POW KHOON SIM v. BAGAN TOWN DEVELOPMENT SDN BHD & ANOR & 2 ORS CASES
HIGH COURT, PULAU PINANG
ABDUL HAMID MOHAMAD J
GUAMAN SIVIL NO. 22-430-92
21 APRIL 1997
[1997] 1 LNS 258

CONTRACT *- building,breach,redemption sum - CIVIL PROCEDURE - counterclaim*

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GROUNDS OF JUDGMENT

I shall refer to the Plaintiff in 22-430-92 and 22-429-92 as the First Plaintiff, the Plaintiff in 22-428-92 as the Second Plaintiff and the Defendants in all the three suits as the First Defendant and the Second Defendant, respectively. The three cases were consolidated and heard together.

I shall first narrate the facts as adduced by the Plaintiffs in chronological order.

On 29th December 1980 the First Defendant entered into an agreement with the First Plaintiff (also PW1) and Chuah Peng Seng, a director of the Second Plaintiff (who will be referred to as PW2). Under the Agreement, the First Plaintiff and PW2 agreed to transfer their land known as lot 466 and Holding No. 1038 Mk 15, Province Wellesley North ("the said land") to the First Defendant. In consideration thereof, the First Defendant will build at is own cost two units known as Plot 1 and 2 of 4-storey shop houses. In addition the First Defendant is to sell to the First Plaintiff and PW2 four units of the said shoplots at a price of RM1,200,000.00. For the purpose of the Agreement the land was valued at RM320,000.00 and the. two units at RM160,000.00 each.

Pursuant to Clause 32 of the Agreement, the Agreement is to bind the parties successors and assigns. Pursuant to Clause 8, the parties are entitled to specific performance.

By another Agreement entered on 30th July 1984, Clause B 3, the First Defendant shall convey and transfer the two units (Plots No. 1 and 2) to the First Plaintiff and PW2 -in exchange of the land and will sell 3 units (Plots No. 3, 4 and 5) of the earlier four units at a price of RM1**,** 200,000.00.

On 5th March 1986 the First Plaintiff entered into two HDA Agreements with the First Defendant for Plot No. 3 and Plot No. 2 (one of the two units in exchange for the land). The Second Plaintiff entered into a similar Agreement for Plot No. 1 (the other unit in exchange for the land) on 15th April 1986. The Agreements also bind the parties successors and assigns. Pursuant to these Agreements, vacant possession is to be delivered within 24 months thereof and if there is delay an interest of 10% per annum is chargeable.

By a letter dated 4th April 1986 PW2 nominated the Second Plaintiff to be the nominee for plot No. 1.

By another Agreement dated 1st August 1988, the First Plaintiff will now purchase only Plot No. 3. Plot No. 4 and 5 will be sold to Hock Hin Hardware Sdn Bhd (Hock Hin).

Sometime in 1990, the First Defendant went into financial difficulties. The First Plaintiff, PW2, Mr Teng (DW1) and Mr Leong (DW5) were authorized by the First Defendant to negotiate to settle the matter with MUI Finance with a view to reduce the redemption sum and to take over the project. On 30th September 1991 certain terms were proposed and the redemption sum was reduced.

On 11th November 1991, PW2 went to Mailis Perbandara Seberang Perai (MPSP) to ask for reduction of car park contribution which was waived. This is to reduce the takeover costs.

In the meantime, MUI Finance had commenced foreclosure proceedings against the First Defendant. On 19th December 1991 the Senior Assistant Registrar fixed the auction date of the land on 12th February 1992. The sale (auction) will be subject to all incumbrances ("tanggungan"), including the rights of individual purchasers.

On 7th February 1992 MUI Finance informed the First Defendant and the parties the terms of settlement in order to stop the auction. Among the terms are:

(i) 10% redemption sum plus legal cost and fees must be paid -clause 2;

(ii) intended purchaser must give an undertaking not to lodge a caveat;

(iii) all interested parties to sign a resolution;

(iv) all terms are to be complied by 10th February 1992.

On 7th February 1992, in anticipation of the sale, First Defendant signed Form 14A National Land Code (NCL) to transfer Plot No. 2 to the First Plainitiff in consideration of RM160,000.00 which was acknowledge received. Another Form 14A NLC was signed by the First Defendant to transfer Plot No. 1 to the Second Plaintiff. The total consideration of RM320,000.00 mentioned in two the Forms actually represents the value of the land given by the First Plaintiff and PW2 in exchange for the two units.

