

Peter Edward Nathan v De Silva Petiyaga Arther Bernard and another
[2016] SGHC 70

Case Number : Originating Summons No 1209 of 2014
Decision Date : 18 April 2016
Tribunal/Court : High Court
Coram : Aedit Abdullah JC
Counsel Name(s) : Roche Eng Keng Loon, Segal Param & Tay Hao Ran (Vision Law LLC) for the plaintiff; The first and second defendants not present.
Parties : Peter Edward Nathan — De Silva Petiyaga Arther Bernard @ Mohamed Rashid Abdullah — Sa'Adiah Binte Abdul Rahman

Land – Registration of title – Land Titles Act

Equity – Rectification

18 April 2016

Aedit Abdullah JC:

Introduction

1 The plaintiff, Peter Edward Nathan, brought an *ex parte* application before me seeking the “perfection” of a contract for sale by registering the Instrument of Transfer (“the Transfer”) with the Singapore Land Authority (“SLA”). This application was seemingly simple, but it raised issues about the exercise of the powers of a committee of person and estate (“COP”) appointed under the Mental Disorders and Treatment Act (Cap 178, 1985 Rev Ed) (“the MDTA”), which is the predecessor to the Mental Capacity Act (Cap 177A, 2010 Rev Ed) (“the MCA”) and has since been repealed.

2 A number of avenues were explored to attempt to resolve the issues in the hopes of balancing the interests of the parties but no interim solution was feasible. I eventually determined the matter on the basis of the plaintiff’s application for an order that the Transfer be registered, and refused the application. The plaintiff has now appealed.

Background

3 In these originating summons, the plaintiff applied for an order to register the Transfer of a Housing and Development Board flat (“the Flat”) in order to perfect a contract of sale that he had entered into with the first and second defendants (“the Defendants”). The SLA had declined to register the title of the Flat in the plaintiff’s name as the Transfer and the other documents of the sale had been executed by the COP of the first defendant, who did not have the power to execute the documents on behalf of the first defendant.

4 The plaintiff asserted that sometime in 2009 or 2010, he was persuaded by the Defendants’ daughter, Ms Millicent Ruby De Silva (“Ms De Silva”), with whom he was then in a relationship, to buy the Flat, which was owned by the Defendants. The first defendant, Mr De Silva Petiyaga Arther Bernard, was also a childhood friend of the plaintiff’s father. The Flat, which was the matrimonial home of the Defendants, had to be sold pursuant to a divorce order that was granted by the Syariah

Court on 29 January 2008.

5 It became clear sometime in 2009 that the first defendant was incapable of managing his affairs. This appeared to be the case before there was any plan for the plaintiff to purchase the Flat. As a result of the first defendant's condition, Ms De Silva applied to be his COP under the MDTA. She successfully obtained an order of court on 29 April 2009, appointing her as his COP and empowering her to represent him in any Syariah Court Appeal Board hearing or other court hearings. Crucially, the order did not grant any power to Ms De Silva to execute any documents relating to the first defendant's properties.

6 The parties, with Ms De Silva acting on behalf of the first defendant, completed the sale and purchase of the Flat on 8 September 2010. The purchase price of the Flat was based on a valuation done in January 2010 and was fixed at \$270,000. The plaintiff stated that he paid for the Flat using proceeds from the sale of his previous flat and monies in his Central Provident Fund, and thus did not need to take up any mortgage loan.

7 According to the plaintiff, he then moved in to stay at the Flat with the first defendant and Ms De Silva. This arrangement continued until Ms De Silva passed away in April 2012. Thereafter, the plaintiff resided in both the Flat and his parents' property. The plaintiff said that after a period of time, he found that he could not stay at the Flat with the first defendant any further, as his relationship with the first defendant, a 75-year-old man suffering from dementia and other conditions, had deteriorated to the extent that the first defendant would chase him out of the Flat when he tried to enter. He asserted that he tried to ask the first defendant's two surviving children to take care of the first defendant but they refused to do so.

8 This prompted the plaintiff to take legal action in order to regain possession of the Flat sometime in 2014. He was of the impression that the Flat belonged solely to him as the sale of the Flat had been completed in September 2010. The plaintiff was, however, informed by his solicitors from M/s Andrew Yap & Company that he was not the registered owner of the Flat. The plaintiff approached SLA and was informed that this was because the Transfer had not been lodged. He then asked M/s Vision Law LLC, who had acted for him in the conveyance of the purchase of the Flat and who acted for him in these proceedings, to find out why the Transfer had not been registered. It turned out that the Transfer and the option to purchase had been signed on behalf of the first defendant by Ms De Silva, who had no authority to do so even though she was the first defendant's COP.

