
K. GOVINDARAJU v. CHIANG SIU MIN HUGH
HIGH COURT, PULAU PINANG
ABDUL HAMID MOHAMED J
CIVIL SUIT NO. 22-457-93
11 AUGUST 1995
[1995] 1 LNS 97

CONTRACT - *Sale and Purchase Agreement - Agency - specific performance - Damages - counterclaim*

Counsel:

For the plaintiff - Lim Kean Chye; M/s. G. Raju & Co.

For the defendant - Ooi Soo Jit; M/s. Wong-Chooi & Mohd. Nor

JUDGMENT

Abdul Hamid Mohamed J:

Plaintiff is an advocate and solicitor. Defendant is a registered owner of lot 2439, Section 6 Daerah Timur Laut Pulau Pinang on which there is a house known as No.4 Jalan Hargreaves, Pulau Pinang (the said property). According to the statement of claim of the plaintiff, he had entered into an agreement to purchase the said property with the defendant's agent, Agnes S.K. Chua who was authorised to sell the said property on behalf of the defendant. As the defendant refused to complete the sale, the plaintiff claimed for specific performance of the agreement or damages in lieu of specific performance and costs.

The defendant denied that he authorised Agnes S.K. Chua to sell the property on his behalf. The defendant denied that there was such a contract, or if there was, it was made without his knowledge or authority. The defendant counter-claimed, *inter alia*, for damages caused by the plaintiff in filing a caveat against the said property.

I shall go straight to the main issues in dispute and deal with the evidence as I discuss them.

First, did Agnes Chua have the authority to sell the property on behalf of the defendant? But, first of all, who is this Agnes Chua? When she stepped into the witness box, she gave her occupation as "real estate manager with Robert Bench". In the course of her evidence she referred to herself as "an estate agent". In fact, under cross-examination she said "I am an estate agent by profession." However, pressed further she admitted "I am not myself a registered estate agent. I am just an employee of Robert Bench. I worked with Robert Bench since 1992. Before that I was with Tung Foo Sdn. Bhd. as a beauty consultant." Further, under cross-examination, she said, "plaintiff and defendant dealt with me only. They did not deal with anybody else in my office." And further she said, "I get my commission after

signing the sale and purchase agreement."

Of course in her correspondence subsequent to the purported sale, she used Robert Bench's letterhead - see letter dated 8 September 1993.

Valuers, Appraisers and Estate Agents Act 1981 defines "estate agency practice" as follows:

estate agency practice means acting or holding oneself out to the public as ready to act, for reward, as an agent in respect of the sale or other disposal of land and buildings and of any interest therein or the purchase or other acquisition of land and buildings and of any interest therein or in respect of the leasing or letting of land and buildings and of any interest therein:

Section22A provides for registration of estate agents. Section22B(1) provides:

22B(1) Subject to the provisions of this Act, a registered estate agent who has been issued with an authority to practise by the Board shall be entitled to practise his profession and shall be authorised to undertake estate agency practice including negotiations for sales, purchases, lettings and leaseings by agreement or tender.

Section22C,*inter alia*, provides:

22C(1) No person shall unless he is a registered estate agent -

(a)...

(b)...

(c) undertake any of the work specified in s.22B;

Of course the section provides three exceptions which do not apply in this case.

Section30 makes it an offence for a person who not being a person acting under the immediate personal direction and supervision of a registered valuer, appraiser or estate agent, carries or undertakes to carry out any work provided under ss.19 or 22B.

On the evidence adduced before me, it appears quite clearly that she, not being a registered estate agent herself, had undertaken the work of an estate agent, at the very least in "negotiations for sales, purchases...", which she is not authorised to do under the Act. Indeed if we were to accept the evidence of the plaintiff, she would have done more, i.e. entering into a contract of sale on behalf of the defendant. However, I would like to make it clear I do not decide here whether she has committed an offence under the Act or not.

Let me go back to the question of whether Agnes Chua had authority to sell the property on behalf of the defendant. In her own evidence she said that the defendant asked her to sell the property at RM500,000 Under cross-examination she said "It is correct to say that my job is only to undertake negotiations between the vendor and purchaser. I don't sign the sale and purchase agreement. I get my commission after the signing of the sale and purchase

agreement... I did not discuss with Mr.Chiang (defendant - added) my commission..."

