# Sembawang Capital Pte Ltd v Ng Hock Kon
# [2008] SGHC 185

**Case Number** : OS 1480/2007

**Decision Date** : 23 October 2008

**Tribunal/Court** : High Court

**Coram** : Kan Ting Chiu J

**Counsel Name(s)** : Nair Suresh Sukumaran and Jonathan Tan (Allen & Gledhill LLP) for the plaintiff; Choo Han Woon Ronald, Loke Shiu Meng and Arigen Liang (Rajah & Tann LLP) for the defendant

**Parties** : Sembawang Capital Pte Ltd — Ng Hock Kon

*Contract – Contractual terms – Deed of settlement containing clause requiring mortgagee to give mortgagor two weeks' notice to rectify any default by mortgagor before terminating deed – Whether notice was communicated to mortgagor by letter – Whether mortgagee had duty to explain notice to mortgagor's agent*

*Equity – Relief – Against forfeiture – When courts would exercise jurisdiction to grant relief – Mortgagor defaulting on three instalment payments under deed of settlement – Whether unconscionable and unjust for mortgagee to require mortgagor to deliver vacant possession of mortgaged property and to sell it*

23 October 2008 Judgment reserved.

Kan Ting Chiu J:

1 This is an action by a mortgagee to obtain possession of a property from a mortgagor in default.

2 The plaintiff, Sembawang Capital Pte Ltd, is the mortgagee. The mortgagor is the defendant, Ng Hock Kon, and the mortgaged property is a house at 73 Jalan Seaview, Singapore.

3 The defendant was indebted to the plaintiff as a borrower and also as a guarantor for facilities granted by the plaintiff to several parties, including a company known as HSC International Investment Pte Ltd ("HSC"). The defendant had acknowledged his indebtedness in the aggregate of $4,371,961.19 in a Deed of Settlement ("the Deed") dated 16 June 2000, and mortgaged the mortgaged property to the plaintiff as security for his liabilities.

4 A reference to the provisions of the Deed directly relevant and applicable to the disputes in these proceedings is useful at this stage. The recitals read:

(A) The Debtor is, at the date of this Deed, indebted to the Creditor in the sum of S$1,720,877.34 under two Facility Agreements …

(B) The Debtor is, at the date of this Deed, further indebted to the Creditor in the sum of S$2,651,083.85 under Guarantees in respect of loans made by the Creditor to various third parties …

(C) The said sums of S$1,720,877.34 and S$2,651,083.85 constitute the total indebtedness of the Debtor to the Creditor, including legal costs, interest and any other costs (hereinafter referred to as "the Total Debt");

…

(E) The Debtor has agreed to execute a Mortgage over his property at 73 Jalan Seaview ("the Mortgage") in favour of the Creditor by way of security for his liabilities arising under this Deed;

…

(G) The Creditor has agreed to accept the said payments, Assignment and Mortgage in full, final and complete discharge and satisfaction of the Creditor's claims against the Debtor under the Facility Agreements subject to the conditions herein; [no Assignment was made, but nothing turns on this.]

5 Clause 1 of the Deed provides that:

> 1. The Debtor hereby irrevocably and unconditionally covenants with the Creditor that he will pay the following sums to the Creditor in the manner herein specified (hereinafter referred to as the "Instalments"):-
>
> (i) S$1,000 within the first 7 days of each calendar month for six months commencing 1 May 2000; and
>
> (ii) Thereafter, S$1,800 within the first 7 days of each calendar month until the Total Debt is fully and finally discharged.

6 Clause 7 provides *inter alia* that:

> 7. This agreement shall terminate upon the occurrence of any of the events listed below provided always that the Creditor shall give the Debtor two weeks notice in writing to rectify any default on the Debtor's part:-
>
> a. if the Debtor fails to pay any Instalment on the due date (including, without limitation, when any payment by cheque is dishonoured for any reason whatsoever);

7 Clause 8 then provides that:

8. Upon the termination of this agreement by virtue of Clause 5 above, all the sums owed by the Debtor then outstanding under this Deed shall become immediately due and payable without presentment, demand, protest or other formalities of any kind, all of which are hereby expressly waived by the Debtor; and the Creditor shall be entitled to exercise all such rights and remedies as it shall or would have been entitled to exercise, including but not limited to the Creditor's right to foreclose on the Mortgage.

