TAN LAY SOON v. KAM MAH THEATRE SDN. BHD.
HIGH COURT, PULAU PINANG
DATO' ABDUL HAMID BIN HAJI MOHAMED J
CIVIL SUIT NO. 22-226-89
28 MAY 1993
[1994] 1 CLJ 85

***CONTRACT**: Parties entering into negotiations for sale and purchase of land - Whether there was a binding contract for the sale and purchase of the land - Whether agreement for sale of the land was conditional upon execution of formal contract between the parties.*

The plaintiff entered into negotiations with the defendant in 1989 for the sale of certain pieces of land. The plaintiff claimed that there was a concluded contract on the basis of a letter (the document) written by the defendant and sued for specific performance of the contract on the defendant's failure to proceed with the sale.

The document stated to the effect that the sale and purchase agreement was to be signed on or before 18 March 1989 and provided that the said sale and purchase agreement shall incorporate all the terms in the document and other usual terms and conditions. The document further provided that in the event the sale and purchase agreement was not signed by the cutoff date, the amount of deposit paid by the plaintiff shall be refunded without demand.

The question that arose for determination was whether the document was in fact a binding contract.

Held:

The document has all the ingredients of a binding contract. The parties had entered into a valid and enforceable contract on 10 March 1989 as evidenced by the letter of that date. The defendant had wrongfully refused to execute a formal agreement and the plaintiff was entitled to judgment.

[Specific performance of the agreement ordered. Consequential orders and directions made. Costs to the plaintiff].

Case(s) referred to:

*Daiman Development Sdn. Bhd. v. Mathew Liu Chui Teck & Anor. [1981] 1 MLJ 56 (**refd**)*

Lim Keng Siong & Anor. V. Yeo Ah Tee [1983] 1 CLJ 231 (Rep)

Counsel:

For the plaintiff - R.R. Sethu; M/s. L.S. Tan &Associates

For the defendant - Wong Kim Fatt (Christina Chia withhim); M/s. Christina Chia, Ng & Associates

Case History:

Supreme Court : [1994] 1 CLJ 1
High Court : [1990] 3 CLJ 183
High Court : [1992] 3 CLJ 657

JUDGMENT

Abdul Hamid bin Haji Mohamed J:

The plaintiff's action is for specific performance of an agreement allegedly contained in a letter dated 10 March 1989 (B3-5) whereby the defendant agreed to sell and the plaintiff agreed to buy the subject land.

It is clear from the statement of claim that the plaintiff's claim is based on that letter dated 10 March 1989.

The only question in issue is whether that letter constitutes a binding contract as between the parties. The plaintiff says it is. The defendant says it is not.

The facts are mostly not disputed. The following are facts which are either not disputed or as found by me.

Sometime in early March 1989, the defendant was desirous of selling the said land. A tender document dated 10 March 1989 was prepared (Bl-2). On the same day, the plaintiff, accompanied by PW2 went to the defendant's premises for the purpose of bidding for the said land. No bidding took place. Instead negotiations took place between them for the sale by private treaty. As a result the letter dated 10 March 1989 was drafted and signed by an authorised representative of the defendant.

The three page letter is to be found in B3-5.

It is addressed to the plaintiff. It begins with the words "This letter serves to confirm that we have agreed to sell the following properties... to you..." Approximate area is given as 200,876 sq. ft. The agreed price was RM9 per sq. ft. The payment of deposit of RM90,394.20 was acknowledged. The terms and conditions were set out. There is also a proviso that the "Sale and Purchase Agreement shall incorporate all the terms and conditions herein and other usual terms and conditions and shall be signed on or before 18 March 1989," otherwise the deposit would be refunded.

On the following day the plaintiff forwarded the draft Sale and Purchase Agreement (I shall refer to the agreement as the draft agreement) to the defendant's solicitors for approval

"together with cheque for RM93,094.20 made out in your favour as solicitors and stakeholders." But according to the evidence of PW1 and PW2, which I accept, the cheque had already been given to the defendant on 10 March 1989 itself. The defendant was to deliver it to the defendant's solicitors.

