Cheng-Wong Mei Ling Theresa v Oei Hong Leong
[2006] SGCA 12

Case Number : NM 118/2005, CA 113/2005

Decision Date : 31 March 2006

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Kan Ting Chiu J; Yong Pung How CJ

Counsel Name(s) : C R Rajah SC, Anand Karthigesu and Moiz Haider Sithawalla (Tan Rajah & Cheah) for the appellant; Loo Ngan Chor (Lee & Lee) for the respondent

Parties : Cheng-Wong Mei Ling Theresa — Oei Hong Leong

Civil Procedure – Appeals – Adducing fresh evidence – Evidence relating to new point not raised by parties at trial but considered by judge in grounds of decision – Whether court should allow fresh evidence to be adduced

Civil Procedure – Parties – Locus standi – Appellant seeking declaration as to future rights as registered proprietor of land pursuant to sale and purchase agreement – Whether appellant having equitable interest in land under sale and purchase agreement – Whether appellant having locus standi to seek declaration

Land – Easements – Rights of way – Only access to property through land belonging to adjoining property – No easement of way registered against certificate of title of adjoining property – Whether implied easement of way existing – Sections 99(1), 99(1A) Land Titles Act (Cap 157, 2004 Rev Ed)

31 March 2006

Kan Ting Chiu J (delivering the judgment of the court):

Background

1 A bungalow that was constructed more than 40 years ago was faced with the prospect of having its only access to the public road removed. When it was developed, access was provided through a short driveway over the land of the adjoining bungalow. These two bungalows were parts of a development on an undivided lot of land. After the subdivision, the bungalows stood on their own separate plots. Subsequently, when certificates of title were issued in respect of the plots on which the two bungalows stood, no express right of way was created. A dispute arose over whether there is an implied easement of way.

2 The first plot with the bungalow is No 48 Dalvey Road ("No 48"). The adjoining plot and bungalow is No 48A Dalvey Road ("No 48A"). There were other bungalows developed on other plots that were created out of the parent lot, but this case is only concerned with the two plots.

3 The parent lot was Lot 45 Town Subdivision No XXV ("Lot 45"). It was owned by Singapore Tobacco Company (Private) Ltd ("Singapore Tobacco"). On 14 July 1970, Singapore Tobacco obtained approval to subdivide Lot 45 into 13 plots. Plots 1 to 8 were expressly described to contain an existing house each, and the subdivision plan showed that No 48 stood on Plot 6 and No 48A stood on adjoining Plot 7, with the word "Access" written on the northerly part of Plot 6 where it abutted Plot 7.

4 On 18 November 1971, Lot 45 was brought under the Land Titles Act (Cap 276, 1970 Rev Ed). Plot 6 became Lot 473 and Plot 7 became Lot 472, and certificates of title, dated 30 December 1971, were issued for Lot 473 and Lot 472.

5 An error made in the demarcation of Lot 472 left a part of Plot 7 out of Lot 472. This was rectified with the creation of a new Lot 1122 in place of Lot 472, and the issuance of a new certificate of title on 13 March 1987. None of the certificates of title issued refer to any right of way for No 48 over No 48A.

6 The ownership of No 48/Lot 473 and No 48A/Lot 1122 changed hands as follows:

(a) No 48/Lot 473 was transferred by Singapore Tobacco to William Goei and Tan May Lee on 10 November 1975, who in turn transferred it to Thye Hong Manufacturing Pte Ltd ("Thye Hong") on 21 March 1980;

(b) No 48A/Lot 1122 was transferred by Singapore Tobacco to Oei Hong Leong ("the defendant") on 5 September 1990.

The application

7 On 20 April 2005, Thye Hong entered into an agreement to sell No 48 to the plaintiff, Theresa Cheng-Wong Mei Ling. As there was no express right of way for No 48 over No 48A, cl 8 of the agreement provided that:

> The sale and purchase herein is subject to the Purchaser obtaining a declaration from the High Court in Singapore (hereinafter called "the declaration") that the Property (comprised in Lot 473 TS 25) enjoys an implied easement of way in accordance with the provisions of Section 99(1) of the Land Titles Act, Cap 157 over the property known as 48A Dalvey Road (comprised in Lot 472 TS 25) for the purpose of access to and from Dalvey Road as shown on the plan annexed hereto….
>
> In the event that the declaration is not obtained within six (6) months from the date of this Agreement, this Agreement shall be deemed null and void and the Vendor shall after the return of the title deeds and the withdrawal of all caveats filed by the Purchaser and all persons claiming under him, refund to the Purchaser the Deposit free of interest and neither party shall have any claim or demand against the other for costs damages compensation or otherwise.