(The reference to Cl 5 should be to Cl 7, as Cl 5 deals with payments, whereas Cl 7 relates to default and termination.)

8 Although it was not stated in the Deed, the defendant retained possession of the mortgaged property, which is his residence, pursuant to the settlement.

9 The defendant admits that as of 8 November 2006, he was in default of payment under the terms of the Deed in that he had not paid the instalments for September, October and November 2006.[note: 1]

10 In these proceedings, the plaintiff applies to court for orders that the defendant is to deliver

vacant possession of the mortgaged property and to repay the outstanding loan with interest, and for liberty for it to enforce its rights as mortgagee to sell the mortgaged property.

11 The defendant denies the plaintiff's right to take possession of and to sell the mortgaged property on two grounds, that:

(i) the Deed was not validly terminated; and

(ii) even if the Deed was validly terminated, there should be relief against forfeiture.[note: 2]

**Whether the Deed was validly terminated**

12 Clause 7 of the Deed requires the plaintiff to give the defendant two weeks' notice in writing to rectify any default on the defendant's part before terminating the Deed. Beyond that, the clause does not specify the mode or place of service of the notice.

13 One of the issues in the dispute was whether a notice in writing had been given on 9 November 2006. On that day, there was a meeting between Loh Tien Ngee ("Loh"), a Group Corporate Finance Manager of the plaintiff at that time, and Yu Limin ("Yu"), the defendant's wife. The meeting took place at the plaintiff's office. The plaintiff's case was that a letter dated 8 November 2006, addressed to the defendant and signed by Richard Quek, a director of the plaintiff, was handed to Yu. Yu signed on a copy of the letter to acknowledge receipt of the letter and her identity card number and the date were also recorded on the copy. Yu, on the other hand, asserted that although she signed an acknowledgement of receipt, no letter was handed to her.

14 The letter reads:

8 November 2006

Ng Hock Kon URGENT

C/o HSC International Investment Pte Ltd BY HAND

371 Beach Road

#09-04 KeyPoint

Singapore 199597

Dear Mr Ng,

**Deed of Settlement Dated 12 June 2000**

**Default in payment of September, October and November 2006 Instalments**

We refer to the Deed of Settlement between Sembawang Capital Pte Ltd and yourself dated 12 June 2000.

We note that you are in default of payment of your instalments for the months of September, October and November 2006, amounting to the sum of S$5,400.00.

> Kindly rectify your abovementioned default immediately, and in any event within fourteen (14) days of the date hereof, otherwise the Deed of Settlement will be terminated.
>
> Yours sincerely,
>
> [signature]
>
> Richard Quek
>
> Director
>
> On behalf of Sembawang Capital Pte Ltd
>
> [signature]
>
> ---
>
> Acknowledged receipt by
>
> Name: *Yu Limin*
>
> Date: *09/11/06*
>
> I/C No.: *S6883105I*

The parts in italics were insertions in handwriting.

15 How did Loh and Yu come to have the meeting? It was not a chance or casual meeting. Loh had telephoned the defendant's office in October 2006 and asked to speak to him regarding arrears in payment under the Deed, but he was ill and not at the office. Loh ended up speaking with Yu instead.

16 Yu's evidence was initially that:

> I was asked by one of the Plaintiff's representatives to attend at their offices … on 9 November 2006.[note: 3]

but subsequently she corrected that to:

> I suggested that a meeting be held on 9 November 2006 to discuss the Settlement Deed.[note: 4]

17 In her evidence in court, Yu confirmed that she suggested the meeting to discuss the defendant's arrears in payments and she informed the defendant of the meeting.[note: 5]

18 With regard to the meeting itself, Yu deposed in her first affidavit that Loh showed her a letter

and told her that certain monthly instalments were in arrears, and instructed her to sign on the letter to acknowledge that she was so informed.[note: 6] In other words, it was to confirm that she was informed of the arrears in payment.

