IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1995] SGCA 41

CA 151/1994, 152/1994

Between

Alivestone Investment Pte Ltd

… *Appellant*

And

Splendore Investments Pte Ltd
and another appeal

… *Respondent*

GROUNDS OF DECISION

Contract; Land — Sale of land

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Alivestone Investment Pte Ltd v Splendore Investments Pte Ltd and another appeal

[1995] SGCA 41

CA 151/1994, 152/1994
Karthigesu JA; L P Thean JA; Yong Pung How CJ
26 April 1995

1 Cur Adv Vult

2 We heard these two appeals together. They arise from two originating summonses filed under s 4 of the Conveyancing and Law of Property Act (Cap 61), namely, OS 769/93 and OS 889/93, respectively, concerning the sale and purchase of certain properties, hereinafter referred to as `the properties`. In OS 769/93, the respondents, referred to hereinafter as `the vendors`, applied for a declaration that they are discharged from further performance of the agreement dated 17 May 1993 (the option agreement) made between them and the appellants (the purchasers) for the sale and purchase of the properties and for a further declaration that they are entitled to retain for their own use and benefit the deposit paid to them by the purchasers. The vendors also claimed an order requiring the purchasers to withdraw the caveat number CV/067354C, lodged by them with the Registry of Titles against the properties. In OS 889/93 the purchasers claimed a series of declarations the net effect of which is that the vendors are not entitled to the declarations and the order they claimed for in OS 769/93 but on the contrary that they, the purchasers, were entitled to

declarations and orders that the vendors are bound by the terms and obligations undertaken by the vendors by the option agreement and another agreement entered into between the vendors and purchasers regarding the sale and purchase of the properties dated 28 April 1993 (the second agreement).

3 The learned judge who heard these applications granted an order in terms of the vendors` application in OS 769/93 with costs and dismissed the purchasers` application in OS 889/93 and ordered the purchasers to pay the vendors` costs. His reasons are to be gleaned from his note recorded in the minutes following the orders he made. He said:

> *... I find for the plaintiffs in OS 769/93 in terms set out in the conclusion, namely, para 34 of the plaintiffs` further submission dated 16 August 1994.*

4 It follows that the application in OS 889/93 has to be dismissed.

5 The para 34 referred to reads as follows:

> *In the premises, the vendor (plaintiffs) respectfully urge this court to find (a) that the contract was a conditional contract; (b) that the cl 4A condition was a condition precedent on the fulfilment of which a fully binding contract or sale was made to depend; (c) that the condition had to be performed by both the parties to the contract; (d) that the condition had to be performed at the latest by 10 August 1993, that is, the completion date; (e) that the condition was not performed by the completion date; (f) that the non-performance of the condition by that date was due to the default of the purchaser in failing to perform its obligation under the contract, that is, to provide the vendor with the requisite evidence to proceed with the application to the TCB [refers to Tenant`s Compensation Board]; (g) that the vendor was accordingly entitled to rescind the contract; (h) that the vendor is entitled to retain the deposit; and (i) that the vendor is also entitled to the consequential relief sought in this action.*

6 The facts which are uncontroversial are these. The vendors are the owners of the properties which were formerly rent-controlled premises under

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the Control of Rent Act (Cap 58) but are situated within the designated development area for the purposes of the Controlled Premises (Special Provisions) Act (Cap 60) (the Act). On 3 July the vendors obtained an order for recovery of possession of the properties under s 4 of the Act from the Tenants` Compensation Board (the Board). In compliance with the order of the Board (which was not exhibited) the occupiers of the properties vacated the properties and by a date in December, presumably 10 December 1992, the vendors had fully recovered possession of the premises such that they were in a position to commence development of the properties in accordance with the plan approved for that purpose. It will be noted that by s 4(2)(c) of the Act the vendors were required to undertake to the Board in writing that work for the purpose of putting into effect the approved development of the properties will commence within six months of the date when possession of the properties has been obtained or such further period as the Board may determine in any particular case. Since there is no evidence of any other period we will assume that the period in this case was six months. Accordingly, the vendors were or would be required to commence the approved development of the properties before 10 June 1993 or else they ran the risk of the properties being acquired by the government (see s 5(1)(a) of the Act). This, however, has not happened. It would also be noted that by s 4(2)(a) of the Act the vendors were required to produce evidence to the Board that they had the necessary funds or will be able to raise the necessary funds to put into effect the approved development of the properties. In the absence of evidence of the extent of the funds required by the Board, we will assume that it was $800,000.

