Macly Assets Pte Ltd *v* Loke Yew Kong Andrew and another
[2014] SGHC 145

Case Number : Suit No 439 of 2013

Decision Date : 15 July 2014

Tribunal/Court : High Court

Coram : Lee Seiu Kin J

Counsel Name(s) : N Kanagavijayan (M/s Kana & Co) for the plaintiff; Mahmood Gaznavi and Leow Zi Xiang (M/s Mahmood Gaznavi & Partners) for the defendants.

Parties : Macly Assets Pte Ltd — Loke Yew Kong Andrew and another

Contract – Breach

15 July 2014 Judgment reserved.

Lee Seiu Kin J :

1 The plaintiff is the developer of the condominium known as Thomson V Two ("the Development"). The defendants are the subsidiary proprietors of one of the residential units in the Development, *viz* #04-19 ("Unit"), having purchased it from the plaintiff by way of a sale and purchase agreement dated 8 May 2007 ("the Agreement"). The plaintiff's claim against the defendants is in damages for the breach of cl 10.2 of the Agreement. The issue in this trial is whether the defendants are in breach of this provision and, if so, what is the extent of damages that the plaintiff is entitled to recover.

Background

2 The Development comprises 74 residential units and 48 commercial units. After the temporary occupation permit ("TOP") was granted on 15 May 2012, the plaintiff issued a notice of vacant possession to the defendants on 2 July 2012. Shortly thereafter the first defendant handed to the management office a form entitled "Application Form for Additions & Alteration Works". Sometime after this, he returned to the office to collect the renovation permit. What transpired during the collection is disputed and I shall deal with this below. In the event, the first defendant was issued a renovation permit and he proceeded to carry out renovation works in the Unit. These works included the construction of two timber decks ("the Timber Decks") with a total area of about 14 square metres. The Timber Decks were completed by August 2012.

3 In the course of the renovation works, the first defendant complained to the plaintiff's representatives about certain defects in the Unit. The first defendant's complaints found their way to the Building and Construction Authority ("BCA") and on 14 January 2013, the BCA sent two of its officers, Mr Cheong Yee Chek and Mr Wu Zhen Hong ("the BCA officers") to inspect the defects. In the course of that inspection, the BCA officers noticed the Timber Decks. They pointed out to the first defendant that the Timber Decks might not be in compliance with statutory requirements and, with the first defendant's permission, took photographs for further investigation.

4 On 15 March 2013, the plaintiff's solicitors sent a letter to the defendants stating that the certificate of statutory completion ("CSC") for the Development was held up due to the Timber Decks. The letter gave notice under cl 15.3 of the Agreement to the defendant to take such measures as are

necessary within 30 days to enable the plaintiff to obtain the CSC. On 10 April 2013, the first defendant attended a meeting at BCA in an attempt to resolve the matter to the satisfaction of all parties. The following people were also present: the BCA officers who inspected the defendants' unit, and the plaintiff's representatives, Mr Nelson Koh and Mr Ronny Chin. However, the efforts came to nought. On 18 April 2013, the plaintiff's solicitors wrote to the defendants stating that the 30-day period had lapsed. The letter pointed out that the defendants' failure to rectify the matter had caused the plaintiff to suffer and continue to suffer losses arising from the delay in the issuance of the CSC. The letter also highlighted that, under cl 15.4 of the Agreement, the plaintiff had the right to enter the Unit to make such necessary alterations and additions to the Unit as required by BCA and recover the cost from the defendants, and inquired if the defendants were prepared to cooperate in this regard. Meanwhile, on 3 May 2013, the architect certified that, save for the Timber Decks in the Unit, the Development was ready for the issuance of the CSC.

5 There followed a series of communications between the parties by way of letters, emails and orally. On 14 May 2013, the plaintiff filed the writ in this action and applied for a mandatory injunction to remove the Timber Decks. Then on 28 May 2013, the Urban Redevelopment Authority ("URA") wrote to the defendants stating that it was prepared to permit the Timber Decks to be retained upon payment of development charge, subject to certain conditions. However, on 30 May 2013, BCA issued a demolition order requiring the defendants to remove the Timber Decks by 30 June 2013. There was further toing and froing between the defendants and the agencies. On 5 July 2013, BCA issued a revised demolition order extending the deadline to 7 August 2013. Finally, sometime in September 2013, the defendants carried out some works to the Timber Decks, the outcome of which satisfied the BCA that they complied with the relevant regulations and the demolition order was withdrawn on 23 September 2013.

