

FLJ Property Pte Ltd v Heritage Hotel Pte Ltd
[2012] SGHC 13

Case Number : OS 794 of 2011
Decision Date : 18 January 2012
Tribunal/Court : High Court
Coram : Tay Yong Kwang J
Counsel Name(s) : Cheah Kok Lim (Cheah Associates LLC) for the plaintiff; Lim Khoon (Lim Hua Yong LLP) for the defendant.
Parties : FLJ Property Pte Ltd — Heritage Hotel Pte Ltd

Contract – Contractual Interpretation

18 January 2012

Tay Yong Kwang J:

1 The defendant is the lessee and the vendor of adjoining Housing Development Board (“HDB”) shop houses known as 91/A, 93/A, and 95/A Owen Road Singapore 218903 (the “Property”). The plaintiff is the purchaser of the Property. This originating summons was brought by the plaintiff to enforce the sale of the Property in response to the defendant’s purported rescission of the sale agreement in reliance on a clause in the Option to Purchase.

2 At the conclusion of the hearing of this application, I declared that the defendant’s notice of rescission was invalid and that the sale agreement subsisted. Accordingly, I made an order for specific performance of the said agreement. The plaintiff was also awarded its costs for this application. The defendant has appealed against my decision.

Background facts

3 The defendant was the lessee of the HDB and the vendor of the Property while the plaintiff was the purchaser of the Property, which was used as a coffee shop.

4 The reversion of the lease of the Property was previously held by the Singapore Improvement Trust. It is now vested in the HDB.

5 The lease of the Property has been varied and supplemented by Deeds of Variation. Clause 1(v) of the lease was replaced by Clause 1 of a Deed of Variation, which provided as follows: [\[note: 1\]](#)

(a) not to mortgage, lease, let, licence, sublet the said land in whole or in part or do anything in the like manner without first obtaining the consent of the Board in writing and which consent the Board may give on any terms and conditions as it in its entire and unfettered discretion deems fit and which terms and conditions shall include the levy of a fee

(b) **Not to** demise, transfer, assign or **part with the possession of the said land or any part thereof whatsoever manner** and not to effect any form of reconstruction however brought about including any form of amalgamation or merger with or takeover by another company, firm or body or party, **without first obtaining the consent of the Board in writing and such consent**

shall be given on such terms and conditions as the Board may in its entire and unfettered discretion deem fit to impose and shall include the payment of a fee amounting to 10% of

- (i) **the market value of the said land at the time of application of such consent and**
- (ii) **the costs of the buildings erected on the said land**

PROVIDED THAT the 'costs of the buildings erected on the said land' shall mean: -

either the construction costs of the buildings where the original Lessee who has executed the lease with the Board is applying for such consent

or the market value of the buildings as at the time of the last transaction whether a demise, transfer, assignment or parting with the possession of the land or such reconstruction whichever is applicable, where any Lessee, other than the original Lessee is applying for such consent.

The existing market value of the said land and buildings or costs of construction of the building shall be determined by the Board alone and the Board's assessment shall be final and accepted and not be subject or open to review by the Lessee".

[emphasis added]

6 The defendant granted an Option to Purchase in respect of the Property on 18th March 2011 to Fairlady Jewellers Private Limited ("Fairlady") and/or its nominees for \$3,330,000. [\[note: 2\]](#) In return for this Option to Purchase, Fairlady paid the defendant \$33,300.

7 Fairlady was a shareholder of the plaintiff, holding 55% of its share. The plaintiff was the Fairlady's nominated purchaser of the Property.

8 In a letter dated 11 April 2011, the defendant wrote to the plaintiff requesting various amendments to the Option to Purchase, in response to the plaintiff's proposed amendments to the same. In particular, the defendant proposed the addition of two clauses ("clauses 17 and 18") to the Conditions of Sale found in the Option to Purchase. [\[note: 3\]](#) The clauses provide as follows:

Clause 17:

- (i) The Property is sold subject to the written approval of the Housing Development Board ('HDB')
- (ii) The Purchaser shall apply for HDB's approval to the sale and purchase of the Property and shall expeditiously complete execute and submit all forms and documents as required by HDB and the Purchaser shall pay for the administrative fees chargeable.
- (iii) The Vendor will provide the Purchaser with such assistance as HDB may require of the Vendor from time to time, including the completion, execution and submission of all requisite forms and documents to HDB.
- (iv) The Purchaser shall perform all the conditions imposed by HDB to be performed by the Purchaser as conditions precedent for the approval and shall bear all costs whatsoever imposed by HDB or otherwise for the said approval and for the performance of the said conditions imposed by HDB, if any.