19 In her second affidavit, Yu deposed that Loh produced a letter and wanted her to sign at the bottom of the letter to acknowledge the fact that the defendant was in arrears. Loh did not explain the contents of the letter and took it away after Yu signed it. When Yu asked for a copy of the letter, Loh told her it would be mailed to the defendant later on.[note: 7]

20 Yu's evidence in court was that Loh did not inform her of the purpose of her signature. She said:

> [W]hen I went to the meeting, the moment I stepped into the room, Loh Tien Ngee told me to sign a letter. Actually I wasn't sure what was the letter for. She spoke a lot about Mr Ng being in arrears for instalment payments in September, October. Actually I wasn't sure about which months is it. So I … I thought it's something about the arrears and I … I just signed it. I didn't think that it's very significant.[note: 8]

21 She also said she knew the letter was addressed to the defendant[note: 9] and she found it strange that Loh wanted her to sign for a letter addressed to the defendant, but she felt that it might not be important, and did not ask why she was required to sign on the letter.[note: 10]

22 Loh's account of the meeting, particularly with regard to the letter, was different from Yu's. She deposed that:

> I asked Mdm Yu to sign a copy of the Plaintiff's letter dated 8 November 2006, gave a copy of this letter to her, and retained the signed copy for the Plaintiff's records.[note: 11]

23 She confirmed that the meeting on 9 November 2006 was set up at the request of Yu.[note: 12] She remembered that during the meeting, Yu informed her that the defendant was ill and was in the hospital.[note: 13]

24 When counsel for the defendant put to her Yu's evidence that Yu did not receive a copy of the letter after signing on it, Loh disagreed and repeated that:

> I gave her a copy [of the letter] and asked her to acknowledge receipt.[note: 14]

25 Was a copy of the letter given to Yu? Yu's evidence was that it was not, but her account of the meeting was marred by inconsistencies that I have referred to. There were other indications that Yu's recall of events could be unreliable. She explained that she went to the meeting on behalf of the defendant because he was very ill. In her first affidavit, she recounted that the defendant was gravely ill and was hospitalised between 25 November 2006 and 29 November 2006. [note: 15] In her second affidavit, she corrected herself and said that the defendant was hospitalised between 30 October 2006 and 3 November 2006 and not between 25 November 2006 and 29 November 2006.[note: 16]

26 In court, when she was asked:

> Q … You knew your husband was in arrears; you were asked to attend that Sembawang Capital on the 9th of November; you were handed a letter on Sembawang Capital's letterhead, asked to sign and put your IC number, but you don't think it's important?[note: 17]

She replied:

A It's very common for a letter from a company comes with its letterhead. As for acknowledging, I think it's usual practice. I've seen a lot of letters whereby people acknowledge receipt.[note: 18]

This answer raises other questions. If she thought that it is the usual practice to sign to acknowledge receipt of a letter, why did she sign when, according to her, the letter was not given to her? Why did she not ask for the letter?

27 Compared to Yu's evidence, Loh's evidence was clear and consistent. Her evidence was that Yu had asked for a meeting, and the plaintiff had prepared the letter addressed to the defendant which was signed and dated 8 November 2006 and intended to be handed over to Yu. When they met, she had ensured that Yu acknowledged receipt of the letter by signing on a copy of the letter, and she recorded her name and identity card number, and the date as well.

28 There was no reason for Loh to deceive Yu into signing the acknowledgment of receipt. The plaintiff had issued another copy of the letter addressed to the defendant and sent it to the office of the auditors of HSC, which was probably the registered address of HSC. That letter[note: 19] was received and acknowledged by the auditors, but was not forwarded to the defendant. Nevertheless, the sending of the letter showed that the plaintiff took steps to deliver the letter to the defendant, and refuted any suggestion that it did not want the defendant to have the letter.

29 On the balance of probabilities, I accept Loh's evidence that she delivered a copy of the letter to Yu on 9 November 2006.

30 What is the effect of the handing of the letter to Yu? To answer this question, it is necessary to consider the circumstances under which the letter was delivered to her. The plaintiff had no dealings with her. Its dealings were with the defendant, her husband. The meeting of 9 November 2006 was convened at the request of Yu expressly to discuss the defendant's liabilities under the Deed and Yu informed the defendant of the meeting in advance, and briefed him on it afterwards. By Yu's own evidence, she and Loh were talking about the defendant's liabilities under the Deed with a view to seeking a resolution of the defendant's liabilities. In the circumstances, I find that the letter was handed to and received by Yu as an agent of the defendant.