9 The plaintiff's solicitors from M/s Vision Law LLC thereafter tried to lodge the Transfer with SLA and sent a copy of the order of court appointing Ms De Silva as the first defendant's COP to SLA on its request. On 22 July 2014, the SLA issued an objection notice informing that the registration of the Transfer was not accepted as the order of court relied upon did not grant any power to the COP to execute any document. SLA also pointed out that M/s B B Marican Maideen & Co, who had acted for the first defendant in the sale of the Flat, had previously lodged the same order of court with SLA, and SLA had, on that occasion, rejected the lodgement of the order on 7 October 2010 for the same reason.

10 The plaintiff's solicitors then wrote to M/s Lutfi Law Corporation, who had acted for the second defendant in the sale of the Flat, asking for a copy of an order of court empowering Ms De Silva to execute documents on the first defendant's behalf. The plaintiff explained that this was done because they thought there might be a possibility, however remote, that M/s B B Marican Maideen may have applied to court to vary or obtain an order of court empowering Ms De Silva to execute documents on the first defendant's behalf after SLA had informed it on 7 October 2010 that the order of court dated

29 April 2009 (referred to at [5] above) did not provide as such. It appears odd, at first sight, that the plaintiff had asked M/s Lutfi Law Corporation, who was acting for the second and not the first defendant, for such an order, but it appears that this was because M/s Lutfi Law Corporation was the plaintiff's point of contact for both the Defendants throughout the transaction. In any event, no such court order existed.

11 This was apparently followed by an attempt by M/s B B Marican Maideen to seek an amendment to the order of court dated 29 April 2010 that appointed Ms De Silva as the first defendant's COP, in order to retrospectively empower her to execute documents. This failed, unsurprisingly, not least because Ms De Silva had passed away by then.

12 After the plaintiff's subsequent attempts to persuade SLA to agree to the registration of the Transfer failed, he filed the present originating summons.

Proceedings before me

13 The plaintiff sought three main prayers in these originating summons:

- (a) an order for the contract for the sale of the Flat to be perfected with the registration of the Transfer with SLA;
- (b) an order for the plaintiff to lodge the Transfer with SLA within 14 days from the date of the order; and
- (c) for the Registrar of the Supreme Court to be empowered to sign all documents necessary to give effect to the sale and transfer of the Flat in the event that the Defendants fail, refuse or neglect to do so.

14 The plaintiff argued that all the parties had consented to the sale and that the circumstances were appropriate for the court to grant an order in terms of the prayers sought. Although the plaintiff asked for a perfection of the contract for sale in his originating summons by registering the Transfer with SLA, I understood counsel for the plaintiff to be arguing that (i) the contract for sale of the Flat should be rectified to recognise that it was transacted on behalf of the first defendant as Ms De Silva's lack of power to execute documents on behalf of the first defendant was a mere "technicality" and (ii) the Transfer should thus be registered.

15 Counsel submitted that the plaintiff was not seeking a new contract, but simply wished to reflect the common intention of the parties through rectification. He referred me to the relevant documents such as the option to purchase, the correspondence between the solicitors of the parties, the correspondence from the Housing Development Board confirming the purchase, and argued that the plaintiff and the Defendants had agreed to the terms of the contract. Citing *Kok Lee Kuen v Choon Fook Realty Pte Ltd and others* [1996] 3 SLR(R) 182, counsel asked the court to exercise its discretion in favour of rectification to reflect the agreement that was reached. He submitted that the plaintiff, who was a lay person with no knowledge as to the requirements for such transactions, should not be penalised by a technicality especially given that the Defendants had not suffered any monetary loss.

16 As I will go on to discuss below, I was not satisfied that the order should be granted in view of the circumstances surrounding the execution of the sale documents by Ms De Silva, which were also noted by the plaintiff in his affidavit. Although the second defendant, who did not participate in these proceedings, appeared to have no objections to the application, her position was not, and could not

be, representative of the first defendant's.

17 However, I did not render my decision immediately and instead adjourned the matter to see if the matter could be resolved in a manner that would balance the interests of all the parties involved. The best course appeared to have been for a deputy to be appointed to represent and look after the interests of the first defendant under the MCA, which superseded the MDTA. Importantly, such a deputy would also be able to represent the first defendant in the present proceedings. In this regard, a number of options were explored. Attempts were made to see if the family members of the first defendant would be willing to apply to be the first defendant's deputy. Further, the Public Trustee and the Public Guardian were also asked if this was an appropriate case for either of them to step in to assist.