What happened on 10th February 1992 requires some discussion of the evidence.

On 10th February 1992 the First Plaintiff PW1, PW2, DW1 and DW5 "stopped the auction". What it means is that they complied with the letter of MUI Finance dated 7th February 1992 and paid the 18% deposit totalling RM478,000.80 and interest of RM110,150,00. It was admitted by DW1 and I accept as a fact that the Second Defendant was not involved in stopping the auction. The money was paid by DW1 and DW5. On whose behalf? DW1 admitted that it was paid "on behalf of the purchasers" at that time, i.e. the First Plaintiff, PW2 (representing the Second Plaintiff), Hock Hin (represented by DW1) and Tze Meng Jewellery Sdn Bhd (represented by DW5). DW2 (representing the Second Defendant) said that the money was paid on behalf of the Second Defendant. However, DW5 said that DW1 (representing Hock Hin) paid on behalf of the First and the Second Plaintiff. That is what the First Plaintiff and PW2 said too.

In the circumstances I accept that DW1 paid the money to stop the auction on behalf of the First Plaintiff and PW2 and not on behalf of the Second Defendant which, according to DW5, and which I accept had not come into the picture yet. The other condition to be complied to stop the auction was the giving of the undertaking not to lodge caveats on the land. This was complied by the First Plaintiff, PW2, DW1 (representing Hock Hin) and Tze Meng (represented by DW5) - Bundle B page 197. This too supports contention that the Second Defendant was not one of the "intended purchaser" as on 10th February 1992, and had not come into the picture yet.

Soo much for what happened on 10th February 1992. We move on to the following day, 11th February 1992. On that day DW2 bought the Second Defendant company which was a shell company. This again support he contention that the Second Defendant could not have been

involved in stopping the auction on 10th February 1992.

So, the auction scheduled to be held on 12th February 1992 was called off. There was a meeting, after that, which was attended by the First Plaintiff, PW2, DW1 (on behalf of Hock Hin). No one from Tze Meng turned up, though informed. As a result of that meeting DW1 wrote this Note which was signed by the First Plaintiff, PW2 and himself (on behalf of Hock Him). That Note, written on Hock Hins' letter-head, reads"

12/12/92

"WE THE FOLLOWING PURCHASERS AGREE TO PAY THE NEW PURCHASER FOR BAGAN TOWN DEVELOPMENTS PROPERTY KNOWN AS LOT 1038. 465, 466 SECTION 4 TOWN CT BUTTERWORTH THE ADDITIONAL SUM APART FROM OUTSTANDING ON SALES & PURCHASERS AGREEMENT WITH BAGAN TOWN DEVELOPMENT SDN BHD.

THE ADDITIONAL AMOUNT IS FOR COMPLETION OF THE 9 41/2 STORY SHOPHOUSES AND SUBJECT TO THE NEW PURCHASING COMPANY'S APPROVAL. THE ADDITIONAL AMOUNT IS TO BE PAID ON SIGNING OF THE NEW S/P AGREEMENT WITH THE NEW PURCHASING COMPANY.

LOT

1.NAM HOLDING SDN BHD 1 $120,000 TT

2. MD. POW KHOON SIM 2 $120,000 TT

3. MD. POW KHOON SIM 3 $120,000 TT

4. HOCK HIN HARDWARE SDN BHD 4 $120,000 TT

5. HOCK HIN HARDWARE SDN BHD 5 $120,000 TT

6. TZE MENG JEWELLERY SDN BHD 6 $108,000

$708,000

It should be noted that fist, there is a mention of "the company." The First Plaintiff and PW2 said the intention was for them (together with DW1) to form a new company to take over the project. However, DW1 said that the "new company '' or "new purchaser" which was to take over the project was the Second Defendant. It is my finding that "the new company" is the company agreed by the First Plaintiff, PW2 and DW1 on 12th February 1992 to be formed to take over the project. This is because, first, DW1 himself admitted under cross-examination:

"Put: You decided to not to team up with the rest of the purchasers but teamed up with Monarich (the Second Defendant added) to take over the project?

A: Yes."

Let us further look at DW1's evidence at the beginning of the Cross-examination. He said:

"My company (Hock Hin) is a shareholder of Monarich -50%. I am a director of Monarich. I became director of Monarich on 11.2.92. Mr Ooi Bak Chai also became director at same time. We bought the company on 11.2.92".

