PULAU PINANG CLINIC SDN. BHD. v. SHUI KAT & CO. (PG) SDN. BHD. & ANOR.
HIGH COURT, PENANG
DATO' ABDUL HAMID BIN HAJI MOHAMED, J
CIVIL SUIT NO. 23-1375-85
12 AUGUST 1992
[1993] 1 CLJ 150

***CONTRACT**: Agreement for sale and purchase of land - Conditional agreement - Failure to satisfy condition - Whether agreement could be rescinded and deposit paid refunded - Collateral agreement for sale and purchase of shares - Whether the two agreements interdependant - Whether rescission of one agreement automatically led to termination of the other.*

By an agreement dated 7 January 1985 (the land agreement), the defendant agreed to sell a piece of land to the plaintiff. The plaintiff paid a sum of RM705,672 by way of deposit upon execution of the agreement, and was to pay the balance of the purchase price within a specified period, provided all the conditions were complied with. The completion of the land agreement was subject to the condition that the land should be capable of development into a private hospital as as an extension of the Penang Medical Centre, the plaintiff to obtain the required approval of the Majlis Perbandaran Pulau Pinang (MPPP) within the stipulated period.

The plaintiff was unable to obtain the required approval of the MPPP. On 6 October 1985, they gave notice rescinding the agreement, and claiming the refund of the deposit. The defendants did not refund the deposit. The plaintiff therefore claimed for an order for rescission of the land agreement and refund of the deposit.

The defendants averred that the sale and purchase was upon the terms and conditions contained not only in the land agreement, but also in another agreement (the share agreement) of the same date, between the plaintiff and the second defendant, the managing director and major shareholder of the first defendant company. According to the share agreement, the plaintiff agreed to purchase the land from the defendants at the agreed price on the second defendant agreeing to purchase certain number shares of the plaintiff company. The defendants contended that the two agreements were interdependent and could not be construed in isolation. They also averred that a deposit of RM187,500 was paid by the second defendant under the share agreement, on the same day as the deposit paid by the plaintiff under the land agreement, that the plaintiff had failed to take the necessary steps to obtain the approval of the MPPP within nine months as required under the land agreement. The defendants counterclaimed for specific performance of the share agreement, and in the alternative, the refund of the deposit paid by the second defendant under that agreement.

Held:

[1] The land agreement and the share agreement were clearly interdependent, in the sense that one party agreed to purchase the land from the other at a certain price if the other party

agreed to purchase the shares from the first party at a certain price. Yet each agreement was independent of the other. There was no mention of the other agreement in either one of them. In respect of each agreement, its terms and conditions must independently be complied with.

[2] The plaintiff had lawfully terminated the land agreement and were entitled to the refund of the deposit paid by them under the land agreement. They had done the needful to obtain the approval of the MPPP but were unable to obtain it within nine months.

[3] In the circumstances of the case, it would be premature for the court to make an order for either forfeiture to the plaintiff or refund to the second defendant of the deposit paid by the second defendant in respect of the share agreement. There was no provision of forfeiture of the deposit in the share agreement, and forfeiture had not been pleaded by the plaintiff. Furthermore, though there was a provision regarding rescission of the agreement by mutual consent, there was not the slightest evidence that the share agreement had been rescinded or cancelled. Rescission of the land agreement did not automatically terminate the share agreement.

[Plaintiff's claim allowed. Defendant's counter-claim dismissed. Costs to the plaintiff].

Case(s) referred to:

Guna Sittampalam & Anor. v. Aik Hua Properties Sdn. Bhd [1989] 1 CLJ 580[1989] 2 MLJ 162 ***(cit)***

Howe v. Smith [1884] 27 Ch. D 89 ***(cit)***

Hall v. Burnell [1911] 2 Ch. D 55 ***(cit)***

Damon Cia Naviera S.A. v. Hapag-Lloyd International S.A. [1985] 1 All ER 475 ***(cit)***

Counsel:

For the plaintiff - Wong Chong Wah (Teoh Soo Bee withhim); M/s. K. Ahmad & Yong

For the defendants - Lim Kean Chye (Paul Manecksha,Ernest Theseira and K.H. Koh with him); M/s. V.P.Nathan & Partners

JUDGMENT

ABDUL HAMID BIN HJ. MOHAMED J:

Plaintiff's claim against the defendants was based on a written Agreement dated 7 January 1985. By that Agreement, the plaintiff agreed to sell the land in question. The said Agreement provides, *inter alia,* that the plaintiff shall pay the defendants a sum of RM705, 672 by way of deposit upon execution of the Agreement. Provided that the conditions contained in the

Agreement are duly complied with, the balance purchase price of RM6,351, 048 should be paid within nine calendar months or by 7 October 1985. The completion of the sale and purchase was subject to the condition that the said land should be capable of development into a private hospital as an extension of the Penang Medical Centre (PMC). According to the plaintiff, the said express condition was not fulfilled in that the plaintiff was unable to obtain the required approval of the Majlis Perbandaran Pulau Pinang (MPPP) to develop it into a private hospital within the stipulated period.

On 8 October 1985, the plaintiff's solicitors gave notice to the defendants' solicitors rescinding the said Agreement and claimed the refund of the deposit of RM705, 672 paid to the defendants, within 14 days. The defendants had not refunded the said amount. The plaintiff therefore claimed for an order for rescission of the Agreement, refund of the deposit, interest and costs.

The defendants, in their defence, averred that the sale and purchase was upon the terms and conditions contained not only in the Agreement mentioned above (the Land Agreement) but also in another Agreement (Share Agreement) of the same date between the plaintiff and Mr. Chan Eng Hock (second defendant), managing director and major shareholder of the first defendant company. In the Share Agreement, the plaintiff agreed to sell to second defendant 625,000 ordinary shares of RM1 each at RM3 each totalling RM1,875,000. In other words, the defendants averred that the plaintiff agreed to purchase the land from the defendants at RM120 per sq. ft. totalling RM7,056,720 if the second defendant agreed to purchase the shares of the plaintiff company at RM3 each totalling RM1,875,000.

The defendants contended that the Land Agreement and the Share Agreement were interdependent with one another and as such the Land Agreement could not be construed in isolation. The defendants also admitted that the plaintiff paid the first defendant the deposit of RM705,672 on 7 January 1985 under the Land Agreement and averred that the second defendant had also paid the deposit of RM187,500 to the plaintiff under the Share Agreement on the same day. The defendants contended that the failure to obtain the approval of the

MPPP within nine months as required under the Land Agreement was because the plaintiff failed to take the necessary steps to obtain such approval. The plaintiff was therefore in breach of the express conditions of the Land Agreement. The defendants also alleged *mala fide* on the part of the plaintiff in that the plaintiff was also negotiating for the purchase of another adjoining lot belonging to another person.

There is also a counterclaim by the defendants.

First, I have to determine whether the two Agreements are interdependent, and, if so to what extent and the effect of non- compliance and termination of one on the other.

The Land Agreement was between the plaintiff and the second defendant's company whereas the Share Agreement was between the plaintiff and the second defendant himself. It was not disputed that both Agreements were signed by the second defendant and that both Agreements were negotiated a the same time. The letter from the plaintiff dated 29 August 1984 offering to purchase the subject land clearly shows that two prices were offered for the land, RM100 per sq. ft. if the payment was in cash but RM120 per sq. ft. if the second defendant agreed to purchase shares of the plaintiff company at RM3 per share. The letter also says that the plaintiff had no objection to employ Mr. K. Teoh and H.C. Chan (second

defendant's son) as architect.

Considering the evidence before me, I am of the view that the two Agreements are clearly interdependent in the sense that the plaintiff agreed to purchase the first defendant's land at RM120 per sq. ft. and that the second defendant (owner of first defendant) agreed to purchase the shares of the plaintiff's company at RM3 per share.

Yet, each Agreement is independent of the other. Each contains terms and conditions pertaining to that particular Agreement. There is no mention of the other Agreement in either one of them. So what it means is that, in relation to each Agreement, the parties thereto are bound by the terms and conditions contained therein, and not the other.

I shall now consider whether the plaintiff had lawfully terminated the Land Agreement. To determine this question, first, I shall have to consider whether the plaintiff had taken the necessary steps to obtain the required approval.

Clause 8 of the Land Agreement provides that the purchase of the land was subject to the land being capable of development into a private hospital as an extension of the PMC. It further provides that if the plaintiff is "unable to obtain" the approval within nine months, the plaintiff shall have the absolute right to rescind the Agreement. If the Agreement is rescinded, the first defendant would refund the deposit. Paragraph (c) of Clause 8 provides that the plaintiff "shall do the needful to obtain the approval" mentioned above. The plaintiff was to "enquire" from the relevant authorities within 14 days whether the latter had any objection to the land being used for the intended purpose.