Clause 4 of the draft agreement contains a provision that the balance of the purchase price shall be paid to the plaintiff's solicitors as stakeholders.

On 15 March 1989, the plaintiff's solicitors wrote to the defendant's solicitors reminding them that the Sale and Purchase Agreement had to be executed on or before 18 March 1989.

On 18 March 1989, the plaintiff's solicitors wrote to the defendant's solicitors enclosing the Sale and Purchase Agreement (I shall refer to this Agreement as "the Agreement") duly signed by the plaintiff together with two cheques. Of the two cheques, one is for shortpayment of the deposit and the other for 10% of the balance purchase price.

On the same day, the defendant's solicitors wrote back to the plaintiff's solicitors informing them that the defendant's solicitors would have to take instructions from their clients on clause 3 and 17 of the agreement.

In her evidence in Court, DW2, the defendant's solicitor said that on 18 March 1989 the plaintiff's uncle ("the authorised representative") had seen her and the draft agreement. According to her, he had no objections to the contents of the agreement and was prepared to sign it.

On the same day the plaintiff's solicitors wrote again to the defendant's solicitors, acknowledging receipt of the latter's letter, asking for "redemption advice" and for sight of the advice of withdrawal of the proposed acquisition of 6,000 sq. ft. of the land.

On 25 March 1989, the defendant's solicitors wrote to the plaintiff's solicitors informing the latter that they (the defendant's solicitors) had yet to receive instructions from their clients and would revert to them as soon as the instructions were received.

On 23 March 1989, the defendant's solicitors wrote to the plaintiff's solicitors that the defendants did not accept "the condition of the proposed agreement" and returned all the payments so far made by the plaintiff's solicitors to them.

The plaintiff's claim is based on the letter dated 10 March 1989. The plaintiff says that letter is a binding contract in itself. The defendant says it is not a binding contract and no contract had been formed yet as the conditions had not been agreed to. In other words the defendant says that a valid contract would only be formed if and when the parties execute the Sale and Purchase Agreement, which did not happen.

The primary issue that has to be decided is whether the document dated 10 March 1989 is an enforceable contract or not.

Edgar Joseph Jr. J. (as he then was) had occasion to consider this very issue when he heard the application by the defendant for the removal of the caveat lodged by the plaintiff (Enclosure 9). In his judgment he said "I was satisfied that the caveators' claim did disclose a

serious question to be tried as to whether there was any contract at all".

However, now I have to finally decide whether or not the document dated 10 March is a binding contract.

This is a letter signed by the authorised representative of the defendant addressed to the plaintiff. It begins with the words "This letter serves to confirm that we have agreed to sell the following proprieties..." It describes the land and the approximate area. The price is agreed. Receipt of the deposit is acknowledged. It then goes on to provide the terms and conditions of the sale with the time table for payment of the balance purchase price. Of course there is a proviso. The proviso states that "the sale and Purchase Agreement shall incorporate all the terms and conditions herein and other usual terms and conditions and shall be signed on or before 18 March 1989..." Other conditions are provided in paragraph 4 to 9 which I shall not repeat.

Looking at the document, I am of the view that it has all the ingredients of a binding contract. In this regard I am guided by the judgment of the Privy Council in *Daiman Development Sdn.. Bhd. v. Mathew Liu Chui Teck & Anor.* [1981] 1 MLJ 56 and the judgment of the Federal Court in *Lim Keng Siong & Anor. V. Yeo Ah Tee [1983] 1 CLJ 231 (Rep)*.