6 Unfortunately, the matter did not end there. In the course of making his case to BCA, the first defendant had pointed out to BCA that there were similar timber decks in other units in the Development. On 10 October 2013, BCA issued demolition orders in respect of units #04-24, #04-25 and #04-42. After representations from the owners of those units, BCA was persuaded that, on a proper method of computation, their timber decks were not in breach of the relevant regulations. In the event, the demolition orders were withdrawn and the plaintiff obtained the CSC for the Development on 13 November 2013.

The Issues

7 The plaintiff's position is that cl 10.2 of the Agreement was breached by the defendants. That clause provides as follows:

> 10.2 Where the Certificate of Statutory Completion has not been issued for the Unit, the Purchaser shall not, without the prior written consent of the Vendor, carry out or cause to be carried out any alterations or additions to the Unit which result in the Unit not having been constructed according to the plans and specifications approved by the Commissioner of Building Control.

8 The plaintiff's case is that the defendants carried out alterations or additions in the form of the Timber Decks without its prior written consent. This constituted a breach of cl 10.2. The construction of the Timber Decks had caused the delay in the issuance of the CSC. The plaintiff claimed that the CSC would have been issued on 15 March 2013 if not for the Timber Decks. However, this date is incorrect as the architect had only certified on 3 May 2013 that the Development would have been ready for the grant of the CSC if not for the Timber Decks (see [4] above).

9 The plaintiff sought an indemnity from the defendants against all losses, expenses and damages incurred as a result of the delay in the issuance of the CSC from 15 March 2013 until the date it was issued, that is, 13 November 2013. This was principally the loss arising from the delay in obtaining the release of the final payment of $5,047,364 upon the grant of the CSC.

10 The plaintiff also prayed, in the alternative, for damages to be assessed. However, there was no order for bifurcation. At the commencement of the trial the plaintiff's counsel applied for bifurcation which the defendants' counsel objected to. As there was no reason for the late application, I declined to grant that order. The plaintiff did not adduce any evidence of other damages and therefore the plaintiff's claim to damages is limited to the loss of use of the final payment of $5,047,364 for the period 3 May 2013 to 13 November 2013, or a shorter period, should liability be found against the defendants.

11 The defendants raised the following defences:

(a) The plaintiff had granted written permission for the Timber Decks.

(b) The plaintiff was estopped from asserting that there was no written permission.

(c) The plaintiff had waived cl 15.3.

(d) The delay was also caused by other units.

(e) The plaintiff had failed to mitigate damages.

(f) The damages claimed were too remote.

12 The defendants also counterclaimed for the costs of the works undertaken to render the Timber Decks in compliance with BCA's requirements in order to procure the withdrawal of the demolition order.

The Evidence

13 The primary dispute of fact was whether the plaintiff had granted written permission to the defendants for the construction of the Timber Decks in the Unit. The document constituting the written consent under cl 10.2 of the Agreement was titled "Renovation Permit" ("the RP") gave the following description of the works permitted to be carried out:

1. Installation of cabinets

2. Installation of ceiling fans, lightings, power point switches

3. Installation of wall cabinet/cupboard/handrail for baby height/curtain

4. Shifting of aircon unit at single bedroom

14 On the face of the RP, there was no permission to erect the Timber Decks.

15 The first defendant's evidence on the circumstances under which the RP was issued was as follows. He had been given to understand that a "renovation permit" would be required in order to carry out renovation work in his Unit. He inquired at the management office about the possibility of

constructing "loft floors" and was advised to submit an application annexing plans of the works. Sometime in July 2012, he finalised his application and submitted it to the management office. Under "Description of Works", he stated as follows:

> Loft floors above kitchen & half of living room and above single bedroom 2, including stair access; Installation of ceiling fans, lightings, power point switches; shifting of aircon unit of single bedroom higher; installation of wall cabinet/cupboard; hand rails for baby height; curtain.

16 The first defendant also attached plans which showed the Timber Decks above the kitchen and bedroom described as "loft floors" in the application.

17 A few days later, the first defendant was informed that the application had been approved and was asked to collect it from the management office. When he went there, he was attended to by one Christian Concepcion ("Chris"). It was not disputed that Chris was an employee of the managing agent and that he was an agent of the plaintiff in relation to the issuance of the RP. Chris told the first defendant to amend the word "loft floors" in the application form to "storage area". He said that such "storage areas" could not be "officially" considered as additional gross floor area ("GFA") for the Unit and the first defendant was not to make reference to them as additional GFA should he sell the Unit. The first defendant said that he did not think much about it and thought that this was industry practice. He amended the application form accordingly. After this, Chris handed the RP to the first defendant. The first defendant said that at no time did Chris tell him that permission had not been granted for the construction of the Timber Decks and he was led to believe that permission had been granted for their construction.

