Aqua Art Pte Ltd *v* Goodman Development (S) Pte Ltd [2010] SGHC 161

Case Number : Suit No 642 of 2009

Decision Date : 25 May 2010

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Pereira Kenetth Jerald (Advocatus Law LLP) for the plaintiff; Ng Hui-Li Felicia and Yeo Piah Chuan (ComLaw LLC) for the defendant.

Parties : Aqua Art Pte Ltd — Goodman Development (S) Pte Ltd

Contract

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 98 of 2010 was allowed by the Court of Appeal on 10 November 2010. See [2011] SGCA 7.]

25 May 2010 Judgment reserved.

Choo Han Teck J:

1 Michael Ma ("Michael") was a director of the plaintiff company which has the business of a restaurateur. The plaintiff was a member of the Indochine Group of companies and has an in-house legal counsel who was Terry Toh. Michael himself was a director of 26 companies. On 17 June 2007, Michael went to see five shophouses at 306-314 Tanjong Katong Road with the intention of purchasing some of them. The defendant's case was that this took place on 16 June, but the discrepancy was not crucial. Michael telephoned his friend Andrew Neary, who was a senior vice-president of Wisma Atria where Michael's companies ran some of their restaurants. Michael and Andrew met the plaintiff's property agent Odelia Tan ("Odelia") from Orange Tee at the Tanjong Katong shophouses that afternoon. Shortly afterwards, Katherine Poh O'Malley ("Katherine"), the defendant's property agent, arrived and met them. Michael had intended to purchase the shophouses for his companies' restaurant business. He looked at the upper floor of the shophouses and noted that they were used to house the staff. He thought that he too could use the upper floor as living quarters for his restaurant staff. According to him, he asked Katherine whether the shophouses were zoned commercial. She said that they were but she would check with the owner, which according to Michael she did, and confirmed that the shophouses were zoned "commercial". Michael was a permanent resident and according to him, this fact as well as the fact that permanent residents can only buy residential properties with approval from the land authorities was known to Katherine. Katherine testified that neither Odelia nor Michael had asked her if the property was zoned commercial. She said that she told Michael that the upstairs unit was residential and the downstairs unit commercial. She also said that Michael was very thorough in his inspection of the shophouse (they inspected only one of the five). Michael also took several photographs of the five shophouses.

2 About 7 or 8pm on the same day and after some negotiations, the price for the five shophouses was agreed at $7.72m by the parties. Michael asked to have the option to purchase stipulate that he or his nominee was to be the purchaser, and to have the option that evening. Katherine then met him later that evening at his club at 47 Club Street where she recorded his name for the option. She collected a cheque for $77,200 being 1% of the purchase price. Katherine got the option signed by the defendant the next day and handed it to Odelia. The option was dated 17 June 2007. Michael

thought that option was signed and handed over on the evening of 17 June, but nothing turned on this part of the story. Patrick Tan & Associates were then appointed to act as solicitors for the plaintiff in this matter, and on 9 July 2007 they exercised the option on behalf of the plaintiff. A cheque for $308,800 was issued in the defendant's favour. Patrick Tan & Associates lodged a caveat against the shophouses on 25 July 2007 to protect the plaintiff's interests.

3 Michael deposed in his evidence-in-chief that the plaintiff's solicitors told him on 8 August 2007 that the shophouses were zoned "Residential with Commercial at 1st Storey". On 29 August 2007, the plaintiff's solicitors wrote to the defendant's solicitors the contents of which were as follows:

1. We refer to our letter dated 27 August 2007 and the phone conversation between your Mr Yeo and our Mr Patrick Tan yesterday evening.

2. We are instructed that one of our clients' directors Mr Michael Ma has contacted and spoken to your clients' Mrs Pak regarding the state of affairs of the transaction. Although Mrs Pak remains keen to continue with the sale of the Properties, the transaction cannot, as of now, be completed due to the restrictions imposed by the Residential Properties Act ("RPA").

3. Our legal requisition reply from the URA has confirmed that the Properties are zoned as "residential with commercial at 1st storey only". This means that the Properties are classified as "restricted residential properties" and cannot be sold or transferred to a foreigner (which includes a Singapore Permanent Resident) or a company which is not wholly owned by Singaporeans unless approval is obtained from the Land Dealings (Approval) Unit ("LDU") or that the Properties are strata subdivided.