31 Counsel for the defendant argued firstly, that the letter was not handed to Yu, and secondly, that even if it was, that did not amount to service under Cl 7. He cited two cases. The first was *Holwell Securities Ltd v Hughes* [1974] 1 W.L.R. 155, where the English Court of Appeal held, in a case of an exercise of an option to purchase a property, that the acceptance must be conveyed to the owner, and that an acceptance effected by posting a letter which went astray and never reached the owner was not a proper acceptance because "acceptance of an offer must be communicated to the offeror" (per Russell LJ at 157).

32 The second case counsel cited, *Ho Miaw Ling v Singapore Island Country Club* [1997] 3 SLR 892 ("*Ho Miaw Ling*") dealt with the issuance of a notice under the rules of the defendant club. In this case, Chao Hick Tin J held at [20]:

> The ordinary meaning of a 'notice' is an intimation or a warning. A notice is a means of making something known. To give notice must necessarily mean to bring the matter to a person's knowledge or attention. There must be actual communication.

33 In that case, rule 47(e) of the defendant club specifies that:

> If any member fails to place his account in credit within seven days after notice from the Secretary or the Honorary Treasurer, the Secretary or Honorary Treasurer shall give him a notice stating that unless his account be placed in credit within a further period of seven days, his name will be posted on the Club's Notice Boards as a Defaulter.

34 The club had sent a notice by AR registered mail to the plaintiff, but the letter was returned undelivered. Chao J held that the notice was not served.

35 I do not think that there can be any complaint against that conclusion. The notice did not reach the plaintiff and there was no provision that postage *per se* constitutes effective service.

36 In the present proceedings, the evidence was that the contents of the letter were not explained to Yu when she was asked to append her signature on it. This leads to another issue – was the plaintiff under the duty to *serve* as well as to *explain* the notice? What do "be communicated" and "actual communication" encompass?

37 It may be argued that communication implies explanation. This was not part of Chao J's findings in *Ho Miaw Ling*, and he made it clear that there was no requirement for explanation. He found at [34] that proof of the posting of a notice, *ipso facto*, cannot be accepted as proof of notice, but service by AR registered post would be proof of receipt if the AR card had been produced. That meant that the need to "bring the matter to a person's knowledge or attention" and the requirement for "actual communication" is satisfied by receipt of the notice *per se*. Defence counsel showed that he understood that when he referred to the "need to be actually communicated (i.e. physically received) by the Defendant".[note: 20] Communication therefore means receipt, with no need for explanation.

38 In this case, was the delivery of the notice to Yu as the defendant's agent delivery to the defendant? To use the AR registered post analogy, a notice would be deemed to be delivered if the AR card was signed by the addressee's wife. In another scenario, if someone had gone to A's residence, and handed to A's wife a notice addressed to A, and she accepts it knowing that it was for A, that would surely be sufficient delivery of the notice to A.

39 Thus, when Yu went to the meeting as his agent, and was handed the letter addressed to him, that constituted delivery of the notice to him.

**Whether there should be relief against forfeiture**

40 The defendant argued that if the Deed was validly terminated, there should be relief against forfeiture.

41 At the outset, the forfeiture that the defendant seeks relief from must be considered. It is not his right to redeem the mortgage on his house – the plaintiff had made it clear that if the defendant wanted to repay his debt and discharge the mortgage, it would not stand in his way. What the defendant wants is to preserve his right to remain in possession of his house by paying the monthly $1800 payments and to prevent the plaintiff from selling the house.

42 Are these interests to which relief against forfeiture applies? Counsel for the defendant argued they are, but he did not produce any authority to support that. Courts grant this equitable relief flexibly. Lord Wilberforce had noted in a leading judgment on this area of the law, *Shiloh Spinners Ltd v Harding* [1973] AC 691 at 722, that "[t]he jurisdiction has not been confined to any particular type of case."

43 The scope of the equitable relief is not closed. It is well settled that it is available against the forfeiture of deposit and instalment payments made towards the purchase of land, as well as the contractual right to buy land, see *Pacific Rim Investments Pte Ltd v Lam Seng Tiong & Anor* [1995] 3 SLR 1 ("*Pacific Rim")* and the cases discussed therein. In the present case, the interests involved are the right to continued possession of the mortgaged property and the continued legal ownership of the property. These interests are more substantial (or at any rate not less substantial) than payments of deposit and instalment payments, and the right to complete a purchase of land. As the relief applies to the latter interests, it must be available to the former interests.