7 Section 4(10) of the Act provides that the properties having been vacated under s 4 `shall not be used by the landlord (ie the vendors) for any purpose other than effecting development in accordance with the plan approved for that

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purpose and ***until such development is commenced the premises (ie the properties) shall not be sold, leased, or otherwise disposed of without the consent in writing of the Board*** .` (Our emphasis.) The sanction for the contravention of this provision is contained in s 4(11) of the Act and it is a fine not exceeding $500 or imprisonment for a term not exceeding one year or both.

8 It is common ground that by 28 April 1993 the vendors had not commenced the approved development of the properties. On 28 April 1993 the vendors for a consideration of $46,000 paid to them granted an option (the option) to one Chua Boon Kwang alias Chua Hong Keng, and/or to his nominee, for the sale of the properties for $4.6m. The option was to be exercised before 4pm on 18 May 1993 by completing the `acceptance copy` attached to the option and by paying to the vendors a sum of $414,000 which together with the consideration for obtaining the option will be equal to 10% of the purchase price. Failure to exercise the option by the time set for its exercise would result in the forfeiture of the consideration of $46,000 without recourse. The option was duly exercised by the purchasers on 17 May 1993 and became the option agreement referred to earlier. The relevant clauses of the option agreement for present purposes are cll 4A, 4B, 5 and 9 which we set out in full below:

> *4A The sale herein is subject to the vendor obtaining the consent in writing of the Tenants` Compensation Board (TCB) under s 4(10) of the Controlled Premises (Special Provisions) Act (Cap 60) (the Act) to sell the property. To enable the vendor to obtain such consent from the TCB, the purchaser agrees and undertakes that:*
>
> (i) he shall commence development of the property in accordance with the plan for development approved by the Ministry of National Development for the purpose of the Act within six (6) months from 10 December 1992;
>
> (ii) he shall, if necessary, satisfy the TCB that he has the fund of Dollars Eight Hundred Thousand ($800,000) to carry out the aforesaid development; and

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> (iii) he shall, if necessary, comply with any other conditions imposed by the TCB.
>
> *4B In the event the TCB does not consent to the sale herein, then the option herein shall be rendered null and void and each party is to bear their own costs and neither party shall have any claim against the other.*
>
> 5 The sale shall be completed at the office of the vendor`s solicitors, M/s Donaldson & Burkinshaw on 10 August 1993.
>
> ...
>
> 9 The sale is subject to the Singapore Law Society`s Conditions of Sale 1981 in so far as the same are applicable to a sale by private treaty and are not varied by or inconsistent with the express provisions and terms herein.

9 It is clear that the option was granted by the vendors with s 4(10) of the Act in mind. When it was exercised, as it was, by the purchasers, as the nominee of Chua Boon Kwang alias Chua Hong Keng, it became the option agreement and was conditional on the vendors obtaining the consent in writing of the Board to the sale. We shall have to return to the option agreement later.

10 It is now necessary to refer to another agreement signed between the vendors and the purchasers for the sale and purchase of the properties. This is the second agreement referred to earlier. It is dated 28 April 1993 but it could not have been signed on that date. In all probability it was signed at the same time as the option was exercised by the purchasers on 17 May 1993 but dated 28 April 1993. The purchasers in the affidavit of Wu Chuan filed on 24 September 1993 in support of their application in OS 889/93 say this:

> *3 The plaintiffs (the purchasers) on 18 May 1993 by way of exercise of the option handed to the solicitors for the defendants the following:*
>
> (a) The option dated 17 May 1993 and agreement dated 28 April 1993 duly executed by the plaintiffs;
>
> (b) Cheque for $414,000 being the balance of 10% deposit to be held by the said solicitors for the defendants as stakeholders.

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> *The option although duly exercised on 18 May 1993 is dated 17 May 1993. ...*
>
> 4 The purpose of entering into these two agreements (ie the option and agreement) was to ensure that the parties would be bound to sell and buy even if the Tenants` Compensation Board refused to give its consent to the sale as contemplated by the option. ...