(v) The Vendor shall perform all the conditions imposed by HDB to be performed by the Vendor as conditions precedent for the approval and shall bear all costs whatsoever imposed by HDB or otherwise for the said approval and for the performance of the said conditions imposed by HDB, if any.

(vi) The imposition of terms and conditions by HDB including the payment of annual rent and other terms of HDB's Lease in respect of the Property shall not be a ground which will entitle the Purchaser to refuse to complete the sale and purchase herein.

...

Clause 18:

Where the Vendor is unable or unwilling, because of difficulty, delay or expense or for other reasonable cause to comply with any term of HDB to be performed by the Vendor for the sale of the Property, the sale and purchase herein, may be rescinded at the Vendor's option by written notice of the Purchaser on or before the scheduled date of completion as provided in Clause 11 of the Option or the extended completion date, as the case may be. On rescission pursuant to this clause the Purchaser shall forthwith return to the Vendor all documents of title and shall withdraw any caveats lodged by the Purchaser or the Purchaser's chargee or mortgagee as the case may be and the Vendor shall refund to the Purchaser all monies paid by the Purchaser under this Option without any interest or compensation whatsoever and thereupon neither party shall have any claim or demand against the other for costs, damages, compensation or otherwise.

9 The plaintiff exercised the Option to Purchase on 11 April 2011 by paying the balance of the deposit of 9% of the purchase price and delivering the duly signed acceptance copy to the defendant. Although the plaintiff had earlier taken the position that clauses 17 and 18 were not incorporated into the Option to Purchase, before me, the parties agreed that the said clauses were part of the Option to Purchase.

10 The HDB wrote to the defendant on 14 June 2011 stating that it had no objection to the assignment of the lease by the defendant to Fairlady subject to the payment of an assignment fee of \$128,935 (inclusive of 7% GST) to the HDB, clearance of use of the premises by the relevant authorities and the submission of a stamped copy of the transfer instrument for HDB's records. [\[note: 4\]](#) The defendant replied to the HDB on 15 June 2011 clarifying that the lease was to be assigned to the plaintiff and not to Fairlady. [\[note: 5\]](#)

11 In further correspondence in June 2011, the defendant informed the HDB that it was "surprised by the amount of assignment fee of \$128,935 (inclusive of GST) levied" and asked the HDB to elaborate on the breakdown of the amount. HDB replied that "the assignment fee imposed is according to HDB's prevailing policy for assignments of leases" and explained that the assignment fee "is based on 10% of the proposed sale price of \$3,330,000 less the total original purchase price of \$600,000 and \$1,525,000 of the three properties". The defendant replied stating that it was "surprised that the assignment fee levied by HDB was a hefty 10%" and objected "strongly" to the imposition of the assignment fee. HDB replied to explain that "the leases for the properties allow the lessor to impose an assignment fee equivalent to 10% of the market value of the land and buildings at the time of application".

12 Thereafter on 1 July 2011, the defendant wrote to the plaintiff to defer completion. [\[note: 6\]](#)

Following this was the defendant's letter of 15 July 2011 to the plaintiff stating that it was "unable or unwilling because of difficulty or expense to comply with the payment of the assignment fee of \$128,935 imposed by HDB for the sale of the Property" and that it wished to exercise its rights under clause 18 to rescind the Option to Purchase. [\[note: 7\]](#) The defendant's intention to rescind on this ground was reiterated in another letter dated 19 July 2011 to the plaintiff. [\[note: 8\]](#)

13 The plaintiff, in its letter dated 21 July 2011, rejected the defendant's purported rescission of the Option to Purchase. The rejection was reiterated by the plaintiff in another letter dated 1 August 2011. With a view to completion, the plaintiff thereafter proceeded to forward a draft transfer document, among other things, in a letter dated 10 August 2011 to the defendant. [\[note: 9\]](#)

14 In a letter dated 16 August 2011, the defendant refused to proceed to completion and repeated that the Option to Purchase had been duly rescinded in accordance with clause 18. The next day, the plaintiff wrote to dispute the defendant's right to rescind the agreement and insisted that the parties proceed to complete the sale.