8 Easements of way are implied under ss 99(1) and 99(1A) of the current Land Titles Act (Cap 157, 2004 Rev Ed) ("the Act") which provide that:

> **99.**—(1) Where the competent authority has approved the development and subdivision of any land comprised in an estate before or after 1st arch 1994 and the subdivision plan has been submitted to the competent authority, there shall be implied, in respect of each lot of the estate which is used or intended to be used as a separate tenement, in favour of the registered proprietor of the lot and as appurtenant thereto, all the easements referred to in subsection 1A).
>
> (1A) The easements which shall be implied under subsection (1) are all such easements of way and drainage, for party wall purposes and for the supply of water, gas, electricity, sewerage and telephone and other services to the lot on, over or under the lands appropriated or set apart for those purposes respectively on the subdivision plan submitted to the competent authority relating to the estate, as may be necessary for the reasonable enjoyment of the lot and of any building or part of a building at any time thereon.

9 After entering into the agreement, the plaintiff took out an originating summons against the

defendant to seek:

> A declaration that the property known as Lot No. 73 Town Sub-Division No. XV together with the building thereon known as 48 Dalvey Road ("48 Dalvey Road") enjoys an implied easement of way in accordance with the provisions of Section 99(1) of the Land Titles Act, Cap 157 over the property known as Lot No. 472 (now forming part of Lot No. 1122) Town Sub-Division No. XXV together with the building thereon known as 48A Dalvey Road ("48A Dalvey Road") for the purpose of access to and from Dalvey Road as shown on the plan annexed hereto.

10 In support of the application, the plaintiff made an affidavit in which she deposed that:

> (a) the driveway through No 48A was the only means of access from No 48 to Dalvey Road;
>
> (b) she was informed by Thye Hong that in December 2004 the defendant had erected an electronic security barrier along the common driveway of No 48 and No 48A leading to Dalvey Road and that there was unobstructed access before the barrier was erected; and
>
> (c) Thye Hong had written to the defendant on 16 December 2004 for a remote control device to operate the barrier to give access to No 48, but the defendant did not respond to the request.

11 In the affidavit, the plaintiff gave a history of No 48 and No 48A from the subdivision in 14 July 1970 through to the issuance of the separate titles for the two properties and the rectified title for No 48A on 13 March 1987. It is to be noted that in her affidavit she did not refer to any approvals for the development of the two bungalows in No 48 and No 48A.

The decision below

12 The plaintiff's application came on for hearing before a judge. Although the defendant opposed the plaintiff's application, no affidavit was filed in opposition to it. After hearing counsel and reserving judgment, the judge dismissed the application (see *Cheng-Wong Mei Ling Theresa v Oei Hong Leong* [2006] 1 SLR 145).

13 In her grounds of decision , the judge dealt with the defendant's counsel's preliminary objection that the plaintiff did not have *locus standi* to seek the declaration because she had not completed the purchase of the property, and that only a registered proprietor had the right to do that:

14 She rejected that objection and held at [11]:

> If there was a valid contract, the plaintiff would have an equitable interest in the property and the vendor would hold the property as constructive trustee: see Tan Sook Yee, *Principles of Singapore Land Law* (Butterworths Asia, 2nd Ed, 2001) at p 355. In my view, the Sale and Purchase Agreement was a valid contract even though it was made subject to certain conditions. I would characterise cl 8 of the Sale and Purchase Agreement as a condition subsequent.

While we agree that the plaintiff had an equitable interest in the property under the agreement, we did not come to our conclusion that the agreement was a valid agreement solely because cl 8 was not a condition precedent which had to be fulfilled before a contract can come into being, but was a condition subsequent.

15 It is apposite to refer to Prof Tan Sook Yee's explanation at pp 355–356 that:

> It is generally accepted that the purchaser, under a valid contract for sale, has the equitable interest in the land while the vendor is the constructive trustee. The *locus classicus* is *Lysaght v Edwards* [(1876) 2 Ch D 499]. The basis of the imposition of the constructive trust in this situation is that the parties are entitled to the remedy of specific performance. There is, however, some difference of views as to when the equitable interest passes to the purchaser or when the constructive trust arises. There is a view that it arises as soon as the contract is entered into, while another view is that it arises only when the contract is binding and then it is related back to the time when the contract was entered into.
>
> While there may be doubt in other jurisdictions, in Singapore the view of the courts is clearly that the *equitable ownership passes when the contract is enforceable and binding*. [emphasis added]

citing the decisions of the Court of Appeal in *Lee Christina v Lee Eunice* [1993] 3 SLR 8 and *British Malayan Trustees Ltd v Sindo Realty Pte Ltd* [1999] 1 SLR 623.

