Ong Chay Tong & Sons (Pte) Ltd v Ong Hoo Eng and Another
[2007] SGHC 182

Case Number : OS 180/2007

Decision Date : 19 October 2007

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Lee Eng Beng and Ryan Loh (Rajah & Tann) for the plaintiff; Albert Teo (PKWA Law Practive LLC) for the first defendant

Parties : Ong Chay Tong & Sons (Pte) Ltd — Ong Hoo Eng; Ong Kay Eng

Land – Caveats – Wrongful lodgment – Caveator having right of first refusal pursuant to directors' resolution – Terms of directors' resolution subsequently varied – Whether caveator still having caveatable interest when it lodged caveat

19 October 2007 Judgment reserved.

Kan Ting Chiu J

1 This action is, on its face, a dispute over whether a caveat lodged in the Registry of Land Titles against a property under s 115 of the Land Titles Act (Cap 157, 2004 Rev Ed) ("LTA") should remain on the land register. The real cause of the dispute was disharmony between the children of the two wives of a patriarch.

Background

2 The patriarch was the late Ong Chay Tong ("OCT"), a businessman who died on 15 August 1993, leaving two widows and six sons, five from the first wife and one (the first defendant) from the second wife.

3 The plaintiff company, Ong Chay Tong & Sons (Pte) Ltd is a family company incorporated on 9 March 1976 primarily to hold a residential development at 17 Nallur Road Singapore known as "Ong Mansions", which comprised eight flats.

4 On 4 January 1979, the directors of the plaintiff company passed a resolution ("the first resolution") that the company was to sell six of the flats to each of OCT's sons at $100,000 each with the condition that "The buyers of the flats are not allowed to resell the flats to any other persons except to the Company at the same purchase price." When this resolution was passed, the first defendant was not a director of the plaintiff company; he only became a director after OCT's death.

5 Six agreements for the sale and purchase of the flats between the plaintiff company and each of the purchasers/sons were subsequently executed on 26 March 1982, and they each contained the same Special Condition 3 that:

> In compliance with the Vendor's directors' resolution dated 4th day of January 1979, the Purchaser undertakes and covenants that he shall not sell transfer or otherwise dispose off [sic] or part with possession of the said Flat or any part thereof except to the Vendor at Dollars One Hundred Thousand ($100,000.00).

6 The first resolution and the agreements for sale and purchase were made in the lifetime of OCT. After OCT's death, the directors of the plaintiff company decided to alter the resolution to free the purchasers from having to resell the flat to the company. The alteration was made in a resolution ("the second resolution") passed in a directors' meeting of the plaintiff company on 7 May 1998 and recorded in the minutes of the directors' meeting:

> 17A, 17B, 17C, 17D, 17E And 17F Nullur Road
>
> Mr Ong Choo Eng said that he would like to discuss the Directors' Resolution passed on 4th January 1979 wherein it stated, inter alia, that [the six sons of OCT], each a buyer of the flat at 17A, 17B, 17C, 17D, 17E and 17F Nullur Road (now known as 17 Nallur Road #03-01, #03-02, #04-01, #04-02, #05-01 and #05-02), Singapore, respectively, is not allowed to resell his flat to any other person except to the Company at the same purchase price of S$100,000/-.
>
> The meeting agreed unanimously that it may not be the intention of the late Ong Chay Tong at that time to restrict the holder of each flat to only the generation of his sons without consideration for future generations of male lineal descendants bearing the surname of "Ong". Neither was it each buyer's intention. They also agreed unanimously that each of them would like his flat to be sold or transferred or leased to only his own lineal descendant(s) bearing the surname of "Ong". Accordingly, it was unanimously resolved:
>
> "That the terms and conditions (a) and (b) as set out in the Directors' Resolution dated 4 January 1979 in respect of the 6 units of flats at 17 Nallur Road, Singapore, be deleted and substituted with the following terms and conditions:
>
> (a) Each of [the six sons of OCT] ("the "Ongs") being the first buyer or individual owner of an apartment unit or flat at 17 Nallur Road, Singapore, is allowed to dispose of, transfer or lease his flat to only his own lineal descendants bearing the surname of "Ong" (the "Descendant Ongs"), and each of the Ongs and each of his Descendant Ongs shall procure that the transferee(s) of his flat shall execute the same undertaking; and
>
> (b) Having regard to the following:
>
> (i) that it is the intention of the late Ong Chay Tong to confine or restrict membership of the Company to only male lineal descendants of Ong Chay Tong bearing the surname of "Ong" (including legally adopted sons) as reflected under Clause of the Memorandum of Association of the Company; and
>
> (ii) that the Company was established by the late Ong Chay Tong in 1976 for the purpose of holding the whole of the land and premises at 17 Nallur Road, Singapore (the "Property") and that each flat in the Property was transferred by the Company to each of the Ongs for goodwill purposes of providing a roof and home for each of the Ongs and not for monetary gain or commercial purposes.
>
> in the event that if any owner or transferee of the flats breaches or is unable to fulfil condition (a) above for whatever reason, the Company shall have the irrevocable right to repossess the relevant flat at the original book cost entry of S$100,000/-