The First Plaintiff in her evidence said:

"Subsequently on 19/2/92 when Chuah Peng Seng (PW2 -added) came out with the RM120,000, Hock Hin Hardware (DW1 - added) told him that they did not want Chuah to have a share. They wanted get a new buyer to buy the project."

She further said:

"After Hock Hin told us they did not want to share with us, we went to see Defendant 1 (Bagan Town - added). Defendant 1 told us that he had sold the project to a new company."

Evidence of PW2 is also to the same effect.

It is clear to me and It is my finding of facts that PW1, at first agreed to team up with the First Plaintiff and PW2 to form a new company to take over the project. But, for reasons best known to him, he decided to leave the First Plaintiff and PW2 and teamed up with DW5 and for that purpose they bought the Second Defendant Company.

On 7th March 1992 the First Defendant entered into an Agreement with the Second Defendant whereby the Second Defendant would take over the property subject to rights of individual purchasers. DW4, the solicitor for the Second Defendant said in his evidence:

"My instruction was to take into consideration interest of purchasers. There is no provision in the Agreement requesting the purchaser to pay redemption sum construction cost and late delivery."

It should also be noted that the Note of 12th February 1992 reproduced earlier did not mention about redemption sum etc. All that each "purchaser" agreed to pay was the amount stated therein. That too is the Plaintiff's case.

Sometime in May 1992, Hock Hin (represented by DW1) and Tze Meng (represented by DW5) each signed a Settlement Deed with the Second Defendant. Under this Deed, Hock Hin and The Meng had to pay RM120,000.00 and RM108,000.00 for the construction of their own units and redemption sum of RM305,500.00 and RM400,000.00 respectively and not to sue for late delivery.

Before going any further we have to remember again that Hock Hin is a shareholder (50%) of the Second Defendant Company (the alleged "new purchaser") and DW1 (who own's Hock Hin) is also a director of the Second Defendant Company. Tze Meng like Hock Hin, is one of the purchasers but, unlike the First Plaintiff and PW2, were not owners of the land that was developed. The First Plaintiff and PW2 had given their land in exchange of the "free unit" to be given to them. So, it is understandable why the First Plaintiff and PW2 refused to sign the Settlement Deed to pay additional costs, a portion of the redemption sum and not to sue for

late delivery.

Furthermore, they said that the Note of 12th February 1992 was not for the benefit of the Second Defendant and that the terms were different from what is contained in the Note of 12th February 1992.

On 18th August 1992 and 21st September 1992, notices of demand were sent to the First and Second Defendants.

On 28th May 1993, Occupation Certificates were issued.

The main thrust of the argument of the learned Counsel for the Defendants is that there is no assignment of liabilities to the Second Defendant. He said that the Agreement of 7th March 1992 is merely an agreement for the sale of the said property by the First Defendant to the Second Defendant. The sale arose out of the extreme urgency to redeem the property and to avert the auction. Two grounds were forwarded. First, there is no express provision in the Agreement of 7th March for the transfer of the First Defendant's liabilities under the previous agreements to the Second Defendant. Secondly, liabilities cannot be transferred without the consent of "the other party".

First I would like to state that I have made my finding of facts that the Second Defendant was not involved in stopping the auction. The new company mentioned in the Note dated 12th December 1992 (Bundle c page 1) is the company the purchasers therein stated proposed to form, then. So, it is not correct to say that the Second Defendant entered into the Agreement of 7th March 1992 to stop the action scheduled on 12th February 1992 which had been stopped on 10th February 1992. What happened was, and that is my finding, that, DW1, after agreeing with the First Plaintiff, PW2 and DW5 to take over the project and form a new company for that purpose, changed his mind and teamed up with the Second Defendant.

We now come to the provisions of the Agreement of 7th March 1992. This Agreement is between the First Defendant and the Second Defendant. The First Defendant is described as the "Vendor" and the Second Defendant the "Purchaser". Recital 5 says that the First Defendant had carried out housing development and sold 6 plots to the First and Second Plaintiff 5, Hock Hin and Tze Meng, but the First Defendant had failed to complete the buildings.

Recital 6, inter alia, says that the First Defendant agreed to sell and the Second Defendant "agreed to purchase the said land free from incumbrance but subject to :.. the right of the house purchasers refers (sic) to in recital 5 herein and on a "as is where is" basis... "

Clause 1 repeats the same thing mentioned in recital 6.