4. As far as the application for approval from the LDU is concerned, the LDU has confirmed with our clients that a foreign owner, even if approval is granted, can only own one restricted property at any one time, whether directly or indirectly. This being the case, any application by our clients to the LDU would most probably be unsuccessful given that our clients' Mr Michael Ma (who is one of the directors of our clients) is already an existing owner of a restricted property.

5. The only practical approach left would thus be to apply for the Properties to be strata subdivided. However, as this application takes time, our clients need your clients to grant (a) an extension of time for the completion until the application for strata subdivision is completed, (b) a letter of authorization permitting our clients to instruct your clients' previous surveyors M/s Wang & E F Tan to apply for the strata subdivision of the Properties, and (c) to provide our clients with a fresh Option reflecting that our clients will be purchasing the Properties as ten (10) separate units subject to the application for the strata subdivision of the Properties.

6. As both of our clients remain committed in completing the transaction, we urge you to impress upon your clients on the current predicament and the need for the application to strata subdivide the Properties. Otherwise, the transaction will have to be aborted, which is neither the intention of your clients nor ours.

7. Meanwhile, our clients understand that unit nos. 306A, 310A, 312A and 314A are currently untenanted. As our clients need 3 of these units (upper floors) to house their staff, our clients ask if your clients are prepared to lease the same to our clients on a month to month basis at a monthly rent of S$1,200.00 per unit pending the application for strata subdivision of the Properties.

8. In view of the urgency of the matter, kindly revert with your clients' instructions soonest possible.

The "Properties" in the letter above referred to the five shophouses. It was not disputed that the option exercised on 9 July 2007 was a plain sale and purchase of the five shophouses in one title. Although the plaintiff merely asked the defendant to help it apply for a strata sub-division in order to convert the shophouses into ten units, by the same letter set out above (paragraph 5) it also asked that "a fresh option" be given to the plaintiff. Naturally, that was a fundamental change in the terms and the defendant was not obliged to agree. There was no evidence at trial to show that if the shophouses were given strata sub-division the plaintiff would have been entitled to purchase them. Neither was there evidence that an application for strata sub-division was bound to succeed. From the evidence, as far as the defendant was concerned, he had a simple sale and purchase agreement for the sale of its shophouses. The plaintiff's position was complicated by Michael's status as a foreigner. How it (and Michael) had hoped to secure the purchase only they would know. The evidence only hinted that the plaintiff (and Michael) must have been busy in the background between the time the option was secured and the plaintiff's letter of 29 August 2007.

4 In response to that letter of 29 August 2007, the defendant's solicitors wrote on 13 September to say that the defendant was not aware that the plaintiff was not qualified to purchase the shophouses and since the sale could not be completed the defendant was forfeiting the deposit. They also rejected the plaintiff's request to lease the shophouses to it pending a subdivision the shophouses into strata titles. The defendant also gave notice to the plaintiff to remove the caveat lodged. The plaintiff, however, continued to persevere and its legal counsel, Terry Toh, wrote to the defendant on 25 September 2007 asking that the defendant discuss the matter directly with the plaintiff, and proceed with the strata-sub-division. In this letter, the defendant also placed on record for the first time that Michael "entered into the agreement to purchase the above properties on the basis of representations made by [the defendant's] property agent that the property can be purchased by foreigners", and further, that the tenancy agreements sent by the defendant to the plaintiff indicated that the shophouses were commercial properties.

5 In the end, the plaintiff was unable to proceed with the purchase because it was a foreign-owned company. It however refused to remove the caveat and the defendant applied by Originating Summons No 1840 of 2007K to compel it to do so. The Originating Summons was heard on 22 January 2008 with the plaintiff (defendant in the Originating Summons) not appearing. The court declared the option to Michael to be null and void by reason of s 3 of the Residential Property Act (Cap 274, 2009 Rev Ed) ("the Act") (which prohibited a foreigner from buying residential property in Singapore and declared any such transaction to be null and void). The plaintiff was thus ordered to withdraw the caveat and pay costs to the defendant. The plaintiff did not explain why it did not appear at the hearing of the Originating Summons if not to challenge the application, at least to ask for its deposit to be repaid. The defendant in taking out the application under the Originating Summons did not ask for the ancillary order that the deposit be forfeited. It seemed to me that it was not the right moment for either side to be reticent about the full claim. The result of that coyness was that it became necessary for the plaintiff to commence this suit.

