out the water stains during their first visit on 22 November 2010 although he maintained that he did not say anything in response. Loy was certain that at least one set of contractors had inspected the property before the defendants signed the OTP. This critical fact was etched in Loy's mind for the perfectly practical reason that Loy was only interested in closing the deal in order to be paid his commission. After Loy had stated his "last price", the defendants' agent had said that he would need someone to check the property before the option money could be paid. This fourth and last visit, which took place sometime between 28 November and 2 December 2010, was particularly important to the defendants because, according to Loy, the defendants' agent had informed him that they were on a tight budget and needed to know the cost of renovations as this would eat into the overall budget they had set aside for acquiring the property. While I note Mr Seah's objection that this last visit was not mentioned in Loy's AEIC or the pleadings, I found his testimony on this point to be convincing and believe him.

6 In contrast, the defendants' testimony was that there were only three viewing on 22, 23 and 28 November 2010 before the OTP was signed on 2 December 2010 and that the first time they had brought anyone matching Loy's description of a building specialist, contractor or interior decorator was on 18 December 2011, after the OTP was exercised on 16 December 2010. The defendants also denied that there was a fourth and final viewing before the OTP was signed where their experts had inspected the building. Taking the defendants' case at its highest, Loy had told the defendants during the 23 November 2010 visit that there were no leakage problems. The water stain on the floor of the master bedroom on the first floor had been caused by a window that had been left open such that rainwater had blown into the property, while the peeling wallpaper in the master bedroom on the second floor was caused by the humid weather conditions in Singapore. Even if Loy had been less than forthcoming in answering the defendants' queries, that alone is not sufficient to establish the defendants' claim for misrepresentation. It is also necessary for me to consider whether Loy's representations induced the defendants to enter into the contract. On this issue I find in favour of the plaintiffs.

7 The second defendant explained that she could not tell conclusively from a visual inspection whether there was water leakage in the property. For that, she candidly conceded that she would have to hire an expert. As alluded to above at [1], the defendants had previously encountered water leakage problems in their rental apartment in Hong Kong where they had resided from 1998 to 2006. The water leakage in the Hong Kong apartment could not be solved for two years even though multiple contractors had been hired to perform repeated corrective works. In these circumstances, I

find it difficult to understand why she would unquestioningly rely on Loy's say-so on the water leakage instead of seeking the advice of her own expert. The second defendant's three-pronged explanation that:

(a) Singapore was a "huge law-abiding society";

(b) Loy was a certified property agent with a well-known agency; and

(c) Loy was an older gentleman, does not hold water.

8 Significantly, she admitted that Loy did not possess the sort of technical expertise to decide whether a building was leaking and would not be able to tell any better than herself if there was a leakage.

9 Similarly, the first defendant rigorously asserted that he expected Loy, as a certified agent, to have knowledge of the condition of the property. However, this assertion was significantly qualified by the first defendant's earlier concession that a layperson (*ie* someone without the necessary expertise to carry out a survey to see whether there was a leakage) would not be able to tell conclusively whether the property had a leakage problem. These concessions are fatal to the defendants' case because even if Loy had made the misrepresentations that the defendants' alleged (see above at [6]), this did not induce the defendants to sign the OTP. It is also pertinent to note that the defendants' were legally represented during the course of the transaction albeit by a different firm from the present (see above at [2]). Accordingly, the defendants' claim for rescission must fail.

10 In the light of this finding (*viz*, that even if Loy had falsely represented the condition of Emery Point Property, it did not induce the defendants to enter the contract), it is unnecessary for me to consider in detail the plaintiffs' alternative submission that paragraph 9 of the OTP and/or Condition 9 of the Law Society's Conditions of Sale 1999 (see above at [1]) precluded the defendants from raising misrepresentation in the first place. That said, my tentative view is that both clauses only go so far as to mirror the position at common law that there is no obligation on the seller to positively disclose to the buyer defects of quality, as opposed to latent defects of title, in the property (see *Huang Ching Hwee v Heng Kay Pah and another* [1992] 3 SLR(R) 452 ("*Huang Ching Hwee*")). As such both clauses do not preclude a purchaser from successfully pleading that he or she was induced to contract by a *positive* misrepresentation on the part of the vendor or his or her representative.

11 Courts will ordinarily be willing to specifically enforce a contract for the sale of land. The rationale being that, unlike most other goods, no two pieces of land are identical ("the *sui generis* rationale"). Consequently, damages, more often than not, are an inadequate remedy.

12 However, the present case is the obverse to the common situation where the purchaser is eager to complete and is seeking the specific performance of the sale of the property. Here, the plaintiffs, as vendors, are seeking to foist the property on the unwilling defendants, as purchasers. In such cases, the argument for allowing specific performance is considerably weaker since the *sui generis* rationale is not engaged. This is because the property does not have a "particular value" to the vendor whose interest is purely financial in nature. In commenting on this unique scenario, the learned editors of *Snell's Equity* (Sweet & Maxwell, 32nd Ed, 2010) note at para 17–011:

> In most cases a monetary remedy of damages or the action for an agreed sum will be an adequate remedy for breach of a contract for the payment of money, but in exceptional cases such a contract may be specifically enforced. ... More controversially, in what has been described as "an awkward exception" to the normal requirement that damages should be

> inadequate, in contracts for the sale of land, the vendor is readily awarded specific performance even though his interest in performance is purely financial and thus damages or the action for an agreed sum would (other than in exceptional cases) be an adequate remedy. This is commonly justified on the basis of mutuality, but this principle is no longer given the weight it traditionally was and, in any event, the purchaser's entitlement to specific performance against the vendor may no longer be absolute.

