IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1981] SGHC 13

OS 135/1981

Between

Fiscal Consultants Pte Ltd

… *Plaintiff*

And

Asia Commercial Finance Ltd

… *Defendant*

GROUNDS OF DECISION

Credit and Security — Mortgage of real property — Discharge of mortgage

Version No 1: 11 Sep 2026 (01:05 hrs)

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Fiscal Consultants Pte Ltd v Asia Commercial Finance Ltd

[1981] SGHC 13

OS 135/1981
Lai Kew Chai J
14 July 1981

1 The plaintiffs are seeking in this action a declaration that the defendants are not entitled to charge as interest the sum of $22,660.43 in addition to the repayment of the principal sum and interest due upon the redemption of the plaintiffs` mortgaged property. They also seek a consequential order that the defendants repay to them the said sum paid to the defendants under protest and objection together with interest at the rate of twelve per cent per annum from 20 February 1981 to the date of payment.

2 The plaintiffs are a company incorporated in Singapore. The defendants are a finance company incorporated in Singapore.

3 By an agreement for sale and purchase made on 12 September 1978 between Hotel Merlin Singapore Ltd of the one part and the plaintiffs of the other part, the plaintiffs agreed to purchase the office units known as Unit Nos 313 and 314 on the 14th floor of the building known as `Merlin Plaza`, Beach Road, Singapore (which units are hereinafter referred to as `the mortgaged properties`).

4 On 10 September 1980 the defendants lent to the plaintiffs the sum of $200,000. The plaintiffs agreed to pay interest at the rate of twelve and a half per cent per annum. The plaintiffs also agreed to pay the principal sum and interest by one hundred and eighty (180) monthly instalments of $2,520 each. Although the date of the first instalment was left blank in the documents, it was presumably agreed and intended by both parties that it was repayable on 10 October 1980. At all times material to these proceedings strata titles relating to the mortgaged properties were not issued. By way of security and as is usual in transactions of this nature in Singapore the plaintiffs created in favour of the defendants an equitable mortgage over the mortgaged properties.

5 By a deed of assignment dated two days after the loan was disbursed the plaintiffs assigned absolutely to the defendants all their rights and interest in and relating, to the mortgaged properties under the said agreement for sale and purchase subject to the usual proviso for re-assignment upon full payment of the principal sum and all other monies secured thereunder. In addition to the deed of assignment, the plaintiffs executed in favour of the defendants a mortgage in escrow and in the form as prescribed under the Land Titles (Strata) Act (Cap 277). By cl 3 of the mortgage, the plaintiffs agreed to perform and observe all the covenants and conditions set forth in the memorandum filed by the defendants in the Registry of Titles and numbered as MM/17.

6 Sub-cl 2(j) of the memorandum provided as follows:

> *The mortgagor (the plaintiffs) shall only be entitled to redeem this security upon the expiry of one year from the date of these presents by giving to the mortgagee (the defendants) three (3) months` notice of his intention to do so and upon payment of all monies due to the Company (the defendants) hereunder at the expiry of the notice including interest up to that date.*

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7 The expression `the date of these presents` refers either to 22 August 1980 on which the memorandum was signed by the defendants or to 12 September 1980 which was the date of the deed of assignment. The former date is clearly inapplicable. Both parties took the stand that the expression referred to 10 September 1980 which was, as it will be recalled, the date of the disbursement of the loan. Neither party to these proceedings addressed the court whether the notice of redemption under sub-cl 2(j) could be given during the period of one year from the date of the presents or whether it could only be given after the expiry of the period of one year. In view of my findings as hereinafter appearing, and on the facts as had happened, nothing turns on this issue.

8 On 26 December 1980 the plaintiffs through their solicitors purportedly gave notice to the defendants to redeem the mortgaged properties and asked for the redemption statement. As the period of only a little over three months after the disbursement of the loan had elapsed, this notice was obviously in breach of sub-cl 2(j) of the memorandum. After several reminders, the defendants by their solicitor`s letter of 9 February 1981 sent to the plaintiffs the redemption statement and required the plaintiffs to pay the sum of $231,645.19. The computations in the redemption statement disclosed that the defendants were asking for interest on the loan and overdue interest for the period of some fifteen months. The computation was worked out on the basis as if sub-cl 2(j) of the memorandum was to have run its full course and that the defendants were entitled to interest for the full period of one year and the period of three months` notice of redemption. On receipt of the redemption statement the plaintiffs expressed shock at the defendants` attempt to charge interest up to 31 December 1981. The plaintiffs also referred to an earlier transaction between the parties when in similar circumstances the defendants had waived their rights under a

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clause similar to sub-cl 2(j) of the memorandum and had not charged interest for the full period. In that transaction, the plaintiffs had also created equitable mortgages in favour of the defendants over certain units in the Sim Lim Tower. Although the plaintiffs had prematurely redeemed the properties in Sim Lim Tower, the defendants did not insist on the clause similar to sub-cl 2(j) of the memorandum running its full course and had not charged interest for the full period. The plaintiffs urged the defendants to adopt a similar course.