18 These attempts, however, did not work. It was conveyed to the court that other family members of the first defendant were at the time either unable or unwilling to assume the responsibility of acting for the first defendant. After rendering the court much assistance in this matter and after detailed consideration, the Public Trustee and the Public Guardian indicated that they were unable to act on the first defendant's behalf. It also became apparent that it was not possible for other agencies, such as the Legal Aid Bureau, to come in directly to act for the first defendant.

19 In the meantime, the plaintiff told the court that he did not have a permanent home and had to resort to living in the open on occasion because of the situation concerning the Flat. As the appointment of a deputy under the MCA to act on behalf of the first defendant would have to go through the proper proceedings and would take time, I asked parties if it was possible to work out an arrangement that may help the plaintiff out of his predicament while preserving the status quo pending the ultimate resolution of the matter. As there was no evidence before me to put in doubt the fact that the plaintiff had paid money to purchase the Flat, I tried to see if a temporary arrangement could be made for the first defendant to move out of the Flat and to allow the plaintiff to move in, while at the same time preserving the first defendant's rights in the Flat pending a full determination of the matter. However, despite the best efforts of the Public Guardian and other agencies, the first defendant could not be readily homed in any care or housing facility due to various reasons.

20 In the course of the proceedings, the possibility that the first defendant might have recovered from his mental incapacity and thus become able to act for himself was also raised. However this did not turn out to be the case.

21 There appeared to be some progress when two family members of the first defendant, his daughter and grandson, indicated that they might be willing to apply to be the first defendant's deputy. However, neither of the two family members made the necessary application under the MCA even though the matter had been adjourned for four times over a period of two months for them to do so. As considerable time had been spent exploring the various options in order to find the best solution for all the parties involved and further time would be needed for the application under the MCA to take place (assuming such an application would eventually be made), I asked the plaintiff to proceed with the application before me so that he could be advised by his counsel, after I render my decision, on the next appropriate course of action either in respect of these proceedings or in respect of fresh proceedings.

22 Mr Noor Marican, (Marican & Associates) who was acting for the first defendant's grandson, appeared at the final hearing on 14 December 2015, and made an oral application to intervene in the action. He stated that the first defendant had to be represented and alluded to the possibility that the plaintiff's claim to the Flat would be contested. I did not, however, hear Mr Marican's arguments

against the plaintiff's claim to the Flat or consider the affidavit that had been filed by the first defendant's grandson, as this was not strictly relevant to the application for rectification before me. I thus made no order on Mr Marican's application to intervene and left it to the first defendant's family members to consider what separate proceedings they should take, if any. Thereafter, I delivered brief oral grounds dismissing the plaintiff's application.

My decision

23 As I stated at [14] above, I understood the plaintiff to be asking (i) for the contract for sale of the Flat to be rectified and (ii) for the Transfer to be registered, even though he had framed the application in his originating summons as one for the perfection of the contract for sale by registration of the Transfer with SLA.

Ms De Silva's lack of authority to execute documents

24 The plaintiff did not dispute that Ms De Silva did not have the authority to execute any document on behalf of the first defendant. The order of court dated 29 April 2009 appointing Ms De Silva as the first defendant's COP did not provide for any such power.

25 While this was not argued, it would not in any event have been possible to imply any such power under the MDTA. Section 10 of the MDTA provided that the court may confer powers on the COP for the management of the mentally disordered person's estate if necessary and proper, taking into account the nature of the property in question. But it was expressly caveated in s 10 that such powers would not extend to the sale of the property. Section 11 of the MDTA created a mechanism for the COP to make proposals to the Registrar for orders to be made beyond the powers he has under s 10, but no such application had been made by Ms De Silva in the present case. Section 15 of the MDTA also provided an avenue for the sale of any property for certain purposes, including paying off the mentally disordered person's debts or for the provision of his maintenance. However, such a sale could only be made pursuant to an order of court. Further, although s 16 permitted the COP to execute documents, this power was also clearly premised on there being an order of Court. Section 16 read as follows:

The committee of the mentally disordered person's estate shall, in his name and on his behalf, execute all such conveyances and instruments of transfer, relative to any sale, mortgage or other disposition of his estate *as the court shall order*. ...