16 In *Lysaght v Edwards*, Jessel MR had explained at 506–507:

> [T]he moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession. In other words, the position of the vendor is something between what has been called a naked or bare trustee, or a mere trustee.
>
> …
>
> Now, what is the meaning of the term "valid contract?" "Valid contract" means in every case a contract sufficient in form and in substance, so that there is no ground whatever for setting it aside as between the vendor and purchaser—a contract binding on both parties.

17 The same proposition (and more) was stated without reference to *Lysaght v Edwards* by the Court of Appeal in *Chi Liung Holdings Sdn Bhd v AG* [1994] 2 SLR 354 ("*Chi Liung Holdings*") at 364, [34]:

> One of [counsel's] contentions was that a sale of a property is made when a contract for the sale and purchase is entered into and the purchaser becomes the beneficial owner of the property. We accept that general proposition as correct. But *it is premised on the availability of specific performance*, as equity looks upon as done what has been agreed to be done and the purchaser is deemed the owner in equity as at the date of the contract. *If, for any reason, specific performance is not available, the purchaser is not deemed to have been the owner of the property*. [emphasis added]

18 In that case, two agreements for the sale of land were subject to the condition that the purchaser was to obtain qualifying certificates from the Controller of Housing ("the Controller") under the Residential Property Act (Cap 274, 1985 Rev Ed) for the purchase of the property.

19 The question before the court was whether the vendor had breached an undertaking not to sell or dispose of the properties without the approval of the Controller by entering into the

agreements. The court held that the undertaking was not breached because until the qualifying certificates were obtained no estate or interest passed to the purchaser, and the vendor had not made any sale or deposition of the properties.

20 At first blush, it may appear that in the present case too, no equitable interest passed to the plaintiff on the signing of the agreement of sale because the declaration was not obtained yet, in the same way as the qualifying certificates were not obtained in *Chi Liung Holdings*.

21 However, it does not follow that whenever an act of a third party is required (such as the Controller's approval or the court's declaration), no equitable interest passes until that condition is fulfilled.

22 It is established law that a condition in a contract for the exclusive benefit of one party may be waived by that party, as illustrated in *Chip Thye Enterprise Pte Ltd v Development Bank of Singapore Ltd* [1994] 3 SLR 613. Clause 8 in the agreement was intended exclusively for the benefit of the plaintiff. If she did not obtain the declaration, she could rely on the clause and call off the purchase. However, it was within her right to waive that benefit and seek specific performance of the agreement without the declaration.

23 On the facts, it is unlikely that there would be a waiver by the plaintiff, but that is not the issue. The question is whether specific performance is available to her, and the answer is it is if she wants it. When the agreement was signed, specific performance was available to the plaintiff, and she had thereby acquired the equitable interest and *locus standi* to seek the declaration. It may be that if she fails to obtain the declaration, she may not want to complete the purchase, but that does not detract from the fact that specific performance is available to her now. The situation in *Chi Liung Holdings* is different because the condition specifying qualifying certificates must be obtained for the sale of the properties to be completed was not incorporated for the exclusive benefit of either party. It was a statutory requirement which could not be waived.

24 On the facts, the plaintiff has an equitable interest in No 48 recognised under s 4 of the Act, and she thereby has the *locus standi* to maintain the action as long as she has not renounced her equitable interest by invoking cl 8 to call off the purchase.

25 After disposing of the preliminary objection, the judge went on to consider whether the conditions of s 99(1) of the Act were satisfied so that an easement of way could be implied in favour of No 48 over No 48A.