The first defendant had become a director of the plaintiff company at that time. Although he did not give his support to the proposal, he was aware of the second resolution and did not object to it or challenge its effect.

7 According to the first defendant, the relationship between him and his mother, and his half-brothers, which was not good during OCT's lifetime, deteriorated after OCT's death. Eventually, he and his mother sold their shares in the company to his half-brothers in June 2006, and he resigned as a director of the company.

8 After the first defendant had left the company, the plaintiff company passed another resolution ("the third resolution") on 14 August 2006:

> (1) that the resolution passed at the Directors' Meeting held on 7 May 1998 relating to the amendments of terms and conditions (a) and (b) of the First Directors' Resolution be hereby rescinded with immediate effect and
>
> (2) Each of the Caveats, a draft copy of which is annexed hereto … be and is hereby approved and that … the solicitors acting for the Company be instructed … to complete, lodge and register the Caveats with the Singapore Land Authority.

9 Pursuant to this resolution, a caveat was lodged by the plaintiff company against the first defendant's flat on the same day, i.e. 14 August 2006. The plaintiff company claimed an interest or estate in the flat as purchaser, citing as the consideration:

> An undertaking by the Registered Proprietor pursuant to a Sale and Purchase Agreement dated 26th March 1982, not to sell, transfer or otherwise dispose or part with possession of the within land, except only to the Caveator at the price of S$100,000.00.

stating the grounds of claim as:

> an undertaking by the Registered Proprietor pursuant to a Sale and Purchase Agreement dated 26 March 1982, not to sell, transfer or otherwise dispose or part with possession of the within land, except only to the Caveator at the price of S$100,000.00

and seeking the prohibition of the registration of any instrument without the plaintiff company's consent.

10 The caveat created a dilemma for the Registrar of Titles, with the plaintiff company asserting that it was entitled to lodge the caveat, and the first defendant taking the contrary position. The Registrar decided that the parties should refer the matter to court for a determination, and this led the plaintiff company to file the present originating summons for an order that the caveat be allowed to remain on the land-register. (A similar application in respect of another flat sold to the second defendant was settled between the parties).

My decision

11 The starting point is whether Special Condition 3 created an interest that can be protected by a caveat, or in short, a caveatable interest. The interest created by the condition is a right of first refusal. The plaintiff company has no absolute right to buy the flat from the first defendant. It only obliged the first defendant to offer the flat to the plaintiff company at the agreed price if and when he decides to sell it.

12 There was until lately no clear pronouncement whether such an interest is a caveatable interest. However, the position has been made clear by Andrew Phang Boon Leong J (as he then was) in *Ho Seek Yueng Novel and another v J & V Development Pte Ltd* [2006] 2 SLR 742, where he held

that a right of first refusal is an interest in land for the purpose of lodging a caveat under the LTA.