Further under cross-examination she said, "defendant told me he was interested to sell this property in December 1992. He mentioned to me he wanted to sell for RM600,000 I did not meet Mr.Chiang in September 1993. I only spoke through the phone. If spoke to Mr.Chiang a few times in September." She then went on to describe the calls she made to Mr.Chiang about an offer made by another prospective buyer, one Mr.Awther Singh, at RM450,000 which was not agreed to by the defendant as the defendant wanted RM500,000.

She also placed an advertisement in the newspapers about the property. She admitted that she did not tell Mr.Chiang about the advertisement. However, she said she told one Mr.Kong. I should interject here and note that Mr.Kong (DW4) is a company secretary who manages one of the defendant's companies. Mr.Kong was not asked whether Agnes Chua told him about the advertisement. However, he said he did not see the advertisement.

Again, under cross-examination, Agnes Chua (PW2) admitted, "defendant did not execute a power of attorney to me/my firm to sell this property. There was no option given to me. There was nothing in writing in which Mr.Chiang appointed me/my firm to act on his behalf... Mr.Chiang only asked me verbally to sell his property. He did not say he himself would not sell the property." Shown P1 (the purported contract) she said, "I did not deliver it to Mr.Chiang. This document only binds the purchaser (plaintiff - added). It has nothing to do with the owner." (defendant - added).

Now let us look at the evidence of the defendant (DW1). In his examination-in-chief he said that when he wanted to sell the property some time in the middle of 1993, he mentioned it to Mr.Kong (DW4) and his colleague, Mr.Lam (DW2) to whom the defendant "sold" the property at about the same time as it was "purchased" by the plaintiff (I shall deal with this later). He said "I did not tell anybody else, after mid 1993". However he admitted that Agnes Chua telephoned him at night on 5 September 1993 informing him that she had an interested client who offered RM450,000. (This "client" must have been Mr.Awther Singh). No evidence was led whether the defendant told Agnes Chua that he was interested to sell the property in December 1992. The defendant was also not cross-examined on it.

Another significant piece of evidence on this point is the affidavit sworn by the plaintiff himself (Enclosure27A) and filed on 3 February 1995 in support of his application to amend his statement of claim wherein he affirmed:

3. I have perused the statement of claim and realised that I appointed M/s. Robert Bench (hereinafter referred to as "the said Agency") a registered housing agency in respect of this matter and that my dealing was through one Agnes Chua, an employee of the said Agency.

So, going by the plaintiff's own affidavit, Agnes Chua or Robert Bench was the plaintiff's own agent.

Considering the evidence on this point, on the balance of probabilities, it is my finding of fact that the defendant must have told Agnes Chua verbally that he wanted to sell the property meaning that she could find a buyer for him. But he did not authorise her to sell the property on his behalf. In other words she had no authority to sell the property on his behalf.

The next issue is whether there is a concluded and binding contract on both the plaintiff and the defendant. The plaintiff said yes there was. The defendant said no.

Let us now look at the evidence. In order to appreciate what had transpired during those few days, I shall tabulate the incidents in chronological order.

According to the plaintiff, on 5, 6 September 1993 he telephoned Agnes Chua to arrange for him and his wife to view the property. I accept this evidence.

According to Agnes Chua in late evening on 5 September 1993 he telephoned Agnes Chua to arrange for him and his wife to view the property. I accept this evidence.

According to Agnes Chua in late evening on 5 September 1993 she telephoned the defendant to tell the defendant that there was a purchaser who wanted to know how much he wanted to sell the property and the intended purchaser also wanted to view the property. She also told the defendant that another interested purchaser (Mr. Awther Singh) had offered RM450,000. According to her the defendant wanted RM500,000 and nothing less. She also obtained his permission to view the house. This was admitted by the defendant in his evidence. Mr. Kong (DW4) also confirmed that on 6 September 1993 he received a call from the defendant's secretary asking him to make arrangement for someone to view the property. I accept this evidence.

What happened on 6 September 1993? Nothing happened on the side of the plaintiff. But on the defendant's side, the defendant said that when he reached his office on 6 September 1993 he went to Mr. Lam's office. He told Mr. Lam that somebody was interested to buy the property and asked Mr. Lam how much he would offer. Mr. Lam said that he would pay at the most RM500,000. The defendant told Mr. Lam he would consider. I accept this evidence.

We now come to the following day *i.e.* on 7 September 1993. According to Agnes Chua, she telephoned the defendant on behalf of the plaintiff informing the defendant that the plaintiff was offering RM480,000. According to her the defendant said that he would not sell for that price. The defendant also told her that his colleague (it must be Mr. Lam) was interested to purchase at RM500,000. This is confirmed by the defendant, and I accept it.