It should be noted that in the First Defendant's Defence, it says, at paragraph 4, that the First Defendant is not liable in respect of the three earlier agreements because the First Defendant had entered into a Supplemental Agreement (the Agreement dated 7th March 1992) with the Second Defendant whereby the Second Defendant agreed, promised and undertook to complete the project fully. It goes on to say that that means that the Second Defendant will complete construction work.

So, we have a situation here where the Plaintiffs are relying on the Agreement of 7th March

1992 to pin the liability on the Second Defendant. The First Defendant takes the same stand relying on the same Agreement. But the Second Defendant, though represented by the same counsel as the First Defendant, takes the view that the Second Defendant only took over the benefit, relying on the same

Agreement, but denies that it also took over the liabilities from the First Defendant.

Let us now look at the evidence of the Defence witnesses themselves. DW1 (from Hock Hin) who is also a director of the Second Defendant, though, at times, an evasive witness, when asked, under cross-examination whether the Second Defendant purchased the project subject to the rights of purchasers replied "yes". It may be because he (under the name of Hock Hin) is one of the purchasers and knows that the only party who can now deliver his unit to him is the Second Defendant and not the First Defendant.

DW2 (Mr Ooi with whom DW1 teamed up, bought the Second Defendant and took over the project) also admitted that before he "come into this project" he was aware of the Sale and Purchase Agreements signed by the individual purchasers, and that this Agreement bind successors etc.

DW4, the Solicitor who drafted the Agreement of 7th March 1992 said that he was informed by the First Defendant and Second Defendant that there were existing purchasers and that was why he included recital 5 and 6.

Based on all these evidence (of the Defence witnesses) themselves and the provision of the Agreement of 7th March 1992, I am of the view that the Second Defendant took over, not only the rights but also the liabilities of the First Defendant under the earlier Agreements between the First Defendant and the purchasers, including the Plaintiffs.

It was also argued by learned Counsel for the Defendants, that consent of the Second Defendant is required before the liabilities can be passed on to the Second Defendant.

Cases like Housing and Development Board v Lee Sam Yoong Sdn Bhd (1987) 2 MLJ 204 (S.C.), Chung Khiw Bank Ltd v Penang Garden Sdn Bhd (1990) 2 CLJ 621, Tolhurse vAssociated Portland Cement Manufacturers (1900) 2 K.B. 660 were referred to me. It is clear to me what what those cases say is that consent the other party" is required. "The other party" is the other party to the original contract besides the assignor. There is no doubt that they (the "purchasers") did consent. They are relying on it -the Agreement of 7th March 1992.

Learned Counsel for the Defendants, if I understand him correctly, say that "the other party" is the Second Defendant - the "assignee". I do not think that "the other party" that these cases speak about mean the assignee. Of course the assignee must consent. Otherwise, there is no assignment at all.

In this case the assignee (the Second Defendant) is not disputing that there is an assignment. All it says is that there is an assignment of the rights but not the liabilities. I have said that evidence of the Defendants' own witnesses, say that is not the case. They say there is an assignment of both rights and liabilities of the First Defendant to the Second Defendant.

It is also alleged by the Defendants that the Plaintiff s have not paid the additional costs

mentioned in the Note of 12th February 1992 and also the redemption sum paid to MUI Finance. It is further alleged that the Plaintiffs refused to execute the Settlement Deed similar to the one executed by DW1. This is also the subject matter of the Counter-Claim by the Second Defendant.

First, I will deal with the question whether there is an agreement by the Plaintiffs to pay the Second Defendant the redemption sum for their respective units and the construction cost and to waive suing for late delivery.

In his written submission, learned Counsel for the Defendants said:

"4. The 2nd Defendant's counterclaim is based on an agreement that if the 2nd Defendant paid MUI FINANCE in terms of para. 2(b)of their letter dated 7 February, 1992 and undertook to complete the project for the benefit of the purchasers including the Plaintiffs, each of the Plaintiffs would pay the 2nd Defendant RM120,000.00 as additional costs and the redemption money as concerned their. respective units. The 2nd Defendant would complete the project within 12 months from the date of execution of a Deed of Settlement to be entered into separately by the purchasers including the Plaintiffs and the 2nd Defendant. All the purchasers including the Plaintiffs shall waive all claims to damages for late delivery occasioned as a result of the default of the 1st Defendant against the 2nd Defendant. Those terms having been agreed upon in good faith, the 22nd Defendant settled with MUI FINANCE and took steps to complete the project."