26 She noted at [15] of her judgment that:

> The Chief Planner's letter of 14 July 1970 permitted the subdivision of the amalgamated land into 13 plots. Significantly, permission for Plots 1 to 8 was confined strictly to subdivision and not development of those plots which already had an existing house or dwelling standing on each plot of land. The approval letter subdivided and created Plots 9 and 11 as vacant land demarcated for future development. Notably, no outright permission was granted for their actual development.

and went on to state at [17] that:

> In my judgment, s 99 of the Act was inapplicable in the present case. The approval did not meet the first condition of s 99(1) … The Subdivision Plan did not relate to both the development and subdivision of the amalgamated lots. The words used by the subsection are "development and subdivision". The word "*and*" is to be read conjunctively. The approval by the competent

> authority must be for development *and* subdivision although it is not necessary that development *and* subdivision must take place at the same time. [emphasis in original]

27 She referred to the decision of this court in *MCST Plan No 549 v Chew Eu Hock Construction Co Pte Ltd* [1998] 3 SLR 366 where it was stated at [31] that:

> The plain language of s 99(1) does not require an approval of both the development and the subdivision of land to be given at one and the same time, and there is nothing in that provision requiring the contemporaneous approvals for both the processes. In our opinion, there is no reason why s 99(1) should not be applicable merely because the approval for development has been granted before the grant of the approval of subdivision for the land, as was the present case.

and she added at [19] that if there should be development of the land in the future, the question of implied easements could be revisited.

28 It should be noted that the issue of development approval was not raised by counsel or the judge at the hearing before her. A reading of the notes of argument, the written submissions tendered at the hearing and the judge's grounds of decision show that this point appeared for the first time in the grounds of decision.

Demarcation of the access route

29 There was another ground for the dismissal of the application. The judge had also found that the requirements of s 99(1A) were not satisfied. She noted at [22] of her grounds of decision that:

> [F]or s 99 of the Act to apply, the question is: Was there on the Subdivision Plan land appropriated or set apart for easement of way as may be necessary for the enjoyment of Plot 6 and of any building or part of a building at any time thereon? Section 99 lists some common easements and these will be implied, where shown, as easements to be made appurtenant to other lots in the approved subdivision plan. And how are the relevant easements to be so shown? There must be delineation of land as a roadway appropriated or set apart on the subdivision plan for use as an easement of way to be made appurtenant to other lots. Bearing in mind the common law position that no easement of way could be created on one's own land, I was not prepared to draw the inference that the strip of land on which the word "access" was handwritten and which abutted the boundary of Plot 6 was intended to be a right of way appurtenant to Plot 6. It could not and did not amount to a delineation of the strip of private land on Plot 7 as a roadway set apart on the Subdivision Plan for the use of Plot 6 to pass and re-pass for the reasonable enjoyment of Plot 6.

30 It is true that the approved subdivision plan of 14 July 1970 did not mark out the land over which the access was to run. Nevertheless, the notation of the word "Access" suggested that the access route ran beyond Plot 6 because if it was entirely within Plot 6, there was no need for the notation. The question is whether an access route was set out.

31 There was in fact evidence of that. After the subdivision in 1970, the land was brought under the Land Titles Act (Cap 276, 1970 Rev Ed) in 1971, and individual certificates of title were issued for the plots with No 48 identified as Lot 473 and No 48A identified as Lot 472. When the error in the demarcation of Lot 472 was discovered, a replacement certificate of title was issued with the lot properly marked out and designated as Lot 1122. In the plans annexed to the certificates of title for Lots 472, 473 and 1122, the part of No 48A that was used to give ingress and egress between No 48

and Dalvey Road was marked by dotted lines.

32 The lots covered by the certificates of title (save for the error in the demarcation of Lot 472) are identical to the approved subdivided plots. In the plans annexed to the certificates, it was clear that the path over which the easement of way run was marked out when the subdivision occurred.

33 In such a situation, it is permissible and proper for a court, when asked to determine whether there is an implied easement of way following a subdivision, to refer to the plans annexed to the certificates of title to ascertain the access route that was provided during the subdivision, and read them together with the subdivision plan.

34 Counsel for the defendant had also contended that there was no implied easement of way over No 48A because the driveway serving it can be repositioned. The judge rejected the argument on the ground that since the defendant did not file an affidavit, he could not raise that contention.

35 In fact there was no basis for the contention as the approved subdivision plan showed that there was no common boundary between No 48 and Dalvey Road. Although No 48 had a frontage along the road, the two are separated by Plot 13, a narrow strip of land reserved for road widening purposes.

36 The plaintiff was not satisfied with the judgment, and appealed against it.

Admission of further evidence

37 In view of the fact that one of the grounds for the decision of the judge below was that there was no evidence of any approved development, the plaintiff applied for the admission of new evidence. Accordingly, a motion was filed to admit the additional evidence in the appeal. The additional evidence covered three areas. First, it was that the plaintiff and Thye Hong had agreed to extend the time for obtaining the declaration under cl 8 by six months to 20 April 2006. Second, that the competent authority had on 4 September 1956 approved the development of five houses on the subsequently subdivided Plots 4 to 8 (which include the plots for No 48 and No 48A), and had also approved the development of another five houses on Plots 1, 2, 3 and 9 on 4 September 1964. The third piece of evidence was a Road Line Plan of the Land Transport Authority which shows the narrow strip of road reserve running between No 48 and Dalvey Road.