13 The question is then whether the plaintiff company had a right of first refusal when it lodged the caveat. The right incorporated in Special Condition 3 was expressly stated to be created in compliance of the first resolution. That resolution, however, was superceded by the second resolution which expressly stated that the terms and conditions set out in the first resolution were to be deleted and substituted with a new condition that each flat could be sold to the proprietor's own lineal descendants with the "Ong" surname.

14 What is the effect of the second resolution? On its face, it was a resolution passed by the company's board of directors for the conduct of the company's affairs, specifically, its right to re-purchase the flats. The resolution was not only an act of the directors, it was an act of the company. *Walter Woon on Company Law* (3rd Ed Sweet & Maxwell Asia 2005) states at p 80 that a resolution of the board of directors of a company acting within its sphere of competence may be taken to be the company's decision.

15 This point was made with greater clarity by the Court of Appeal in *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin & Ors* [1998] 1 SLR 374 at [25] and [27]:

> 25 It is a fundamental concept in company law that the company acts through its organs. The two organs of the company are the board of directors and the members of the company in general meeting. The acts of the two organs are deemed to be acts by the company itself. The decisions of the members are expressed through resolutions passed in general meeting. Similarly, decisions of the board of directors are reflected in the resolutions of the board. A board resolution is passed by a simple majority of the directors present at the board meeting. Another basic concept is the separation of the company's powers between the two organs. Generally, the managerial powers are vested in the board. The memorandum and articles of association can, of course, expressly provide for managerial decisions to be made by the general meeting instead. When the organs of the company act within their scope of powers, they act as the company, not just on behalf of the company. There is no question of agency involved. Their acts are the acts of the company.
>
> 27 … a resolution passed by the board, acting within its sphere of competence, should be taken as the company's decision. Decisions of the board are made by the passing of resolutions. These resolutions in turn form the basis of the validity of any acts by the board in furtherance of the intentions reflected in the resolutions. The acts of the board are the acts of the company, if carried out within the board's constituent power. As an organ of the company, it is a logical conclusion that any resolution of the board is a decision of the company. Thus, in furtherance of a resolution of the board to that effect, the acts of the board of directors will be acts of the company. …

16 There was no issue that the plaintiff's directors were acting within their powers when they passed the first and second resolutions. Once the validity and effect of the second resolution are acknowledged, the plaintiff company cannot be said to have retained its right of first refusal after the passage of the second resolution, and any caveatable interest it had was extinguished when the interest was renounced.

17 Following from that, the grounds of claim asserted by the plaintiff company in support of the caveat were unmeritorious, and even mischievous and misleading, because the right of first refusal was abandoned since 7 May 1998 with the passage of the second resolution.

18 I use "mischievous and misleading" advisedly because the caveat and the third resolution were dated the same day, 14 August 2006. The plaintiff company must have realised that the right of first refusal had been extinguished by the second resolution and it had to be reinstated to support the interest that the plaintiff company claimed to have in the flat. By referring only to the right conferred in the agreement of sale and purchase, and making no mention of the second resolution, or the attempted resurrection of the right of first refusal by the third resolution, serious questions arise whether the plaintiff company had made proper disclosures, or had acted in good faith. On the basis of the foregoing, I dismiss the plaintiff company's application with costs to the first defendant.

19 For the sake of completeness, I should say something about the third resolution which the plaintiff company may consider, if and when it decides whether to file another caveat with reference to that resolution. That resolution cannot revive any right it had that has been given up in exchange for the substitute restriction set out in the second resolution. When the third resolution was passed, the first defendant was neither a shareholder nor a director of the plaintiff company, and he was not involved with that resolution. The plaintiff company and its directors do not have the right to impose any undertaking on him without his consent any more than they can resolve to retract the offer to sell the flat to him in 1979 or rescind the sale. This does not mean the third resolution is entirely of no effect. It was probably passed *intra vires* of the directors' powers, and any of the purchasers who elects to accept it may rely on it, but it cannot apply against the first defendant or any other purchaser who has not agreed to it.

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