These conditions were not disputed.

So the first question to ask is whether the plaintiff had "enquired" within 14 days from the date of the Agreement (7 January 1985)?

The answer is clearly in the affirmative. Such an enquiry was made by the plaintiff's solicitors by a letter to the Pengarah Bangunan-Bangunan MPPP dated 12 January 1985 - page 26, Bundle B.

It was also not disputed that the approval for the proposed use of the land was not obtained within nine months.

So, the next question to be considered is whether the plaintiff, during that period of nine months had done the needful to obtain such an approval. To answer this question it is necessary to list out what had transpired during the period. These are:

(a) On 12 January 1985, the plaintiff's solicitors wrote to Pengarah Bangunan-Bangunan, MPPP. The letter, *inter alia,* says:

Kindly let us know the following:

(i) can the said land be developed into a private hospital as an extension of the Penang Medical Centre? and (ii) is rezoning required for the above development? - page 26, Bundle B.

(b) On 23 January 1985, MPPP wrote to the plaintiff's solicitors informing them that the latter's letter dated 12 January 1985 had been referred to Pengarah Perancang Bandar - page 28, Bundle B.

(c) On 12 February 1985, the plaintiff's solicitor wrote to Pengarah Bangunan-Bangunan, MPPP, asking for an official reply as soon as possible - page 36, Bundle B.

(d) On 26 February 1985, another reminder was sent by the plaintiff's solicitor - page 39, Bundle B.

(e) This was followed by another letter dated 18 March 1985, this time to the Pengarah Perancang Bandar, MPPP to the same effect - page 43, Bundle B.

(f) A reminder to (e) was sent on second April 1985 - page 44, Bundle B.

(g) On 4 April 1985, Pengarah Perancang Bandar MPPP replied:

Tuan adalah dinasihatkan membuat permohonan bagi mendapat kebenaran merancang untuk dipertimbangkan oleh Majlis. - page 45, Bundle B

(h) On 8 April 1985, Arkitek T.C. (which was incorporated subsequent to the date of the Agreement, one of the partners of which was no other than the second defendant's son) wrote to the plaintiff that Mr. Happy Chan (second defendant's son) and Mr. M.K. Teoh would be practising under the name of Arkitek T.C. (the Architects) - page 47, Bundle B.

On the same day the Architects submitted four more copies of the Permit Application Plans for plaintiff's signature - page 46, Bundle B.

(i) On 11 April 1985, plaintiff's solicitors wrote to the plaintiff asking the latter to instruct the Architects to submit the necessary plans to the MPPP. The said plans were submitted on the same day by the Architects - pages 48 and 49 - 57, Bundle B.

(j) On 18 May 1985, the Secretary of MPPP acknowledged receipt of the plan - page 63, Bundle B.

(k) On 8 June 1985, the Secretary of MPPP wrote to the Architects asking the latter to submit the said plan to the Jabatan Telekom and Jabatan Bomba - page 66, Bundle B.

(l) This (k) was complied with on 14 June 1985 - pages 67 and 68, Bundle B.

(m) On 15 June 1985, Jabatan Telekom wrote to the Architects that the former was unable to give his comment until the "Layout Plan" was submitted - page 69, Bundle B.

(n) On 1 July 1985, Pengarah Perancang Bandar, MPPP wrote to the Architects informing the latter that Form A submitted on 11 April 1985 was not properly completed - page 70, Bundle B.

(o) An explanation to (n) was given by the Architects on 8 July 1985 - page 77, Bundle B.

(p) On 5 July 1985, the Penang Water Authority gave its comment and stated its requirement

regarding the proposed plan to MPPP - page 81, Bundle B.

(q) On the same day, the Lembaga Letrik Negara wrote to the Architects for particulars on "Initial Load Data" - page 82, Bundle B. (r) On 29 July the Architects wrote to the plaintiff's solicitors saying that the former had received favourable replies from various government departments but were still awaiting replies from two departments - page 84, Bundle B.

(s) On the same day, the Architects supplied certain information required by the Lembaga Letrik Negara - page 85, Bundle B.

