

Zain Asif Fancy v Soon Chia Chuen (alias Sun Jiajun)
[2010] SGHC 309

Case Number : Originating Summons No 844 of 2010
Decision Date : 19 October 2010
Tribunal/Court : High Court
Coram : Belinda Ang Saw Ean J
Counsel Name(s) : Alvin Yeo SC, Monica Chong, Arigen Liang and Chan Xiao Wei (Wong Partnership LLP) for Plaintiff; P Nair (instructed as Counsel) and Lim Biow Chuan (Derrick Wong & Lim LLP) for Defendant.
Parties : Zain Asif Fancy — Soon Chia Chuen (alias Sun Jiajun)

Contract – Estoppel

19 October 2010

Belinda Ang Saw Ean J:

Introduction

1 This dispute concerned the effectiveness of the plaintiff's exercise of an option dated 28 June 2010 (the "Option") to purchase a property known as 17 Ewart Park, Singapore 279750 (the "Property"). The plaintiff purchaser was Zain Asif Fancy and the defendant vendor was Soh Chia Chuen @ Sun Jiajun.

2 The plaintiff in Originating Summons No 844 of 2010 sought: (a) a declaration that he had validly exercised the Option on 2 August 2010; (b) an order for specific performance of the defendant's obligations under the terms of the Option; and (c) an order to prevent the defendant from dealing with the Property in any way that would be inconsistent with the rights of the plaintiff under the Option. In the alternative, the plaintiff sought damages from the defendant to be assessed.

3 I dismissed the plaintiff's application for the reasons stated below.

Undisputed facts

4 On 28 June 2010, the plaintiff paid an option fee of \$184,600 ("Option Fee") for an Option to purchase of the Property at the sale price of \$18,460,000 ("Sale Price"). The plaintiff's solicitors in the transaction were Tan Peng Chin LLC ("TPC") whilst the defendant's solicitors were Derrick Wong and Lim BC LLP ("DWL").

5 The material terms of the Option were as follows:

C. This Option may be accepted by Purchaser signing at the portion marked "ACCEPTANCE COPY" and delivering the same duly signed together with 5 percent of the Sale Price ("Deposit") less the Option Fee by cheque in favour of the Vendor to the Vendor's solicitors, Derrick Wong and Lim BC LLP, who are authorized to acknowledge receipt of the same on or before the expiry date and who shall release the cheque forthwith to the Vendor

D. If the Purchaser fails for any reason to exercise this Option in the manner stipulated in paragraph C above, the Option Fee shall be forfeited to the Vendor.

6 The deadline for the exercise of the Option was 4 pm on 2 August 2010.

7 On 2 August 2010, the plaintiff's solicitors, TPC, hand delivered to DWL under cover of its letter which was marked "Exercise of Option before 3.30pm. By Hand" the following documents:

(a) HSBC cheque no 679194 dated 1 August 2010 in favour of the defendant's solicitors DWL for the sum of \$738,400 ("the HSBC cheque"); and

(b) Acceptance Copy duly signed by the plaintiff.

8 DWL acknowledged receipt of the cover letter and its enclosures at 3.19 pm on 2 August 2010.

9 On 3 August 2010, TPC received a letter from DWL alleging that the plaintiff had failed to validly exercise the Option as the plaintiff's HSBC cheque was contrary to clause C of the Option. TPC replied to DWL on the same day insisting that the plaintiff had validly exercised the Option.

The plaintiff's arguments

10 Counsel for the plaintiff, Mr Alvin Yeo, SC raised two arguments in favour of a valid exercise of the Option. The primary argument was that the mode of payment prescribed in clause C of the Option – the cheque for \$738,400 was to be issued in the defendant's name – was not a fundamental term requiring strict compliance. As such, the HSBC cheque issued in the name of DWL was sufficient compliance with clause C. This argument rested entirely on the premise that the HSBC cheque in DWL's name was just as valuable to the defendant as a cheque in her name. Accordingly, the exercise of the Option on 2 August 2010 was valid, and the defendant was not entitled to forfeit the Option Fee under clause D of the Option. In the alternative, Mr Yeo argued that DWL's acknowledgment of receipt of the documents from TPC created an estoppel against the defendant that prevented her from claiming that the plaintiff had not validly exercised the Option.

11 With respect, the nub of the issue was not solely the manner in which the HSBC cheque was made out but also how the plaintiff had intended the payment to operate in relation to the conditions provided in clause C of the Option. The primary question is whether the HSBC cheque for \$738,400 drawn in favour of DLW coupled with the express intention that the money be held by DLW as stakeholders pending completion was in compliance with the specific terms of clause C.

Plaintiff's performance of clause C of the Option

12 The exercise of an option is only valid if the purchaser's performance conforms and measures up to the prescribed terms of the option. The legal position on performance of contract provisions is succinctly summarised in *Chitty on Contracts* (HG Beale Gen Ed) (Sweet & Maxwell, 30th Ed, 2008) ("*Chitty*") at paras 21-001 and 21-002 as follows:

The general rule is that a party to a contract must perform exactly what he undertook to do. When an issue arises as to whether performance is sufficient, the court must first construe the contract in order to ascertain the nature of the obligation (which is a question of law); the next question is to see whether the actual performance measures up to that obligation (which is a question of "mixed fact and law" in that the court decides whether the facts of the actual performance satisfy the standard prescribed by the contractual provisions defining the

obligation). ...

The fact that a party to a contract has, in purported performance, acted in a way which may appear, in a commercial sense, to be just as valuable to the other party as the way specified in the contract does not amount to performance in law.