The plaintiff's case

15 The substance of the plaintiff's arguments was that upon construing clauses 17 and 18 and considering the conduct of the defendant and the circumstances, the defendant was not entitled to rescind the sale and that it was acting unreasonably in doing so.

16 The plaintiff argued that the assignment fee was payable by the defendant as it fell within clause 17(v). Moreover, as lessee of the Property, the defendant would have been privy to the terms of the lease which expressly provided for such fee to be payable and the defendant could not therefore argue that it was unaware of such a condition. Clause 18 could not be interpreted to cover the assignment fee imposed as it was something already known to the defendant.

17 The plaintiff further argued that the assignment fee was not hefty and there was no evidence to show the defendant's inability to pay the fee. It argued that the sale price of \$3,330,000 would be sufficient to pay the fee and that the defendant would have taken the assignment fee into consideration in its calculation of the sale price.

18 The plaintiff also submitted that the assignment fee was not an unreasonable expense entitling the defendant to rescind the agreement because such expense was not one newly imposed by the HDB nor was it arbitrarily derived. It was something already known to the defendant. The plaintiff also referred to the HDB's website on industrial properties where it was stated under "Assigning Your Premises":

Fees

For leases on premium scheme, an assignment fee would be payable by the existing lessee (Assignor) which is computed as follows:

10% (Sale price – last purchase price).

19 Additionally, the plaintiff argued that there had to be objective circumstances causing the difficulty, delay or expense resulting in the defendant's inability or unwillingness to comply with HDB's conditions. It argued that the defendant could not unilaterally rescind the agreement pursuant to clause 18 merely because it was taken by surprise by the assignment fee and did not factor this into the sale price. It based this argument on *Chay Chong Hwa v Seah Mary* [1983-1984] SLR(R) 505

(*"Chay Chong Hwa"*) and *Peh Kwee Yong v Sinar Co (Pte) Ltd* [1987] SLR(R) 405 (*"Peh Kwee Yong"*) where the court noted that rescission could not be simply contingent on the defendant's subjective decision.

20 Accordingly, the plaintiff sought the following declarations and orders:

- (a) That the notice given by letters dated 15 and 19 July 2011 from the defendant purporting to rescind the sale contract of the Property in accordance with clause 18 on the ground that the defendant is unable or unwilling because of difficulty or expense to pay the HDB the assignment fee \$128,935, be declared invalid;
- (b) That the sale agreement be declared as still subsisting and binding on the parties;
- (c) That the defendant pay the assignment fee of \$128,935 to the HDB and late completion interest to the plaintiff, with such interest deducted from the proceeds of sale;
- (d) That the defendant specifically perform the Option to Purchase within 21 days of the court order;
- (e) That costs be fixed or taxed and to be paid by the defendant to the plaintiff.

The defendant's case

21 In response, the defendant sought to dismiss the plaintiff's application by arguing that it was entitled, on the basis of clause 18, to exercise its right to rescind the sale agreement. It made the following arguments in support of its case.

22 Firstly, it argued that not only was it unaware that HDB's consent for the sale was required, it was also unaware that HDB would impose payment of an assignment fee as a condition precedent to HDB's consent. It submitted that the provisions for the assignment fee were found only in the "obscure" and "dated" Deeds of Variation of lease made between HDB and the previous lessees in the early 1980s which the defendant did not have in its possession. The defendant therefore could not be deemed to have the requisite knowledge.

23 Secondly, the defendant argued that in any case, the "hefty" assignment fee imposed by HDB amounting to almost 4% of the sale price provided grounds for rescission of the sale in accordance with clauses 17 and 18 as it was "unable or unwilling" to pay the assignment fee because of "difficulty or expense". Indeed, it argued, it was precisely to provide for such an eventuality that clause 18 was added into the Option to Purchase.

24 Thirdly, the defendant argued that in interpreting the clauses, its obligations under clause 17(v) [\[note: 10\]](#) must be read subject to and be qualified by clause 18 or clause 18 would be superfluous. The defendant relied on the canons of construction calling for all parts of a contract to be given effect to and that where a latter clause qualifies an earlier clause in the contract, both should be read together.