11 The purchasers repeat in substance the above in the affidavit of Wu Chuan filed on 11 September 1993 in opposition to the affidavit of Soon Kian Leong filed on 24 August 1993 in support of the vendors` application in OS 769/93. It is to be noted that the vendors made no reference to the second agreement in their application in OS 769/93 and responded to the purchasers` reference to the second agreement only by the affidavit of Soon Kian Leong filed on 5 October 1993 in opposition to the purchasers` application in OS 889/93 where they said:

> *(4) The parties concerned with the pre-contract negotiation were mindful of the possibility that the Tenants` Compensation Board may not give its consent for the proposed sale. However, as the parties were satisfied with the price of the said premises, they agreed to enter into a fresh agreement to buy and sell the said premises at the same price in the event the Tenants` Compensation Board refuses to approve the proposed sale. It was obvious to the parties that the intended fresh agreement can only be lawfully entered into after the defendants (the vendors) have commenced development work on the said premises. It was also obvious that the intended fresh agreement would only be entered into after an application to the Tenants` Compensation Board for consent had been made and rejected.*

12 The second agreement provided as follows:

> *(1) The vendor shall in consideration of the purchaser entering into this agreement with the vendor grant an option to the purchaser to buy the property at the price and upon the terms and conditions set out in the attached option (the option).*
>
> (2) If the Tenants` Compensation Board shall refuse to give its consent to the sale contemplated by the option, the vendor and the purchaser shall enter into a fresh agreement to buy the

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> property at the same price and upon the same terms and conditions as those set out in the option (except the condition providing for the sale to be subject to the consent of the Tenants` Compensation Board).
>
> (3) The vendor shall commence the development works contemplated by s 4(10) of the Controlled Premises (Special Provisions) Act to enable it to lawfully enter into the fresh agreement with the purchaser.
>
> (4) The vendor shall credit the sum of $460,000 paid by the purchaser under the option to the account of the purchaser under the option.

13 We will pause here to make some observations. In so far as s 4(10) of the Act is concerned once the approved development is commenced the written consent of the Board for the sale of the properties would no longer be required. The words `develop` and `development` are defined by s 2 of the Act as follows:

> *`develop` means to carry out -*
>
> *(a) any building, engineering or other operations in, on or over land; or*
>
> (b) any renovation or building works on any premises situated within a conservation area which would enhance or restore the character or appearance of those premises,
>
> *in accordance with a plan for development; and `development` shall be construed accordingly.*

14 The vendors, clearly in our judgment, did not intend to commence the approved development of the properties, as at the date of granting the option they had let four of the six months within which they had undertaken to the Board to commence the development to pass; equally clearly they intended to sell the properties to the purchasers for $4.6m, albeit on a revised date for completion, or else they would not have entered into the second agreement and provided in it that the sum of $460,000 paid by the purchasers to them under the option agreement be held to the credit of the purchasers and to have agreed by the second agreement that they would commence the approved development to

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legally get over the impediment of s 4(10) of the Act. This in our view was the purpose and intent of the second agreement. It was to sell the properties to the purchasers for $4.6m and to incur the expense of commencing the approved development of the properties only as a matter of last resort. The vendors have not argued that the second agreement is not legally binding on them; what they say is that the second agreement becomes legally effective only in the event the Board refuses consent and in the events which have happened the Board`s consent was not sought. So the Board has not refused consent.

15 This said we return to the option agreement to consider the contractual obligations of the respective parties. The crucial clause is cl 4A. It is not denied by the purchasers that the contract for the sale of the properties is a conditional contract and the condition is the obtaining, by the vendors, of the consent in writing of the Board for them to sell the properties. There is no denying that the consent of the Board becomes necessary only because the vendors as at the date they granted the option on 28 April 1993 had not commenced, and as we have observed earlier, clearly did not intend to commence the approved development of the properties. That the vendors intended to sell the properties to the purchasers for $4.6m whether or not they obtained the consent of the Board cannot also be in doubt because of the second agreement. In this situation it cannot be said, as the vendors have endeavoured to say, that the obtaining of the Board`s consent was a condition precedent to the formation of a binding contract since by the terms of the option it was required that the option had to be exercised by 4pm on 18 May 1993 by the `acceptance copy` being signed by the intending purchasers and the sum of $414,000 being paid which together with the $46,000 already paid to obtain the option would constitute 10% of the purchase price failing which the option will expire. In our view, the true position is that a binding contract came into existence on 17 May 1993 when the

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purchasers exercised the option by signing the `acceptance copy` and returning it to the vendors` solicitors together with their cheque for $414,000. This is the option agreement. Thereupon the primary obligation under the option agreement arose. It is provided in the clearest terms in cl 4A that the primary obligation, ie of obtaining the consent in writing of the Board to sell the properties, is to be fulfilled by the vendors. There is also a secondary obligation to be fulfilled by the purchasers to which we will come later. However, until the primary obligation is fulfilled by the vendors the essential and main obligations of the vendors to sell and of the purchasers to complete the sale and purchase of the properties remain inchoate.