[emphasis added]

The execution of the documents by Ms De Silva thus went beyond the scope of the order granted by the court pursuant to the MDTA.

Rectification of the contract for sale was not possible

26 Having set out the undisputed fact that Ms De Silva did not have the authority to execute the contract for sale or other sale documents on behalf of the first defendant, I move on to give my reasons on why rectification of the contract for sale was not possible in the present case.

27 Rectification is an equitable remedy where the court rectifies not a mistake in the transaction itself, but a mistake in the way which that transaction has been expressed in writing: *Mackenzie v Coulson* (1869) LR 8 Eq 368. It may be granted where there has been a common mistake or unilateral mistake. The plaintiff's position seemed to be that there was a common mistake in the present case in

that the contract for sale, as signed, did not represent the intention of the plaintiff and the first defendant (as well as the second defendant). He argued that the common intention of the parties was that the plaintiff was to be registered as the owner of the Flat.

28 However, rectification could not be ordered here. Any rectification on the basis of a common mistake would have to reflect the common intention of the parties. No such common intention could be found in this case. The intention and competence of the first defendant to bind himself by way of contract was limited by his lack of mental capacity. Ms De Silva, who had signed the contract as his COP was, for her part, subject to the limitation that she had no authority to execute documents on behalf of the first defendant. The fact that the parties to the transaction had supposedly consented to the sale and that the solicitors in question had not raised any issues could not overcome the fact that Ms De Silva was simply not empowered to execute the sale and transfer documents. Contrary to counsel for the plaintiff's submissions, this was not a mere technicality – it went to the basis of the transaction as the signatory of the documents had no power to execute and deal with the property. Ms De Silva's consent to the sale was immaterial given that she had no power to bind the first defendant. Even if Ms De Silva had been mistaken about her powers, and such a mistake was shared by the plaintiff, this would have been immaterial as the first defendant could not be bound or affected by the actions of his COP that went beyond the powers conferred by the court and the MDTA. There could not thus be any finding that there was any common intention between the parties or any operative mistake on the part of the first defendant given that the first defendant was not even properly represented in the transaction.

29 As for rectification in cases involving a unilateral mistake, this would require either fraud (*Ball v Storie* (1823) 1 Sim & St 210), or, in the words of the editors of John McGhee gen ed, *Snell's Equity* (Sweet & Maxwell, 33rd Ed, 2015), that unconscionable advantage has been taken by the other side (at para 16-019). But neither could be laid at the feet of the first defendant. Even if the threshold were lower and that it sufficed that a party had knowledge of the other party's unilateral mistake, this would not assist the plaintiff in the present case as the first defendant did not have mental capacity and thus could not have any such knowledge. There was also no evidence to suggest that his COP, Ms De Silva, had any such knowledge, and in any event, she was not authorised to act for him on in respect of the sale of the Flat.

30 This was clearly not a case for rectification. As I have repeatedly emphasised, the contract for sale, as well as the other sale documents, had been signed by Ms De Silva, who was not empowered to execute the documents on behalf of the first defendant. The contract and the documents, and thus the sale and purchase transaction of the Flat were therefore not valid and cannot bind the first defendant, let alone be rectified. It may be that the actions or representations of a properly constituted COP under the already repealed MDTA or a deputy under the MCA may, in some circumstances, bind the person who lacks mental capacity, but nothing of that sort arose on the facts here as the purported execution of documents went outside a clear order of court. In any event, the appropriate cause of action for such a claim would not be rectification. To be clear, the effect of my decision is not that the plaintiff has no legal remedy but that rectification was not the appropriate remedy. If the plaintiff had indeed made payments for the Flat and received nothing in return because the transaction was invalid, he might be able to pursue other actions against the Defendants or against the solicitors who had handled the transaction. That, however, was outside the scope of the present proceedings.

The court's powers in respect of the registration of the Transfer

31 Given that it was not possible for the court to grant rectification of the contract for sale in the present case, there was no need for me to go on to discuss if the court can order registration of the

Transfer. An invalid contract for sale would simply render the Transfer invalid as well. Further, the Transfer was also signed by Ms De Silva, who had no authority to do so. I would, however, make some observations on this issue.