25 Therefore, the defendant submitted that since clause 18 did not require reasons to be given for the defendant's inability or unwillingness to comply with HDB's condition of the payment of the assignment fee, the defendant was entitled to deliver a written notice in accordance with that clause to rescind the sale agreement.

The decision of the court

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26 It was not disputed by both parties that clauses 17 and 18 of the Option to Purchase ought to be read together. However they could not agree on what the outcome ought to be upon such construction. The main contention was whether clause 18 entitled the defendant to rescind the sale agreement despite its assumption of the obligation in Clause 17(v) that the vendor "shall perform all the conditions imposed by HDB to be performed by the Vendor as conditions precedent for the approval and shall bear all costs whatsoever imposed by HDB or otherwise for the said approval and for the performance of the said conditions imposed by HDB, if any".

27 Clause 17 of the Option to Purchase (see [8] above) sets out clearly the respective obligations of the defendant/vendor and the plaintiff/purchaser in obtaining HDB's approval for the sale and purchase of the Property under the lease. In particular, clause 17(v) sets out the defendant's obligation to perform all conditions set by HDB in order to obtain its approval for the sale of the Property under the lease and to bear all costs in relation to the performance of these conditions.

28 One of these conditions was the payment of an assignment fee of \$128,935 (inclusive of 7% GST) to the HDB (see [10]). A perusal of the lease documents would have revealed this. Clause 1 of the Deeds of Variation varying the terms of the lease clearly provided for the payment of a fee amounting to 10% of the market value of the land which was the subject of the sale and the costs of buildings erected on the land (see [5]). It was clear therefore that both the liability for the assignment fee and the method of quantification of the fee had been expressly set out. As the lessee of the Property, the defendant must be taken to have read the lease and to be aware of the express terms found in the lease documents.

29 The defendant could not argue that it was unaware of the terms in the lease documents simply because the Deeds of Variation were dated and obscure documents that were not in the defendant's possession. It ought to have asked for them when it bought over the Property. Alternatively, if it had lost the documents, that was something that should have been put right by itself before it decided to sell the Property. The Deeds of Variation could have been easily obtained from the Singapore Land Authority. [note: 11] As lessee of the Property and now the vendor of it, the defendant must be deemed to know the contents of those documents. Further, the defendant had the benefit of legal advice throughout the sale transaction. Also, as rightly pointed out by the plaintiff, [note: 12] the HDB's website (see [18] above), which is readily accessible, sets out a lessee's liability to pay an assignment fee to the HDB as a condition for assigning a lease together with HDB's formula for computing the said fee. [note: 13]

30 In the circumstances here, clause 18 of the Option to Purchase could not be read as qualifying the express requirement in clause 17(v) regarding the payment of the assignment fee where the liability to pay such and the method of ascertaining the amount to pay were spelt out. Clause 17(v) must, on the facts here, be confined to such conditions or such amounts of fee that were unknown to the defendant at the time it gave the Option to Purchase. It seems contrary to commercial logic that a party who knows or is deemed to know his liability to pay a fee and the amount thereof could in the same breath claim that the liability and the amount are too onerous such that it could then back out of the agreement.

31 Additionally, I found the authorities cited by the plaintiff to be of assistance regarding the court's approach to clauses similar in substance to clause 18. This was set out by the Court of Appeal in *Peh Kwee Yong* (at [25]), where L P Thean J (as he then was) stated that even if a contractual term or condition confers on a party an entitlement to rescind the contract, the court will still carefully examine the conduct of that party to determine whether he is entitled to exercise the right

of rescission given the circumstances of the case. In the preceding Court of Appeal case of *Chay Chong Haw* cited in *Peh Kwee Yong*, the court held that such a clause did not confer on the vendor a "wide and unfettered" right to rescind the contract as such a clause was of a "very drastic nature". In particular, where the vendor was guilty of 'recklessness' in entering into the contract or if his unwillingness to comply with conditions was "unreasonable" he would not be entitled to rescind the contract. As said by the court, a vendor "cannot in reliance on such condition arbitrarily, capriciously or unreasonably rescind the contract".

32 In the present case, Clause 18 clearly contemplates an objective standard for determining whether the impediment claimed by the defendant is valid. This can be seen from the words "[w]here the Vendor is unable or unwilling, because of difficulty, delay or expense or for other reasonable cause to comply with any term of HDB to be performed by the Vendor for the sale of the Property...". The words "difficulty, delay or expense" read in the context of "or for other reasonable cause" mean that they too should be reasonable from an objective point of view.