16 This is amply illustrated by the recent judgment of this court in where all the relevant authorities on this subject are discussed. We are further fortified in our view by the existence of the second agreement the effect of which is that the underlying agreement of the vendors to sell the properties to the purchasers for the same consideration of $4.6m subsists as the vendors by the second agreement have agreed with the purchasers that in the event the Board does not consent to the sale then the vendors will commence the approved development of the properties so as to obviate the necessity of the Board`s consent and the vendors will enter into a new agreement with the purchasers for the sale of the properties at the same price of $4.6m and upon the same terms and conditions as those in the option agreement save for the requirement of the Board`s consent and give credit to the purchasers of the sum of $460,000 paid under the option agreement.

17 The vendors admit that they have the primary obligation under the option agreement to obtain the Board`s consent to the sale of the properties but contend that from the terms of cl 4A of the option agreement the purchasers

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themselves have an obligation to provide reasonable assistance to the vendors to enable them to obtain the Board`s consent or at least, this is to be implied. It is common ground that the vendors did not make any application whatsoever to obtain the Board`s consent and the reason ascribed by them for this is that the purchasers in breach of their contractual obligation, express or implied, failed to provide the vendors with documentary evidence, as requested by the vendors, of their availability of the necessary funds ($800,000) to carry out the approved development of the properties and that without such documentary evidence it would have been futile to have applied to the Board for its consent. Thus, it was the purchasers and not they who were in breach of cl 4A of the option agreement. On the other hand, the purchasers contend that on the plain and ordinary meaning of cl 4A they had no such obligation to the vendors and in any case their obligations arose only ***after*** the vendors had applied to the Board for its consent and their obligations were to comply with cll 4A(ii) and (iii) of the option agreement, which were, ***if necessary, to satisfy the Board that the purchasers had the necessary funds and if necessary, to comply with any other conditions imposed by the Board*** . Since the vendors failed to make any application to the Board for its consent to enable them to sell the properties it was the vendors who were in breach of cl 4A of the option agreement.

18 Just as clear as that the option was granted by the vendors with s 4(10) of the Act in mind, it seems to us that cl 4A(ii) of the option agreement was drafted with s 4(2)(a) of the Act in mind. The vendors could not have obtained an order of possession of the properties from the Board under s 4 of the Act without complying with s 4(2)(a), that is to say, without supporting evidence `that funds are or will be available for the purpose of putting into effect` the approved development of the premises. This is a statutory requirement. In our view any application by the vendors to the Board for consent to sell the

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properties under s 4(10) of the Act must of ***necessity*** be supported by some such evidence of the purchasers` financial ability to carry out the approved development or else it is doomed to fail in limine. On an objective view of cl 4A(ii) of the option agreement satisfactory evidence of the funds contemplated therein is ***necessary*** for the purpose of an application to the Board for its consent under s 4(10). It follows from this that whilst it is the primary obligation of the vendors to apply to the Board for its consent to sell the properties under s 4(10) of the Act there is a concomitant obligation under cl 4A(ii) of the option agreement on the purchasers to furnish the vendors with some evidence of their financial ability to carry out the approved development of the properties in order to support the vendors` application to the Board.

19 This said, there can be no doubt, in our view, that the satisfactoriness of the evidence of the purchasers` financial ability to carry out the approved development of the properties is to be determined by the Board and by the Board alone. The words of cl 4A(ii) of the option agreement are ... ***satisfy the TCB*** [Tenants` Compensation Board] ***that he*** [the purchasers] ***has the fund*** ... ***to carry out the*** ... ***development*** .` These words are clear beyond peradventure to admit of any other meaning.