The "letter dated 7 February 1992" is the letter from MUI Finance (Bundle B page 199 - 200) to the First Defendant in which the MUI Finance agrees to postpone the auction on condition that the First Defendant makes the payments therein stated including the redemption sum. The learned counsel also appears to rely on he Settlement Deed which were never signed by the Plaintiffs. He urged the court to accept the evidence of 0W2 (for the Second Defendant) who said in his evidence:

"This redemption sum was to be paid by all the purchasers in respect of their unit. This was the term agreed between me, PW1, PW2 earlier. They were aware they had to settle the redemption in respect of their own units. The sums are payable to MUI Finance. As of today PW1, PW2 have not settled their redemption sum."

What do the other witnesses say? Of course, the First Plaintiff and PW2 say that there is no agreement for them to pay the redemption sum.

What does DW1 (from Hock Hin who at first agreed with the First Plaintiff and PW2 to buy over the project but later teamed up with DW2 (from Monarich, the Second Defendant Company) say?

At page 34 of the Notes of Evidence, in his evidence-in-chief, about what transpired on 12th February 1992, he said, "We did not talk about the redemption sum owed to MUI Finance." He was asked: "Whoever took over from Bagan Town would have to settle with MUI?" He replied, "I am not familiar with that kind of trade." However, later on he said, "I agree whoever took over from Bagan would have to pay MUI Finance." At page 35, he said, "Monarich was to settle the redemption sum to MUI Finance".

Under cross-examination, he said, inter alia, at page 39 of the Notes of Evidence:

Q: C1 (Note of 7th February 1992 - added) does not mention about redemption sum?

A: I agree

Q: No mention that the people named will waive their rights to sue the Developer?

A: I agree."

At page 40 he said:

"I did not pay the redemption sum myself."

He was also not aware that the Second Defendant was claiming the redemption from the First Plaintiff and PW2. Asked whether the redemption sum was paid from the purchase price, he, again avasively, replied that it was paid from the loan. At page 43 he said:-

"In my case I only have to pay the additional sum of RM120,000.00 and the outstanding sum under the Sale & Purchase Agreement (RM305,500.00)

Q: Were purchasers required to pay the redemption sum?

A: No."

So, even the DW1 himself clearly say that he and the First Plaintiff and PW2 do not have to pay the redemption sum.

We now go to another defence witness, DW5. At page 68, he was asked: "You did not pay any redemption money to DW2?" He answered, "I did not pay any other money to DW2 other than RM108,000.00." Again, he was asked "Are you aware DW2 is asking PW1, PW2 to pay redemption sum of RM430,000 each?" He answered, "I am not aware."

On the evidence, it is clear to me that, apart from DW2's own oral evidence, there is no other evidence that the Plaintiffs have agreed to pay the redemption sum to MUI Finance and to waive their right to sue for late delivery.

On the other hand the evidence of the First Defendant and PW2 to the contrary is supported by DW1 and DW5. In the circumstances, it is my finding of fact, on the balance of probabilities, that there is no such agreement to pay or to waive, as alleged by the Second Defendant.

One short point should also be said about the amount of the redemption sum claimed by the Second Defendant. It is based- on a valuation report Bundle E page 21. DW3, the Chartered Valuer who prepared the report and who was called by the Defendants, admitted that the value he gave in the report was open market value of the property and not the redemption sum. He said in no uncertain terms," Redemption sum is different from open market Value" - page 58.

Now we come to the sum of RM120,008 which the Plaintiffs are said to have to pay the

Second Defendant for the completion of each of their units - see Bundle C page 1. That Note of 12th February 1992 has nothing to do with the Second Defendant. At that time the four named purchasers had agreed among themselves to form a new company to take over the project and they agreed for the purpose, to each pay the additional amount "for the completion of the 9 41/2 story shophouses". That intention never materialised because DW1 changed his mind, left out the First Plaintiff and PW2 and teamed up with the DW2 through the Second Defendant.

Finally, we come to the Settlement Deed. I have C referred to it briefly in the earlier part of this judgment. The point is that this Settlement Deed was never signed by the Plaintiffs. It is also my judgment that they had not agreed to the terms therein.

In the circumstances I gave judgment to the Plaintiff and dismissed the Defendants counter claim with costs - see Orders for details.

Dated this 21 day of April 1997.

(Dato' Abdul Hamid bin Haji Mohamad)

Hakim Mahkamah Tinggi Malaya

Pulau Pinang