18 The first defendant also gave evidence that after the construction of the Timber Decks, various employees of the managing agent as well as one Nelson Koh, representing the plaintiff, had gone to the Unit in relation to his complaints about defects. They had all seen the Timber Decks and did not make any objection to them.

19 There was evidence given by both sides on many other aspects of the matter, but I find them to be of little relevance for determination of the issues in this suit and I therefore do not set them out. I have nevertheless taken them into account in my decision.

Decision

20 The circumstances surrounding the issue of the RP are important on the question of whether there was written permission for the construction of the Timber Decks. Unfortunately, there was no evidence from Chris, the other witness to those events. Peripheral evidence of this was given by one of the plaintiff's witnesses, Andrew Lioe ("Mr Lioe"), who was a director of the managing agent. Mr Lioe said that Chris had telephoned him to ask about the loft floor in the defendants' Unit. He told Chris that this was not allowed except based on the advisory by BCA dated 17 November 2011, which was that it should not exceed 5 square metres. However, Mr Lioe said that he was not aware of what had transpired between Chris and the first defendant.

21 The evidence before me on this matter came essentially from the first defendant. There was nothing inherently incredible about his narrative. It was supported by the documents. The application form, which was retained by the managing agent, showed a cancellation to the word "loft floors" and the addition of the words "storage area" above them. The plans for the Timber Decks were also attached which clearly showed the nature of the structures. There was nothing in the manner in which the first defendant gave his evidence that would indicate that he was not telling the truth. I therefore make the finding of fact that the events surrounding the issue of the RP were as described

by the first defendant.

22 Next, I turn to the question of whether the RP constituted written consent for the construction of the Timber Decks. The first defendant had included plans of the Timber Decks in his application form and had written the words "loft floors" in the description of the works. Chris, as agent of the plaintiff, had instructed the first defendant only to change the words to "storage area" and had explained that it cannot "officially" be considered as additional GFA. Indeed, Chris had informed the first defendant that should he sell the Unit, he should not include the area of the Timber Decks as part of the GFA of the Unit. Chris had not at any point stated that the first defendant's application for permission to construct the Timber Decks was rejected. Indeed the attached plans of the Timber Decks were retained as part of the defendants' application for the RP. The obligation to obtain the written consent is contractual and there is no format under which such written consent is given. In particular, there is no standard form of words to describe the range of renovation that can take place and it is wise for the managing agent to require applications to be accompanied by renovation plans which can clearly set out the scope of the proposed renovation. In the present case, the first defendant had submitted his application with plans for the Timber Decks which clearly showed what they were. Notwithstanding that, there is no specific mention of "loft floor" in the RP, it is a question of fact as to whether written consent had been given to the defendants to construct the Timber Decks. From the circumstances surrounding the issue of the RP, in particular the acceptance of the plans for the Timber Decks, I find that the plaintiff had given written consent within the meaning of cl 10.2 of the Agreement for the construction of the Timber Decks.

23 Furthermore, even if the RP did not constitute written consent under cl 10.2 of the Agreement, the circumstances are such that the plaintiff is estopped from asserting that there was no written consent. This is because Chris, as agent of the plaintiff, had represented that the defendants had such permission, the defendants had proceeded on this basis and constructed the Timber Decks, and thereby changing their position to their detriment.

24 For the reasons given above, I dismiss the plaintiff's claim against the defendants. Although this is sufficient to dispose of the plaintiff's claim against the defendants, for completeness, I make my findings on the other defences set out by the defendants.

25 The defendants claimed that the plaintiff had waived cl 15.3 of the Agreement. Clauses 15.3 and 15.4 provide as follows:

> 15.3 If the issue of a Certificate of Statutory Completion in respect of the Unit is refused, withheld or delayed owing to any alteration or addition carried out or caused to be carried out by the Purchaser without the Vendor's prior written consent, or some other act or omission by the Purchaser, the Vendor may by notice in writing require the Purchaser to take such measures within 30 days of that notice as are necessary to enable the Vendor to obtain the Certificate of Statutory Completion.
>
> 15.4 If the Purchaser does not comply with the Vendor's notice under clause 15.3, the Vendor and his workmen or agents have the right to enter the Unit to make such necessary alterations and additions to the Unit as may be required by the Commissioner of Building Control, and to recover from the Purchaser the cost of the alterations and additions.