However, the learned Counsel for the defendant argued that the document was not a binding contract. The grounds can be summarized as follows:

(a) the plaintiff did not endorse his signature on the said letter to signify his acceptance of the terms and conditions therein contained; (b) the sums of RM90,394.20 was not paid to the defendant on 10 March 1989 as required by the letter; (c) the defendants did not agree to clause 4 of the draft agreement which provides for the purchaser's solicitor to be the stake holder; (d) Until 18 March 1989, the defendants had not agreed to clauses 3 and 17 of the agreement. As the defendant subsequently did not agree to the two clauses, the defendant's solicitors returned the agreement unsigned.

With regard to (a), I am of the view that there is no necessity for the plaintiff "to signify his acceptance" by signing on the letter. The document is not an offer to sell the said property. It is an acceptance by the defendant of an offer by the plaintiff to purchase. The opening words "This letter serves to confirm that we have agreed to sell the following properties" speak for themselves. This ground is without merit.

As regards (b), the evidence of the plaintiff and PW2 is that the cheque was handed to DW1. In examination in chief DW1 did not deny it. Instead he said, "I don't recall the cheque for RM90,394.20 was handed to me on 10 March 1989. Even if they handed to me I cannot get it because it was written in the name of Shearn Delamore". It is also not disputed that the cheque was paid into the account of Shearn Delamore, the defendant's solicitors and was cashed. In the circumstances, I accept the evidence of the plaintiff and PW2 that the cheque was handed to DW1 on 10 March 1989.

Grounds (c) and (d) can be dealt with together. The question is whether they are material terms of the agreement that disagreement over them show that the letter dated 10 March 1989 is not a binding contract.

Clause 4 of the draft agreement is about the appointment of stakeholder. The draft, *inter alia,*

provides: "The balance purchase price... shall be paid to M/s. L.S. Tan & Co. Advocates and Solicitors... (purchasers' solicitors - my addition) to be held as Stakeholders and who shall be authorised to pay the Financier... to redeem the said land..."

This was objected to by the defendant who wanted their solicitors to be the stakeholder.

In this connection it should be noted that paragraph 5 of the letter dated 10 March 1989,*inter alia,* provides:

5. that the **purchaser's** solicitor is authorised to pay the total proceeds of the sale to Malayan United Finance Bhd. or any financial institution for the purpose of discharging the aforesaid properties...

Clause 4 of the draft agreement therefore does not appear to be contrary to paragraph 5 of the letter dated 10 March 1989. Even if it is, I do not think that it is such a material term of the contract. It is one of the "usual terms" in a sale and purchase agreement. Furthermore, the plaintiff in his evidence said, which is not contradicted, that after speaking to the defendant's solicitors, he agreed that the defendant's solicitors be made the stakeholder.

Clause 3 of the agreement,*inter alia,* provides that the defendant's solicitors shall be the stakeholder. This is clearly as required by the defendant. But it goes on to require the defendant's solicitors to provide an undertaking to the purchaser's solicitors to secure the registrable discharge of the charge of the land.

According to the defendant's solicitors' letter dated 18 March 1989 (a Saturday and the last day for completion of the sale) they were seeking instructions from the defendant.

In her evidence, DW2 (the defendant's solicitor) said:

I told my client as a firm we object to giving undertaking of this nature... My client agreed we did not to have agree to provide undertaking. At page 25 of the Notes Evidence DW2 admitted:

Clause 3 is my objection.

It is clear that the objection regarding the giving of the undertaking is by the defendant's solicitors, which is understandable. I do not think it is of such importance to the contract between the plaintiff and the defendant. I am sure that had the defendant wanted to proceed with the sale, the difference could be resolved.