38 Under s 37 of the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) ("SCJA") and O 57 r 13(2) of the Rules of Court (Cap 332, R 5, 2004 Rev Ed) ("the Rules"), further evidence shall not be admitted in an appeal to the Court of Appeal except with the leave of the Court which will only be given when there are special grounds.

39 What are special grounds are not laid down in the SCJA or the Rules. Lord Denning enunciated a rule in *Ladd v Marshall* [1954] 1 WLR 1489 at 1491 ("the rule in *Ladd v Marshall*") for the admission of additional evidence in an appeal. Under the rule, three conditions have to be met before additional evidence may be admitted:

> first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;
>
> secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive;

thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.

This rule has been accepted by this court in numerous cases to be the test for determining special grounds. However, it must be borne in mind that the rule is not a statutory provision to be applied rigidly in all circumstances.

40 Applying the rule, the first category of additional evidence clearly qualifies because the extension was not given till after the decision was delivered, and it was necessary to maintain the plaintiff's *locus standi* for the appeal. The third piece of evidence relating to the road line plan was admitted in evidence without discussion because it only confirmed what was already disclosed in the approved subdivision plan.

41 However, the admission of the second category of evidence drew the most attention. The additional evidence related to the approval for the development of five houses (including No 48 and No 48A) on 4 September 1956 and the further approval for the development of another five houses on 4 September 1964 by the Singapore Improvement Trust, the authority at that time to give such approvals.

42 As no question was raised over the relevance or authenticity of the approvals, the second and third conditions under the rule in *Ladd v Marshall* were met. The problem was with the first condition, that the approvals could not have been obtained with reasonable diligence. The subdivision approval the plaintiff tendered before the court below shows that houses No 48 and 48A were already erected. It seemed to us that the plaintiff assumed that both the houses must have been constructed with approval. It would be difficult to imagine that the authorities would have granted the subdivision approval with the houses indicated thereon if those houses were, in fact, unauthorised structures. Be that as it may, that appeared also to be the assumption of the defendant who did not raise that as a ground to resist the application. Neither did the judge in the course of hearing indicate that the structures could have been unauthorised. It was only in the grounds of decision that this point was brought up for the first time. The judge took a stricter stance and found that although the subdivision plan showed the existing houses, it did not show that permission was granted for their actual development (see [26] hereof).

43 The difference in understanding and treatment of the subdivision plan went to the root of this part of the judge's findings. Had the point been brought up during the hearing, the plaintiff could easily have brought in the new evidence to seal the point. The rule in *Ladd v Marshall* would not have applied. The new evidence was not something that could give rise to controversy. Leave would probably have been granted by the judge to allow the plaintiff to bring the evidence in. In those circumstances, whether there would be costs implications arising from the granting of leave would have to be left to the discretion of the judge.

44 There is another factor that supports a relaxation of the rule in *Ladd v Marshall* in a case such as this. Clearly, when deciding a case, a judge can take a new point which the parties have not raised. However, the judge in such a situation should give notice of the new point to the parties, especially where the point is of a substantive nature, so that they can have the opportunity to address it. In this case, the parties did not receive any notice of the new point before judgment was delivered. If the notice had been given, the point could and would have been addressed.

45 In our judgment, in these very exceptional circumstances the strict rule in *Ladd v Marshall* should not be applied rigidly. The plaintiff's motion was granted, and the evidence on the development approval was admitted.

Conclusion

46 With the admission of the additional evidence of unquestionable relevance and reliability, all the conditions of ss 99(1) and 99(1A) of the Act were fulfilled. We therefore allowed the appeal and made the declaration the plaintiff sought.

47 Before concluding, we have a comment on the requirement in s 99(1) for subdivision approval *and* development approval. There does not appear to us to be a need to link subdivision approval with development approval. As s 99(1A) states, upon the subdivision of land, easements of way necessary for the reasonable enjoyment of the land may be implied. Land may be subdivided and sold as open plots for the purchasers to develop. Easements of way necessary for the reasonable enjoyment of such plots should in proper cases be implied, whether there is development approval or not.