20 Notwithstanding that the purchasers protested that they did not have any contractual obligation under cl 4A(ii) of the option agreement to furnish evidence of their financial ability to carry out the approved development until the vendors had first made their application to the Board for consent under s 4(10) of the Act, the purchasers did, nevertheless, on 14 July 1993 forward to the vendors` solicitors a letter from Singapore Finance Ltd dated 12 July 1993 and addressed to the purchasers. This letter is entitled `revolving loan of $800,000` and materially stated that the loan is to be used as working capital

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and that the loan would only be available after the purchase price for the properties has been paid to the vendors. However, the vendors decided on their own that this letter may not be acceptable to the Board as evidence of funds amounting to $800,000 being available to the purchasers to carry out the approved development of the properties and refused to make the application to the Board supported by this letter and again refused to apply to the Board for its consent despite the receipt of another letter from Singapore Finance Ltd to the purchasers dated 19 July 1993 in identical terms as the former letter except that the purpose of the loan is stated in more positive terms as being `for the proposed development works pertaining to the (properties)`. By these letters Singapore Finance Ltd, in our view, clearly stated that a loan of $800,000 is available to the purchasers for the approved development of the properties and not for the purchase of the properties.

21 In our judgment the failure of the vendors to apply to the Board for its consent under s 4(10) of the Act for the sale of the properties to the purchasers is a clear breach by the vendors of their primary obligation under cl 4A(ii) of the option agreement, the purchasers having, in our view, discharged their concomitant obligation thereunder to furnish the necessary evidence to enable the vendors to apply to the Board for its consent. As we have said, it is not for the vendors to decide whether the evidence furnished by the purchasers is satisfactory or not as that by the clear wording of cl 4A(ii) is for the Board.

22 Not deterred by the objections the vendors had taken on the two letters of Singapore Finance Ltd referred to above, the purchasers, having changed their financiers, forwarded to the vendors` solicitors on 4 August 1993 a letter from Overseas Union Trust Ltd addressed to the Board and dated 4 August 1993 which read: `We are pleased to confirm that a total loan of $4m is available to

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Alivestone Investment Pte Ltd (the purchasers) for the above captioned properties [ie the properties].` The vendors, again on their own, determined that the letter was unsatisfactory because it did not `specify the purpose of the loan`. We repeat what we have said earlier, that it is not for the vendors but for the Board to determine the satisfactoriness of the letter. Accordingly, by again not making the application to the Board supported by this letter the vendors are in breach of cl 4A(ii) of the option agreement. If the Board so required it, it would have been up to the Board to prescribe how much of the loan is to be set aside and earmarked specifically for the approved development of the properties. The vendors have no right to reject the letter as being unsatisfactory.

23 Thus, in our judgment, it is the vendors who are in breach of cl 4A(ii) of the option agreement and not the purchasers. Hence, the vendors` contention that the purchasers are in breach of cl 4A(ii) of the option agreement and that such breach is repudiatory in nature which the vendors accept, thus discharging themselves from further performance of the option agreement and entitling them to retain the deposit (ie $460,000) to their own use and benefit is wholly erroneous.

24 Accordingly, we will allow both appeals and set aside the orders made by the learned judge in both OS 769/93 and OS 889/93 and in their place make the following orders:

> (1) that OS 769/93 be dismissed; and
>
> (2) that the following orders and declarations be made in OS 889/93, namely:
>
> (i) that the plaintiffs (ie the purchasers, Alivestone Investment Pte Ltd) are not in breach of the terms and conditions of the agreement dated 17 May 1993 (ie the option agreement) and the defendants (ie the vendors, Splendore Investments Pte Ltd) are

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> not in any way discharged from further performance of the agreement;
>
> (ii) that the defendants do forthwith apply to the Tenants` Compensation Board to approve the sale of the properties to the plaintiffs and to further apply that the period for development allowed by the Tenants` Compensation Board be extended upon such terms and for such periods the Tenants` Compensation Board deems reasonable; and
>
> (iii) that the plaintiffs (ie the purchasers, Alivestone Investments Pte Ltd) have liberty to apply to a judge of the High Court, in chambers.

25 We now turn to the question of costs. The purchasers by their OS 889/93 have claimed for costs on an indemnity basis. We have not heard arguments on costs. In any event we are not disposed to award costs on an indemnity basis. However, the purchasers are entitled to their costs both here and below. Both applications were heard together in the court below and we also heard both appeals together. But in our view, the substantive and core issue raised in OS 889/93 was the true meaning and effect of cl 4A of the option agreement and this was the same issue already raised by OS 769/93.

26 Accordingly, we will order that there be only one set of costs for both originating summons and both appeals. The appellants in both appeals are also entitled to a return of the appeal deposits which we direct be paid to their solicitors.

27 And we so order.

28 ***Both appeals allowed.***

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[1995] SGCA 41

Karthigesu JA
L P Thean JA
Yong Pung How CJ

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Jimmy Yap (Donaldson & Burkinshaw) for the respondents

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