33 It appeared that the purported rescission by the defendant of the sale agreement was essentially prompted by it being caught by surprise by the \$128,935 assignment fee it had to pay the HDB for the transaction, rather than any real difficulty or significant expense it would have encountered in paying the fee. Additionally, as discussed in [29] above, the defendant's conduct in entering the agreement without ascertaining for itself the terms of the HDB lease amounted to sheer recklessness. Its unwillingness to comply with the payment of the assignment fee could not be said on the facts here to be reasonable.

34 In any case, the quantum of the assignment fee that the HDB imposed on the defendant, namely \$128,935, appeared to be considerably lower than what could have been imposed under the Deed of Variation. The HDB calculated the assignment fee as 10% of the sale price of the Property of \$3,330,000 less the total original purchase prices of \$600,000 and \$1,525,000, inclusive of 7% GST, to arrive at \$128,935. [note: 14] In doing so, the HDB appeared to have used the formula stated in its website (see [18] above), *i.e.* 10% (Sale price – last purchase price). Under the formula stipulated in the Deed of Variation (see [5] above), the HDB could have imposed a fee of 10% of the current market value of \$3,330,000 (which is the agreed sale price between the parties), amounting to \$333,000. With 7% GST, the total amount would be \$356,310. The defendant was therefore effectively given a discount of more than \$227,000 by the HDB in the assignment fee payable.

35 Therefore, considering all the circumstances of the case, I was of the view that the defendant lessee was not entitled to rely on clause 18 to rescind the sale agreement. Consequently I declared invalid the notice given in the defendant's letters dated 15th and 19th July 2011 that it was unable or unwilling because of difficulty or expense to comply with the payment of the assignment fee imposed by the HDB for the sale of the Property and further declared that the sale agreement still subsisted and bound the parties. I further ordered the defendant to pay the assignment fee of \$128,935 imposed by the HDB and to specifically perform the Option to Purchase within 30 days of my order (instead of the 21 days prayed for) or such extended period as may be agreed between the parties.

36 On the issue of costs, the plaintiff's counsel informed me that an Offer to Settle on the terms of this originating summons with late completion interest and costs waived was served on the defendant's counsel on 31 Oct 2011, some three weeks before the hearing. The plaintiff's counsel suggested that costs be fixed at \$6,000 plus reasonable disbursements. The defendant's counsel was content to leave the question of costs to the court. I ordered the defendant to pay the plaintiff costs fixed at \$6,000 plus reasonable disbursements (subsequently agreed at \$1,724.80).

[\[note: 1\]](#) Tan Sin Khoon's 1st Affidavit: Exhibit TSK-1, p 78, 97, 125

[\[note: 2\]](#) Tan Sin Khoon's 1st Affidavit: Exhibit TSK-1, p 23- 29

[\[note: 3\]](#) Tan Sin Khoon's 1st Affidavit: Exhibit TSK-1, p 50-51

[\[note: 4\]](#) Tan Sin Khoon's 1st Affidavit: Exhibit TSK-1, p 53

[\[note: 5\]](#) Tan Sin Khoon's 1st Affidavit: Exhibit TSK-1, p 54

[\[note: 6\]](#) Tan Sin Khoon's 1st Affidavit: Exhibit TSK-1, p 55

[\[note: 7\]](#) Tan Sin Khoon's 1st Affidavit: Exhibit TSK-1, p 56

[\[note: 8\]](#) Tan Sin Khoon's 1st Affidavit: Exhibit TSK-1, p 57

[\[note: 9\]](#) Tan Sin Khoon's 1st Affidavit: Exhibit TSK-1, p 58

[\[note: 10\]](#) The defendant erroneously referred to this clause as clause 17(iv) in its submissions. It ought to be clause 17(v).

[\[note: 11\]](#) Defendant's submissions paragraph 20

[\[note: 12\]](#) Plaintiff's submissions paragraph 4.1.4

[\[note: 13\]](#) Tan Sin Khoon's 2nd Affidavit: Exhibit TSK-2, p 15

[\[note: 14\]](#) Lau Gek Chuan's Affidavit: Exhibit LGC-1, p 26