The disagreement over clause 17 is more significant. Clause 17 provides:

17. The purchase price of the said lands at Malaysian Ringgit Nine (RM9.00) only per square foot amounting to Malaysian Ringgit One Million Eight Hundred Sixty- One Thousand Eight Hundred Eighty-Four (RM1,861.884.00 only is based on 206,876 sq. ft. is subject, however, to adjustment upon a surveyor to be appointed for the cost and expense of the Purchaser (within one month after the execution of this agreement) by a licensed surveyor to be appointed for the purpose. Pursuant to the survey if it is determined that the said lands [taking into account that which have been acquired and disclosed at date of this agreement as set out in Recital (1)] is more that 206,876 sq. ft. the excess will be paid by the purchaser to the

Vendor at the stipulated rate of Malaysian Ringgit Nine (RM9.00) per square foot and conversely, if there is a deficiency the same will be refunded (if such moneys have already been paid by the Vendor to the Purchaser) or deducted (as the case may be) from the balance of the purchase price then outstanding at the same rate of Malaysian Ringgit Nine (RM9.00) per square foot. If the Vendor does not agree with the area of the said lands so determined (by the said survey) as payable hereunder this agreement, then an independent surveyor shall be appointed by mutual agreement of the parties hereto whose decision shall be final as to the area determined (less that disclosed as acquired by the Authority at date of execution of this Agreement) for the purpose of this Agreement.

It should be noted that the letter dated 10 March 1989 speaks of net area agreed to be sold as 200,876 sq. ft."approx." and "more or less". This is because there had been acquisition by the Government of the land.

It cannot be denied that the authorised representative of the defendant had agreed to sell the land the area of which though stated was "approximately" or "more or less". In the circumstances it is normal to have such a clause. It is a very fair provision. Cost of survey is to be borne by the plaintiff. If the actual area is larger, the plaintiff will pay extra. If it is less then purchase price will be reduced at the agreed sale price of RM9 per square foot.

Even DW2, the defendant's solicitor, under crossexamination admitted: "Based on my experience when properties are sold the phrase "more or less" is almost always used".

In the circumstances, I am of the view that this is a "usual term and condition".

It is important to note that in her evidence, DW2 (the defendant's solicitor) said:

Mr. Yap Chin Chuan (the authorised representative of the defendant - my addition) came to my office on 18 March 1989 and we discussed the terms of the 2nd Agreement on that day.

According to my record Mr. Yap said he had no objection to the Agreement.

She also said that it was DW1 and Miss Annie Yap who objected to clause 17.

Mr. Yap Chin Chuan (the authorised representative of the defendant) was not called by the defendant to give evidence. In the circumstances it is my finding that Mr. Yap Chin Chuan (the authorised representative of the defendant) agreed to the terms of the agreement. It was the defendant's solicitors who objected to clause 3 because it involved them giving an undertaking. It was DW1 and Annie Yap who objected to clause 17 not because of anything else but because they did not want to sell the land or changed their minds about it.

I should also say a few words about my observation of the demeanour of DW1. He is not a very straightforward witness. He does not answer questions directly and is quite evasive, at times.

In my judgment the parties had entered into a valid and enforceable contract on 10 March 1989 as evidenced in the letter of that date. The defendant had wrongfully refused to execute a formal agreement. I therefore gave judgment to the plaintiff as follows:

(1) specific performance of the said Agreement;

(2) that the Defendant within two months of the judgment execute a valid and registrable instrument of transfer of the said lands and deliver the instrument of transfer together with the resolution of the Defendant's board of directors;
(3) in the event of the Defendant's default of an order under (2) the above Senior Assistant Registrar of this Court be empowered to execute the memorandum of transfer in the name and on behalf of the defendant and the appropriate memorials be made in the register of titles with respect to the said titles and memorandum of transfer notwithstanding the no-production of the issue document of title and the resolution of the board of the Defendant;
(4) damages for breach of contract to be assessed by the Judge;
(5) the difference between the total purchase price and the redemption sum paid to MUI Finance to be refunded by the defendant to the Plaintiff and such excess, if not agreed by the parties, shall be determined by the Court;
(6) interest at 8% per annum from 31at July 1992 shall be paid by the Defendant to the Plaintiff on the difference between the purchase price and the redemption sum;
(7) costs of this action to be paid by the Defendant to the Plaintiff.