(t) On 5 August 1985, further particulars of the proposed extension were supplied to Pengarah Perancang Bandar, MPPP with a request for early approval - page 87, Bundle B.

(u) On 21 August 1985, the Architects gave more particulars of the proposed extension to Pengarah Perancang Bandar, MPPP - page 89, Bundle B.

(v) On 20 September 1985, Pengarah Perancangan Bandar, MPPP wrote to the plaintiff stating that they had been informed by Mr. Lim Kean Siew that he was the owner of lot 1155, not the plaintiff - page 92, Bundle B.

(w) An inquiry regarding Mr. Lim Kean Siew's objection was fixed for hearing on 30 September 1985 - page 95, Bundle B.

(x) On 8 October 1985, the plaintiff's solicitors wrote to the defendants' solicitors rescinding the Agreement because the plaintiff had not obtained the necessary approval for the extension and requested for refund of the deposit paid - page 96, Bundle B.

In the circumstances, did the plaintiff do the needful to obtain the necessary approval for the extension during the stipulated period?

As I have mentioned above, there is no doubt that the plaintiff's solicitors did "enquire" within 14 days from Pengarah Bangunan-Bangunan, MPPP whether they had any objection to the said land being used as an extension of the PMC.

However, it was upon receipt of the letter from the Pengarah Perancang Bandar, MPPP dated 4 April 1985, that the plaintiff's Architects, on 11 April 1985, submitted the various documents for the application of the Outline Planning Permission - see page 49, Bundle B.

Can the plaintiff be faulted for taking about 3 months to submit the said application?

I am of the view that, had nothing else happened during the three months, and that the application was the first ever communication from the plaintiff to any relevant authority, the plaintiff might be blamed for not moving fast enough. But, here there is a requirement in the Land

Agreement to enquire within 14 days. The plaintiff's solicitors did enquire. But, as no firm reply was forthcoming despite reminders, I do not think one should expect the solicitors to do anything more than what they did. And, when they were told to submit their application for the Outline Planning Permission, they did so within one week, which I consider to be within

reasonable time.

It was argued that there was a lapse of three months before the Application was submitted. It is true that one could not expect the necessary approval to be given by the relevant authorities on a mere letter of 12 January 1985. But that letter was to "enquire" as required by the Agreement. It was approved by the solicitors for the first defendant. Had the solicitors for the first defendant wanted more to be done or submitted at that stage, he would not have approved the letter. Until the reply of 4 April came from Pengarah Perancangan Bandar, MPPP, I do not think that the plaintiff's solicitors could be expected to submit the documents for the Application for the Outline Planning Permission.

In the circumstances, I am of the view that the plaintiff cannot be blamed for not submitting the application earlier.

Next, it is clear that there was a mistake in the entry made in Borang "A", in that lot 1155 which belonged to Lim Kean Siew, which actually had nothing to do with the proposed extension, was included. As a result, there was an objection by Mr. Lim Kean Siew and an inquiry was held.

To consider the effect of the mistake the following facts, which I accept, are important.

Mr. Tan Thean Siew, Acting Director of Town Planning, MPPP (DW1) gave evidence that the application for planning permission was first received on 20 April 1985. The estimated fee for the plan (bayaran pelan) was paid on 25 May 1985. According to him MPPP would normally process the application after payment of the estimated fee was made. The plan would then be circulated to the relevant departments for checking and comment. When the comments were received the Architects would be asked to comply with the requirements of the various departments. According to him, in this case, this last-mentioned process was not done because the application was withdrawn by the plaintiff - see letter dated 14 October 1985 - page 99, Bundle B. However, he said that on 6 August 1992 his office wrote to the land owners of lots 1157 and 1155 which was a normal practice. It is important to note that DW1 said that his office continued to process the application even after sending the notice to Mr. Lim Kean Siew. Under cross-examination DW1 said that the process of studying the application would go on even when the question of ownership was being investigated.

In July, plaintiff's Architects filed a fresh Form A, in which lot 1155 was excluded. He went on to say

Once MPPP knew lot 1155 was not involved MPPP was not concerned with Lim Kean Siew's objection anymore.

From his evidence, which I accept, it is clear that the inclusion of lot 1155 was not the cause of the delay in obtaining the approval.