32 Although it was not expressly stated in the plaintiff's originating summons, it appeared that he was asking the court to invoke its inherent powers to order the registration of the Transfer. This presumably had to be the case as the court did not have a specific statutory power to order the registration of an instrument of transfer in such a situation. The plaintiff cited s 127 and 129 of the Land Titles Act (Cap 157, 2004 Rev Ed) in the title of his originating summons, but these sections are only concerned with caveats, and not the registration of instruments. The competing rights of a caveator and a caveatee did not arise at all in the present case. Rather, the question was whether registration could be ordered by the court on the basis that the contract for sale of the Flat and the Transfer were properly executed.

33 Presumably, the plaintiff was asking the court to grant a declaration for the registration for the Transfer, even though this was not the way the originating summons was crafted. In any event, the grant of a declaration is discretionary. Considering the circumstances of the present case, I once again could not ignore the fact that the COP had signed the documents and disposed of the first defendant's property without legal authority. Thus, I could not exercise the discretion in the plaintiff's favour. Before the court can even consider whether to exercise its discretion to register the Transfer, it must at the very least be shown that the first defendant consented to the documents and the transaction as well as the present application. This was not shown in the present case as the first defendant was neither able to act for himself as he did not have the requisite mental capacity nor was he represented by any deputy who could properly consider the issue and exercise properly granted powers to act on his behalf.

Problems that may arise when a person who lacks mental capacity is not represented

34 This case revealed some problems that may arise in like situations where a person who lacks mental capacity is unable to act for himself and does not have a lawfully appointed representative to act for him. With the passing of Ms De Silva, the first defendant no longer had a COP under the MDTA or a deputy under the MCA. The family members of the first defendant were best placed to make such an application. But at least in the initial period of these proceedings that spanned a few months, there was some difficulty in identifying a member of the family who was able and willing to step forward. This difficulty required me to consider whether there were agencies that could step into the picture to represent the first defendant instead; the Public Trustee and the Public Guardian were thus contacted.

35 But there appears to be nothing in the MCA, which replaced the MDTA and is now the relevant legislation that governs this area of the law, that allows for any agency, such as Office of the Public Guardian or the Insolvency & Public Trustee's Office, to act in place of a deceased deputy. There is no possibility of an automatic succession to the COP. Although the Third Schedule of the MCA contains the transitional provisions in respect of committees appointed under the MDTA, it does not provide for the replacement of a deceased COP or deputy, such as Ms De Silva. An application has to be made, possibly by another family member of the person who lacks mental capacity, before a new representative could be appointed.

36 Part 11 of the Family Justice Rules 2014 (GN No S 813/2014), which regulates and prescribes the procedure and practice to be followed in respect of proceedings under the MCA, contemplates that the Public Trustee or the Director of Social Welfare may be able to act as the litigation representative of the person who lacks mental capacity in some circumstances (see r 184(5)(b)), but

this relates only to proceedings under the MCA. The present case was not an application under the MCA.

37 It also appears that the current legislative framework does not allow for the Public Guardian to step in to represent the first defendant. Although the Public Guardian has extensive functions and powers under Part VII of the MCA, its powers does not extend to allowing it to act for the first defendant in this case given that the first defendant had family members who were able to apply to be appointed as his deputy under the MCA. However, this matter was not fully canvassed as the family members of the first defendant indicated towards the end of the proceedings that they were likely to apply to be his deputy.

38 The court has powers under s 20(2)(a) of the MCA to make decisions on behalf of a person who lacks mental capacity, but the court can only exercise such powers where an application has been commenced under the MCA and the applicable rules. The court cannot, in my view, act *suo motu*. There was no such application before me. What was before me in the present case was an application by the plaintiff to rectify the contract and to register the Transfer.

39 A significant problem was thus presented in this case: there was no one to represent the first defendant. There did not seem to be any mechanism that allowed the Public Guardian or other agencies to step in to act for the first defendant immediately after the demise of the COP. The matter could perhaps have been dealt with more expeditiously and arguably more satisfactorily if the court had been in a position to lead the proceedings, instead of leaving things to the adversarial process. If the court had the flexibility to do so, it could in such instances initiate MCA proceedings within or in addition to the proceedings that were before it so that another person could be appointed as the deputy. The court could also give other necessary directions for the resolution of the case even if there was no such application before it. Such a judge-led approach would, however, be a significant departure from the adversarial process and is thus not something that a court at this level should pursue at present. Although it is unclear how likely similar situations may arise again, this may be a matter for the relevant agencies to consider.

Conclusion

40 As the plaintiff did not make out his case for the orders sought, the application was accordingly dismissed. Various questions on different aspects of the case remain, including what happened during the conveyance of the property, but not all the facts were before me. These may have to be determined through other *fori*.