44 The Court of Appeal in *Pacific Rim*, a case in which relief was sought against the forfeiture of payments made for the purchase of land and for an order of specific performance, ruled (at p 23) after undertaking a review of the authorities, that:

> such jurisdiction would only be exercised in exceptional circumstances since the courts would not ordinarily countenance a departure from contractual rights and obligations. Hence, in order to invoke successfully the courts' jurisdiction, the circumstances of the case must reveal elements of unconscionability and injustice.

This is indeed a common and essential requirement for all forms of relief against forfeiture.

45 It is therefore necessary to look at the facts of this case. Firstly, the terms of settlement were favourable to the defendant. He was indebted to the plaintiff for a total sum in excess of $4m, and was given time to repay by monthly instalments of $1800 without interest. While he had to mortgage his house to secure his repayment of his debt, he remained in possession of the house free of rent.

46 The plaintiff had shown forbearance in the enforcement of its rights. Although Cl 7 of the Deed entitled it to terminate the settlement upon the failure to make any monthly payment, it did not seek to exercise this right until after the defendant had defaulted on three consecutive payments. Even at that stage, it was prepared to listen to what Loh described as Yu's 'sob story', but Yu did not make any payment or acceptable proposal for a settlement.

47 In these circumstances, the necessary elements of unconscionability and injustice are absent. The fact that the defendant was in poor health when he defaulted, and that he has paid the arrears and will continue the monthly payments, do not render the plaintiff's exercise of its rights unconscionable or unjust. It was unfortunate that the defendant may have to lose his house because of his inability to pay the monthly instalments for a few months, but his misfortune was not of the plaintiff's doing. Neither the plaintiff's exercise of its right as mortgagee, nor the defendant's loss of the benefits under the Deed is, to my mind, unconscionable or unjust.

48 I allow the plaintiff's application and make the following orders:

> (i) that the defendant is to deliver to the plaintiff vacant possession of the mortgaged property in three months from the date hereof;
>
> (ii) that the defendant is to pay to the plaintiff the outstanding amount of the debt three months from the date hereof while continuing to pay the monthly instalments of $1800 in the meantime;
>
> (iii) that the plaintiff is at liberty to enforce the mortgage by way of public sale, sale by tender, or private treaty on such terms and conditions and generally as the plaintiff may think fit;

(iv) that the defendant is to pay the plaintiff's costs in these proceedings on an indemnity basis, to be taxed if not agreed; and

(v) there be liberty to apply.

---

[note: 1]Defendant's Opening Statement para 15

[note: 2]Defendant's Opening Statement para 3

[note: 3]Affidavit of Yu Limin 7 November 2007 para 3

[note: 4]Affidavit of Yu Limin 5 March 2008 para 6

[note: 5]Notes of Evidence page 154, lines 15-24; page 168 lines 11-12; page 178 lines 3-6

[note: 6]Affidavit of Yu Limin 7 November 2007 paras 4 and 5

[note: 7]Affidavit of Yu Limin 5 March 2008 para 8

[note: 8]Notes of Evidence page 159 lines 24-30

[note: 9]Notes of Evidence page 169 lines 2-3

[note: 10]Notes of Evidence page 170 line 26; page 171 line 3

[note: 11]Affidavit of Loh Tien Ngee 8 January 2008 para 5

[note: 12]Notes of Evidence page 49 lines 15-20

[note: 13]Notes of Evidence page 51 lines 20-29

[note: 14]Notes of Evidence page 52 line 19

[note: 15]Affidavit of Yu Liming 7 November 2007 para 3 read with Affidavit of Yu Liming 5 March 2008 para 5

[note: 16]Affidavit of Yu Liming 3 March 2008 para 5

[note: 17]Notes of Evidence page 171 lines 24-27

[note: 18]Notes of Evidence page 171 lines 28-30

[note: 19]Affidavit of Quek Hong Liat 4 October 2007 page 43

[note: 20]Defendant's Opening Statement para 21

Copyright © Government of Singapore.