Chitty para 21-004 on substituted or vicarious performance is also relevant. It reads:

The promisor, in the absence of waiver, or subsequent variation by agreement, cannot substitute for the agreed performance anything different, even though the substituted performance might appear to be better than, or at least equivalent to, the agreed performance.

13 With these principles in mind, I turn to the facts of this case. Clause C of the Option required the plaintiff to issue a cheque for \$738,400 in the name of the defendant so that DWL, who was authorised to receive the cheque on behalf of the defendant, could upon receipt of the cheque forthwith release it to the defendant. As stated, TPC's delivery of the HSBC cheque to DWL was accompanied by a cover letter marked "Exercise of Option before 3.30 pm. By Hand". The second sentence of that letter is important and it reads as follows:

We now enclose herewith the following:

1. original Option with the acceptance copy thereof duly executed by our client; and
2. *cheque for \$738,400.00 issued in favour of Derrick Wong & LIM BC LLP being payment of the balance 5% deposit of the purchase price to be held by you as stakeholders pending completion.*

[emphasis added]

14 TPC's letter to DWL made clear that it was passing the cheque to the lawyers as stakeholders pending completion, and not as agents for the defendant. Here, Mr Yeo's argument that the HSBC cheque in the name of DWL and its delivery to DWL was as good as payment to the defendant became untenable. The plaintiff had attempted to unilaterally change the terms of clause C by substituting his agreed performance with something completely different, and that meant that his actual performance did not satisfy what he undertook to perform under clause C of the Option.

15 Counsel for the defendant, Mr Prabhakaran Nair, referred me to *Tan Chee Hoe and another v Ram Jethmal Punjabi* [1983-1984] SLR(R) 73 ("*Tan Chee Hoe*"). In *Tan Chee Hoe*, the terms of the option required the purchaser to issue a cheque to the vendor's solicitors acting on behalf of the vendor. The purchaser's solicitors issued a cheque to the vendor's solicitors but indicated on the Acceptance Copy that the cheque was paid to them "who will hold the same as stakeholders". Wee Chong Jin CJ held that the addition of this phrase was a material variation of the option that the vendor was entitled to reject. Wee CJ quoted with approval Lord Denning MR's judgment in *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd* [1968] 1 WLR 74 at 81 to the effect that:

In point of legal analysis, the grant of an option in such cases is an irrevocable offer (being supported by consideration so that it cannot be revoked). In order to be turned into a binding contract, the offer must be accepted in exact compliance with its terms. The acceptance must correspond with the offer.

1 6 *Tan Chee Hoe* did not merely confirm the principle of strict compliance in the exercise of options; it also recognised that payment to a vendor's solicitors, as agents for the vendor, is materially different from payment to a vendor's solicitors as stakeholders. In this regard, it was plain that the plaintiff had not effectively exercised the Option: he had sent the cheque to DWL as stakeholders to hold the money pending completion, contrary to what was already agreed in clause C, which was for the cheque in the defendant's favour to be forthwith released to the defendant.

17 Neither could the plaintiff rely on clause 9 of the Option to improve his position. Clause 9 read as follows:

The [defendant] hereby confirms that his solicitors have been appointed as agents for the collection of the balance of the Sale Price and any other moneys which may be due to him. The [defendant] acknowledges that payment to any mortgagee or chargee of the Property and payment to his solicitors or payment as directed by the [defendant's] solicitors shall constitute a full discharge of the Purchaser's payment obligations to the [defendant].

I agreed with Mr Nair that clause C was meant to regulate the manner in which the first 4 % of the Sale Price was supposed to be paid to the defendant. Clause 9 only operated after a valid exercise of the Option in regulating the plaintiff's payment of the remaining 95% of the Sale Price plus other additional payments in the completion account. Clause 9 was entirely irrelevant to the plaintiff's exercise of the Option itself.

18 For these reasons, in my judgment, the plaintiff had not effectively exercised the Option as he had failed to perform his obligation in accordance with the specified terms of clause C. By clause D, the defendant would be entitled to forfeit the Option Fee.

Estoppel

19 The alternative argument raised by Mr Yeo was that clause C authorised DWL to acknowledge receipt of the HSBC cheque and the Acceptance Copy from the plaintiff. Thus, even if the plaintiff had failed to comply with the terms of the Option, DWL's acknowledgment of receipt of the HSBC cheque and the other documents without any objections amounted to a representation to the plaintiff that the exercise of the Option was proper. It was unconscionable for the defendant to now claim that the plaintiff had not exercised the Option properly when the date for exercising the Option had passed, and the Option was no longer exercisable. Accordingly, the defendant was estopped from claiming that the plaintiff had not properly exercised the Option.

20 Mr Yeo's argument was untenable. The initial and DWL's rubber stamp (collectively "the receipt stamp") on the cover letter was to acknowledge the fact of receipt of TPC's letter with the enclosures on the date and time indicated: 2 August 2010 at 3.19 pm. The receipt stamp did not go so far as to signify acceptance of the contents of the letter or DWL's unequivocal acceptance of the enclosures on the express terms of the letter. In any case, clause C only authorised the defendant's solicitors to acknowledge the *fact of the receipt* of the relevant cheque and documents from the plaintiff. It did not authorise DWL to make any representations touching on whether the cover letter, HSBC cheque and Acceptance Copy conformed to the specific requirements stated in clause C. Neither did it authorise DWL to waive any defects or non-conformities in the documentation or HSBC cheque on behalf of the defendant.

Conclusion

21 For the above reasons, I dismissed the plaintiff's application with costs fixed at \$5000.

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