6 In this suit, the plaintiff asked for the return of its deposit on the ground that it was induced into the contract by a misrepresentation made by the defendant's director Eu It Hai ("Eu") and property agent Katherine. It was a claim I do not accept. Michael Ma represented the plaintiff throughout the transaction. He lived in a shophouse similar to the ones in issue, he was accompanied by the plaintiff's property agent Odelia who had been in the business since 1999 and had been the plaintiff's agent for six years prior to the transaction in question. I do not believe that she did not

know that the shophouses were zoned commercial with residential on 1st storey. The indications from the photographs and inspection must have alerted her just as they should have alerted Michael. Michael also brought along one Andrew Neary, who was the property manager of the plaintiff's premises in Wisma Atria, to view the shophouses. Michael personally took a number of photographs of the shophouses and it was obvious from the photographs that the upper floors were being used for residential purposes. Although Andrew Neary testified that Katherine told them (Michael, Odelia, and himself) that the owner had said the shophouses were zoned "commercial", he said under cross-examination that the upper floor of the unit that they inspected had a kitchen, bathrooms, and bedrooms and seemed to him to be residential. So far as the claim that Katherine had told them that the owner said that the shophouses were zoned commercial is concerned, I accept Katherine's evidence. I accept that she did not tell Michael that the property was zoned commercial or that the owner had said so. There was a lapse of about three weeks from the payment of the 1% on 17 June 2007 and the payment of the remainder of the 5% on 9 July 2007. I do not accept that the plaintiff would pay $308,800 without verifying whether the shophouses were zoned commercial. The plaintiff had professionals in law and property, the experience and business acumen of Michael, and above all, time, to verify the one point that seemed most important to it – the zoning of the shophouses. I am satisfied that when the balance of the deposit was paid, the plaintiff knew what the zoning was. I therefore find that the plaintiff's claim on misrepresentation fails.

7 That leads me to the plaintiff's claim that since the contract was declared null and void by the order of court in the Originating Summons proceedings, the deposit must be returned as a matter of natural consequence of a void contract. In this case, the contract was not merely void on some innocuous ground, but void by reason of a breach of a statutory provision. Pursuant to s 3 of the Act, the defendant as vendor was prohibited from transferring residential property to a foreigner, and the plaintiff as a foreigner was prohibited from purchasing residential property. Section 36 of the Act provides a general punishment of a fine up to $5,000 or a term of imprisonment up to three years or both. I do not think that it has been established as a matter of law that a purchaser in a contract rendered void by s 3 would never be able to recover money paid over by him to the vendor. However, given the serious nature of a breach under s 3, the party seeking the court's assistance in recovering money paid under such a contract must at least be able to show that he had a strong case that it would only be fair and just that he recovers his money. In this case, I find as a fact that Michael knew that he was unable to buy residential property and that he probably knew that the shophouses were residential property, and, in any event, the evidence indicated clearly that it would not be safe for him to pay over the money without verification or contractual protection. The defendant owner did not deal with Michael or the plaintiff. I find that when the option was given (on 17 June 2007) and when it was exercised later on, neither Eu nor Katherine knew that Michael was not entitled to purchase the property. In the past, the courts have indicated that (in similar but not exactly the same situations) a purchaser who had parted with his money will not be able to recover it if the contract was void under s 3. This was so held in *Cheng Mun Siah v Tan Nam Sui* [1979-1980] SLR(R) 611 (in relation to an earlier version of the Act) and *Lim Xue Shan v Ong Kim Cheong* [1990] 2 SLR(R) 102. *Tan Cheow Gek v Gimly Holdings Pte Ltd* [1992] SLR(R) 240 involved a payment to a stakeholder, but Judith Prakash J seemed to accept that the principle in the other two cases was correct but applied only to payments by the purchaser directly to the vendor. The learned judge seemed to hold the view that where money was deposited with a stakeholder (and not to the vendor as was the case before me) the vendor was only entitled to forfeit it the purchaser was the party in default. The plaintiff who knows that he could not buy a property by reason of s 3 cannot be in a better position than one who did not know.

8 So far as the 1% was concerned, there is no doubt that it was the price paid for the option, separate from the contract for sale. In that case, there is no question that the defendant was entitled to the $77,200 so paid. In respect of the $308,800 on the facts as I found them, it seems to

me that equity and law are against granting relief to the plaintiff. I therefore dismiss the plaintiff's claim with costs to the defendant to be taxed if not agreed.