Indeed, from his evidence, it is clear that until the application was withdrawn:

(a) there was no record that the Fire Department had no objection;

(b) LLN had given its comments but not final approval;

(c) Telecoms reserved their comments to a later stage, that is, when the **building** plan is submitted.

In the circumstances, I am of the view that even if lot 1155 was not wrongly included in the original Form A, it was unlikely that the approval of MPPP could be obtained by 7 October 1985. Furthermore, as was said by DW1, it is normal for architects to make mistakes when submitting Borang A.

In my judgment, the plaintiff had done the needful to obtain the approval but was unable to obtain it within nine months. In the circumstances, I hold that the plaintiff had rightly rescinded the contract and is entitled to the refund of the deposit paid to the first defendant.

The defence of *mala fide* on the part of the plaintiff in that they were at the same time negotiating with Mr. Lim Kean Siew for the purchase of his land, though pleaded, was not pursued. No evidence was led to support it. I am of the view that there is no merit in that defence.

I shall now deal with the Share Agreement.

After the trial was completed, arising from the submission of both learned Counsel, application was made by the second defendant to amend the defence and counterclaim. I allowed the application. Consequently the plaintiff too amended their reply and defence to counterclaim. The amendments are actually cosmetic, to regularise the prayer by the second defendant for the refund of the deposit of RM187,500 to him pursuant to the Share Agreement.

Learned Counsel for the plaintiff urged this Court to make an order allowing the plaintiff to forfeit the deposit paid by the second defendant in respect of the Share Agreement. He cited authorities to support his contention that vendors may forfeit the deposit even if no provision is made in the Agreement. The authorities are:

(1)*Guna Sittampalam & Anor. v. Aik Hua Properties Sdn. Bhd [1989] 1 CLJ 580*[1989] 2 MLJ 162 (2) *Howe v. Smith* [1884] 27 Ch. D 89 (3) *Hall v. Burnell* [1911] 2 Ch. D 55 (4) *Damon Cia Naviera S.A. v. Hapag-Lloyd International S.A.* [1985] 1 All ER 475

On the other hand the second defendant, besides praying for specific performance of the Share Agreement, prayed, in the alternative, that the deposit of RM187,500 be refunded to him.

In view of my ruling on the Land Agreement, what I have to consider now is whether the deposit of RM187,500 paid under the Share Agreement should be forfeited by the plaintiff or refunded to the second defendant.

It is pertinent to note at this stage that, first, there is no provision of forfeiture of the deposit in the Share Agreement. Secondly, there is a provision regarding rescission of the Agreement. It is provided in clause 3 as follows:

3. In the event that this Agreement is rescinded or cancelled by the mutual consent of both parties, this Agreement shall also become null and void in which event, PMC shall refund the said deposit to CEH free of interest and neither party shall have any further claim against the

other whatsoever.

It should be stressed that clause 3 provides for rescission or cancellation of the Share Agreement by mutual consent of both parties.

In this case, there is not the slightest evidence that the Share Agreement had been rescinded or cancelled by consent of both parties or by either party. From the way both parties presented their respective cases, it is clear that the Share Agreement had not been rescinded or cancelled by either or both of them. In the circumstances, it is premature for the Court to make an order for forfeiture or refund of the said deposit.

By way of conclusion, it is my view that the two Agreements are interdependent in the sense that one party agreed to purchase the land from the other at a certain price if the other party agreed to purchase the shares from the first party at a certain price. But in respect of each Agreement, its terms and conditions must independently be complied with. Rescission of the Land Agreement, in my view, does give a right to the second defendant to rescind the Share Agreement but rescission of the Land Agreement does not automatically terminate the Share Agreement.

It is my finding of facts that the failure to obtain the necessary approval for the proposed extension of the hospital was not due to the fault of the plaintiff. The plaintiff had done the needful to obtain the approval but was not successful. The plaintiff had lawfully rescinded the contract and is therefore entitled to the refund of the deposit of RM705,672 paid by them to the first defendant with interest at 8% from 22 October 1985 to the date of realisation. I so order.

I am not making any order for forfeiture of the deposit of RM187,500 because, first, that is not pleaded by the plaintiff; and secondly, because there is no evidence that the Share Agreement had been rescinded,

I also dismiss the Defendant's counter-claim for the refund of the deposit of RM187,500 on the ground that the Share Agreement has not been rescinded yet.

Costs to the plaintiff.