However there is one material difference in their evidence here. The defendant said, "I told her to forget about the deal (*i.e.* offer of the plaintiff for RM480,000 - added) because I was going to sell the property to my colleague (Mr. Lam - added). I asked her not to have any dealings."

Agnes Chua on the other hand said "defendant told me his colleague was interested to purchase at RM500,000. So he would not sell at RM480,000". On this point I accept Agnes Chua's evidence.

We come now to 8 September 1993. According to the defendant, he went to work, called on Mr. Lam, and told Mr. Lam that he would sell the property to Mr. Lam for RM500,000. Mr. Lam was very happy and signed a cheque for RM10,000. He immediately told his Secretary to inform Agnes Chua. As he was very busy he came back to office very late that day. His secretary told him that Agnes Chua called. The secretary also showed him the fax from Agnes Chua. The defendant said he received the fax between 4.30 p.m. to 5.15 p.m. The

fax reads:

Dear Mr.Cheang,

Re: Sale of No.4 Hargreaves Road (RM 500,000)

We have successfully closed the deal. We enclose herewith a photocopy of a cheque for RM5,000 being earnest (sic) money towards account of the purchase price on your behalf.

Pls. revert to me as soon as possible.

I accept this evidence of the defendant.

Now, according to plaintiff, on that same day 8 September 1993 at about 3.00 p.m. the plaintiff and his wife accompanied by Mr.Awther Singh and Agnes Chua went to view the property. The plaintiff said "I liked the house. I closed a deal with Agnes Chua. He gave Agnes Chua a cheque for RM5,000 as earnest money. He left the "pay" column blank at the request of Agnes Chua as she wanted to get the correct name of the defendant. (Anyway when Agnes Chua finally wrote the defendant's name on the cheque she spelled his surname as "Cheang" and not "Chiang" as it should be. However I do not think this is important).

According to the plaintiff Agnes Chua gave him P1. The plaintiff filled the form. Agnes Chua told her the terms, he said. He signed it as purchaser and Agnes Chua signed as a **witness**. I also accept the evidence.

As P1 consists of only one page I might as well reproduce it:

I/We the undersigned hereby deposit with you the sum below stated being Earnest (sic) money for the purchase of the property mentioned below for your onward transmission to the proprietor thereof,... a formal agreement to be drawn up and executed upon the term and conditions herein stated below:

Terms and Conditions

1. Address of Property:

4 Hargreaves Road, Penang

2. Purchase Price: RM500,000

3. Deposit on signing agreement: RM50,000

4. Date of Completion:

3 months from date of agreement.

5. Encumbrance:

6. Other Standard terms & conditions:

7. Other unusual conditions:

8. Forfeitable of Earnest (sic) money: **RM5,000**

Cash/Cheque No. **801302 Bank of Commerce**

9. Date of signing agreement:

I/We further declare and irrevocably agree that the said earnest (sic) money shall be forfeited to the proprietor in the event that I/We shall fail, refuse or neglect to execute the Sale & Purchase Agreement on or before the stipulated date and no action or demand whatsoever shall be made maintained or instituted by me/us against the proprietor or his/her agents thereafter.

Dated **8 September** 1993.

Witness's signature: sgd. Purchaser's Signature: Sgd.

Name: Chua Siew Khim Name: K. Govindaraju

Nric No.5251005 Nric No.4084272

Purchaser's Signautre:

Name

Nric No

It should be noted that the words "subject to" were erased.

Agnes Chua's evidence is similar to that of the plaintiff on this point.

Let us now turn to Agnes Chua's evidence about P1. She said that that was the standard form which she brought along from her office. She said in the original form there was the words "subject to". However, she said "I rubbed the words "subject to" because plaintiff was very sure he wanted the property therefore there was no need for "subject to".

Under cross-examination she admitted, "It is not normal that the words "subject to" be cancelled. I did not get to speak to defendant about cancellation of words "subject to". Defendant did not know that I had cancelled the words "subject to". She admitted that no other terms were discussed other than those in paras. 5, 6 and 7 of P1. When referred to the period of completion of the contract, which is "three months from date of agreement" she said, "I can't remember whether I got instruction from Mr.Chiang (defendant - added) that he could complete the sale in 3 months. She admitted that she did not deliver P1 to Mr.Chiang. Here I must reproduce his own words again, "This document only binds the purchaser. It has nothing to do with the owner". I accept Agnes Chua's evidence here.