26 This provision sets out the rights of the plaintiff in the event that the issuance of the CSC is delayed as a result of any subsidiary proprietor carrying out any alteration or addition without prior written consent. The plaintiff had written a letter to the defendants giving the 30-day notice of intention to take such measures as are necessary to enable it to obtain the CSC, including entry into

the unit, and to recover the costs of so doing from the defendants. These clauses set out the contractual right of the plaintiff in such a situation and the liability of the subsidiary proprietor of an offending unit. In the event, the plaintiff did not effect any such entry nor carry out any work pursuant to cl 15.4 of the Agreement. The plaintiff also did not claim for costs under cl 15.4. Therefore, there is no issue of any waiver of cll 15.3 or 15.4.

27 The defendants claimed that the delay in the issuance of the CSC was also caused by other units, specifically units #04-24, #04-25 and #04-42 in respect of which BCA issued demolition orders on 10 October 2013. BCA eventually withdrew these orders and the CSC was issued on 13 November 2013. The defendants submitted that the proximate cause of the delay in the issuance of the CSC was not the defendants' Timber Decks but the demolition orders for the three other units, as the demolition order for the Unit was withdrawn on 23 September 2013. I agree with the defendants. The CSC was not issued until 13 November 2013 on account of the demolition orders for the other three units. The plaintiff submitted that it was because the first defendant had complained to the BCA about the existence of similar lofts in the other units that had caused BCA to investigate. I do not think that this is a sound argument in law and on policy grounds. Nevertheless, even if I am wrong on this, by 23 September 2013, the Timber Decks was no longer the cause of any delay to the issuance of the CSC and that must be the latest date of delay. On this basis, the commencement of the delay would be 3 May 2013, when the architect wrote a letter confirming that all items for CSC were completed except for unauthorised works in unit #04-19. The period of the delay caused by the Timber Decks would therefore be from 3 May 2013 to 23 September 2013.

28 The defendants claimed that the plaintiff had failed to mitigate damages. I agree with this. Upon learning that BCA did not approve of the Timber Decks, the plaintiff ought to have issued the 30-day notice under cl 15.3 of the Agreement. Instead, on 14 May 2013, the plaintiff took out the writ in this suit and applied for mandatory injunction. If the plaintiff had issued the 30-day notice instead, it would have been entitled to enter the Unit by 14 June 2013 and could well have completed the rectification by end June. Indeed, the plaintiff was aware of the problem by January 2013. Although the plaintiff cannot be faulted for trying to resolve the issue with BCA, if it had started the process by mid-March 2013, allowing two months to attempt a resolution with BCA, the Timber Decks could have been regularised by early May 2013, which was about the time the Architect certified (on 3 May 2013) that the Development was otherwise ready for issuance of CSC. In a situation where the plaintiff claims for loss of use of funds arising from delay caused by the defendants, it is equally incumbent on the plaintiff to take a more active role in enforcing its contractual right to rectify the matter pursuant to cl 15.4 of the Agreement.

29 The defendants claimed that the damages are too remote. I do not agree with this. The obligation is set out in cl 10.2 of the Agreement. The right of entry is set out in cll 15.3 and 15.4 of the Agreement. It would reasonably have been within the reasonable contemplation of parties to the Agreement that any delay in the issuance of the CSC would result in the plaintiff being deprived of the use of funds that would have been released upon grant of the CSC and this would cause loss to the plaintiff.

Counterclaim

30 The defendants also counterclaimed for the costs of the works undertaken to render the Timber Decks in compliance with BCA's requirements in order to procure the withdrawal of the demolition order. The defendants claimed that they were not told that any of the Timber Decks were non-compliant with BCA's regulations. The defendants also claimed that the plaintiff's agents were aware of the Timber Decks while they were being constructed. The defendants pleaded that they had relied on the plaintiff's representations (without specifying what these were) and had incurred expenses in

constructing the Timber Decks, for which they had to incur further expenses to bring them into compliance with the BCA regulations.

31 I find no merit in the counterclaim and I would dismiss it. My reasons are as follows. The onus was on the defendants to ensure that any renovation they carry out would comply with the relevant regulations. Clause 10.2 of the Agreement imposed the obligation on the defendants to obtain prior written consent before carrying out any renovation that might be non-compliant with the BCA's requirements. As an aside, I note that this clause may be interpreted as saying that a purchaser may carry out non-compliant renovation to his unit if he obtains prior written consent. This is a rather absurd interpretation and if this is a standard clause used by developers, they would be well advised to revise it. The sensible interpretation of this clause is that a purchaser is absolved of liability to the vendor if he obtains prior written consent for any renovation even if it turns out to be non-compliant. In my opinion, there is no duty on the part of the vendor to ensure that the purchaser's proposed renovation is compliant with BCA regulations or that of any other authority. Approval of the application cannot and does not amount to a representation that it is.

Costs

32 The claim and counterclaim are therefore dismissed. I will hear parties on the issue of costs.