13 The learned editors cite two cases in support of this proposition. Firstly, in *Anders Utkilens Rederi A/S v O/Y Lovisa Stevedoring Co A/B and Keller Bryant Transport Co Ltd* [1985] 2 All ER 669, which was a purchaser's action for specific performance for the sale of property against the vendor, Gould J noted at 673 that:

> It is well established that the court does not order an agreement to be specifically performed where damages at law would be an adequate remedy for the plaintiff. There is indeed an awkward exception to the rule, namely the vendor's action for specific performance of a contract for the sale of land, of which the usual explanation by the sacred word 'mutuality' is perhaps not wholly satisfying. With that qualification, however, the rule is of general application.

In my opinion, the term "awkward exception" is just a polite form of grudging acknowledgement but not acceptance of its utility. I am of the view that if damages are adequate the vendor should not be granted an order for specific performance.

14 The second case cited is that of *Hope v Walter* [1900] 1 Ch 257 ("*Hope*") which can be concisely summarised by Lindley LJ's pithy dicta at 258:

> It would be a little short of a scandal, to my mind, if the Court, having the power of refusing the extraordinary remedy of specific performance, were to thrust down the throat of an innocent buyer the obligation of becoming the landlord of a brothel.

However, for the reasons set out above at [12], I believe that it would be setting the threshold too high if courts are only allowed to refuse specific performance against a purchaser when he would otherwise be exposed, as owner, to criminal liability (see *Hope* at 260). The Court of Appeal decision of *Huang Ching Hwee* (see above at [10]) is relevant. There, a vendor applied for a declaration that the purchasers were not entitled to rescind a contract for the sale of land and that he was entitled to forfeit their deposit. Following the exercise of the OTP, the purchasers discovered that the vendor had previously carried out substantial additions and alterations to the property in question without the requisite planning permission. Although the appeal was allowed on the basis that the unauthorised works did not constitute a latent defect of title at law which was subject to disclosure by the vendor, the Court of Appeal noted that since the vendor had elected not to proceed with his claim for specific performance in the court below, there was no need to consider it (see *Huang Ching Hwee* at [75]).

15 As the plaintiffs have only a financial interest in the sale of the property their loss can adequately be compensated with damages. In this respect, although the plaintiffs' Statement of Claim pleaded, as an alternative prayer, for general damages to be assessed, this was not quantified and particularised at any time in the course of proceedings. Further, plaintiffs' counsel did not seek to have the trial bifurcated. In these circumstances, I find that nominal general damages in the sum of $1,000 should be awarded.

16 Turning to the items for specific damages that were pleaded by the plaintiffs' in their Statement of Claim, Mr Paul Seah's cross-examination of the first plaintiff left me with no doubt that I should not grant the plaintiffs' claims for airfares and hotel accommodation because these concerned:

(a) events that took place prior to when the dispute arose on 25 January 2011(see above at [2]);

(b) bookings for the second plaintiff and their five year-old daughter when it was the first plaintiff who was giving instructions to their solicitors via phone and email;

(c) bookings for which the first plaintiff conceded he was not sure why he had travelled to Singapore for; or

(d) double booked flights on the same date (*ie* 23 April 2011).

17 I would also dismiss the plaintiffs' claim for $44,084 for commission payable to Loy's property agency. The sale was not successful. More importantly, the plaintiff admitted in cross-examination that nothing had yet to be paid to the agency. The claim for storage fees for the plaintiffs' furniture, which had to be shifted out of the property, should be limited up till March 2011 (*ie* $5,450) since the first plaintiff conceded that the furniture was moved back to the property by March 2011. Further, there is no reason to grant the plaintiffs' claim for $8,000 per month for accommodation from 11 March 2011. The plaintiffs do not reside in Singapore and use the property only as a holiday home. There is also insufficient evidence to establish the plaintiffs' claim for AUD10,000 concerning an alleged aborted deposit for an Australian property, which could not be completed because the plaintiffs' were deprived of the proceeds from the sale of the property. I am, however, willing to grant the legal-conveyancing costs incurred (*ie* $2,200). In total, I award $7,650 in specific damages. The plaintiffs have also prayed for late completion interest pursuant to Condition 8.1 of the Law Society's Conditions of Sale 1999. The plaintiffs' claim on this point should fail because this term only covers interest up till late completion and is not applicable in the scenario where the court has ordered that the defendants are not required to complete the sale of the property.

18 I thus order accordingly. Parties are to draw up an order of court for my approval. I will hear parties on the question of costs at a later date.