On the defendant's side Mr.Kong gave evidence that the existing tenancy agreement would

only expire at the end of December 1993. This was not disputed. In other words Agnes Chua on her own initiative had given the completion date which could well be prior to the expiry of the existing tenancy.

In fact according to Mr.Kong (DW4) the tenant only vacated the property in January or February 1994, a fact which is not challenged.

In this respect it would also be noted that the sale and purchase agreement entered between the defendant and Mr.Lam contains the following provisions:

1. The said property is sold with vacant possession.
2. In the event the vendor shall be unable to procure vacant possession within three (3) months from the date hereof, the vendor shall pay to the purchaser interest at the rate of ten per centum (10%) per annum on daily basis on the said deposit paid under s.2(i) of the Second Schedule hereto and the completion of the sale shall forthwith be postponed to such date when vacant possession is delivered by the vendor to the purchaser.

Many authorities were cited to me on the question whether there is a concluded and binding contract between the parties. I shall refer to some of them which I consider are more important to this Court than the others.

First, the case of *Daiman Development Sdn. Bhd. v. Mattew Lim Chin Tech & Anor.* [1981] 1 MLJ 56. This is a judgment of the Privy Council. The question in that case is whether the "Booking Procedure" constitutes a binding contract. Constructing the terms therein contained the Privy Council was of the view it was a binding contract. I do not intend to analyse the facts of the case, but will not quote the principles therein stated:

The question whether parties have entered into contractual relationships with each other essentially depends upon the proper understanding of the expressions they have employed in communicating with each other considered against the background of the circumstances in which they have been negotiating, including in those circumstances the provisions of any applicable law. Where they have expressed themselves in writing the proper construction of the writing against that background will answer the question. The purpose of the construction is to determine whether the parties intend presently to be bound to each other or whether, no matter how complete their arrangements might appear to be, they do not so intend until the occurrence of some further event, including the signature of some further document or the making of some further arrangement. The question is one as to expressed intention and is not to be answered by the presence or absence of any particular form or words. But, in general, employment of the formula "subject to contract" as a condition of their arrangement will preclude the present assumption by the parties of contractual obligation.

I also take into consideration the decision of the Federal Court in *Lim Keng Siong & Anor. v. Yeo Ah Tee* [1982] 2 MLJ 39, *Kam Mah Theatre Sdn. Bhd. v. Tan Lay Soon* [1994] 1 MLJ 108 and *Ayer Hitam Tin Dredging Malaysia Bhd. v. Y.C. Chin Enterprises Sdn. Bhd.* [1994] 2

MLJ 754.

All said and done, the cases show that each case is to be decided on its own facts.

In the present case, the following facts are important. First, P1 is a letter addressed to Robert Bench and it is only signed by the purchaser (plaintiff). The owner (defendant) did not sign it. Agnes Chua (who the plaintiff claims to represent the owner but in his own affidavit said that he had appointed him/her firm as **his** agent) only signed as a witness.

Secondly, Agnes Chua, in her own words, said that the document was only meant to bind the purchaser (plaintiff). She further added, "It has nothing to do with the owner." (defendant).

So, how could there be a binding contract between the plaintiff and the defendant?

Thirdly, it contains very bare terms, indeed, nothing more than the identification of the property, and the price and the deposit which had not been paid by the plaintiff. He only gave a cheque for RM5,000 to Agnes Chua as "earnest money". The date of completion was arbitrarily put in by Agnes Chua without even bothering to check when the existing tenancy agreement was due to expire, whether the defendant was in a position to had over vacant possession in three months.

Fourthly, the words 'subject to' (a formal agreement) were erased by Agnes Chua, without even consulting the defendant though she admitted that that was "unusual", merely because the plaintiff insisted that they should be erased.

In the circumstances, I was of the view that with or without P1 there was no binding contract between the plaintiff and the defendant. On this ground too, the plaintiff's claim should fail.

On these grounds I dismissed the plaintiff's claim.

Next, we come to the defendant's counter-claim. The plaintiff had lodged a caveat against the property. As a result, the sale to Mr.Lam could not be completed. To date Mr.Lam has paid RM140,000. I have no doubt that the defendant is entitled to damages. All that the defendant asked for was for the interest at 8% per annum between the difference of the full purchase price which the defendant would have received and the RM140,000 the defendant had received to be calculated from February 1994, the month immediately following the completion date of the sale to Mr.Lam, which sale could not be completed because of the caveat. I thought that that was very fair and reasonable and ordered accordingly. I also gave costs to the defendant.