9 The plaintiffs also informed the defendants that they had sold the mortgaged properties and that completion under that sale was scheduled to take place on 18 February 1981 and accordingly required the defendants to complete the redemption on that date. The plaintiffs at the end of their solicitors` letter of 13 February 1981 stated as follows:

> *We shall therefore pay your clients the sum of $231,645.19 on 18 February 1981 strictly under protest and objection to redeem the above properties. Thereafter, if your instructions are that your clients do not wish to refund the sum of $28,997.93 to our clients or if we do not hear from you within seven (7) days thereof, kindly let us know whether you have instructions to accept service.*

10 The protest and objection were elaborated in the annexure to the letter of the plaintiffs` solicitors. It was a copy of a letter dated 11 November 1980 and addressed to the defendants` solicitors relating to the redemption accounts of the said Sim Lim Tower properties. In that letter, the plaintiffs asserted that the sub-clause similar to sub-cl 2(j) of the memorandum by operation had imposed a punitive pecuniary penalty on the plaintiffs` right of redemption and was therefore an oppressive and unconscionable clause which was void in law. The validity of that clause was questioned.

11 On 18 February 1981, the defendants` solicitors replied to the effect that the defendants did not agree to the waiver of the interest for the full period of

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fifteen months or to any reduction thereof. They insisted on their strict rights under sub-cl 2(j) of the memorandum. They also pointed out that their concession in not charging full interest in respect of the redemption of the Sim Lim Tower properties was not, and was not meant to be, a precedent. On the following, day, the plaintiffs paid the entire sum of $231,645.19 to the defendants again expressing the payment to be `strictly under protest and objection`. The engrossed deed of re-assignment was forwarded on an urgent basis to the defendants for execution. The redemption of the mortgaged properties took place on 20 February 1981. The plaintiffs commenced these proceedings for the recovery of the sum of $22,660.43, giving credit for the sum of $2,261.16 which was refunded by the defendants shortly after the redemption.

12 Counsel for the plaintiffs opened his arguments by submitting that the defendants had waived their rights under sub-cl 2(j) merely by the act of allowing, as they did, the plaintiffs to redeem the mortgaged properties on 20 February 1981. It was observed that the sub-clause and the rest of the mortgage documents were silent and did not provide that the defendants were entitled to charge interest in the event of a premature redemption. `Waiver` is a vague term which has different meanings in different contexts. So far as the law of contract is concerned `it is most commonly used to describe the process whereby one party voluntarily grants a concession to the other party by not insisting upon the precise mode of performance provided for in the contract, whether before or after any breach of the term waived`: 9 ***Halsbury`s Laws of England*** (4th Ed) para 571. A good description of `waiver` is by Lord Hailsham of St Marylebone LC in ***Banning v Wright (Inspector of*** Taxes [1972] 1 WLR 972, 980 (HL):

> *Waiver is the abandonment of a right. Viewed from one aspect of the matter the right abandoned is conferred by the conduct of the appellant in breach. Viewed from another aspect the same right*

> *is conferred by the term of the contract which has been broken by the appellant. When a contract is broken the injured party in condoning the fault may be said either to waive the breach or to waive the term in relation to the breach. What in each case he waives is the right to rely on the term for the purpose of enforcing his remedy for the breach. I cannot construe `waiver` as only applicable to the total abandonment of any term in the lease both as regards ascertained and past breaches, and as regards unascertained or future breaches. I am equally unable to regard a compromise forgiving a past default as the same thing as a consent licensing in advance conduct for which a prior licence is required by the terms of the contract.*

13 The defendants in this case did not abandon their rights under sub-cl 2(j) at all. On the contrary, they had made it plain from beginning to end that they required interest to be paid for the full period of fifteen months, notwithstanding but as the price for the premature redemption. It is true that the defendants did not expressly stipulate that the plaintiffs were in breach in tendering the notice of redemption prematurely. It is also to be noted that the defendants did not expressly stipulate that they would only allow premature redemption if the interest for the full period of fifteen months were tendered and paid unconditionally. If that had happened, it would have been the end of the matter. What had happened was that redemption had taken place after the plaintiffs tendered the full sum, albeit `strictly under protest and objection.`

14 The issue therefore arises whether there was a variation of the contract under which it was agreed or the parties in law could be said to have agreed that as consideration for the defendants` waiver of their rights under sub-cl 2(j) the plaintiffs would pay the sum of $22,660.43 for the privilege of prematurely redeeming the mortgaged properties. It was submitted for the plaintiffs and there was no controversy that parties to a contract may by agreement vary the terms of that contract and that the variation must itself possess the characteristics of a valid contract. Counsel for the plaintiffs submitted that in this case there was only a unilateral notification on the part of the defendants to impose interest for

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the full period. I cannot accept this argument. I hold that there was a variation which is expressed or which is to be implied from the conduct of both parties. The defendants had right up to the day of redemption consistently insisted on interest for the full period as if sub-cl 2(j) had run its full course. The plaintiffs desperately needed to redeem prematurely in order to complete the sale of the mortgaged properties. Although they protested and objected, they paid up and received the redemption earlier than they were entitled to under the terms of the mortgage. In relation to the protest and objection, it should-be noted that it was founded solely on the plaintiffs` argument that sub-cl 2(j) in seeking to provide for a postponement of the right to redeem was a clog on the equity of redemption and was therefore void. It is not without significance that this assault on the validity of sub-cl 2(j) was abandoned in the course of arguments as it was clearly unsound in law: see ***Knightsbridge Estates Ltd v Byrne*** [1939] Ch 441. As far as I am concerned, that protest and objection therefore goes out of the window. The plaintiffs` payment of the interest for the full period amounted to or must be deemed to be acceptance of the defendants` counter-offer. It seems to me to be wrong now to allow the plaintiffs to say that their protest and objection had successfully qualified their acceptance of the defendants` requirement of interest for the full period. This would in effect have allowed the plaintiffs to steal a march on the defendants. I therefore hold that there was a variation by express agreement or the variation is to be implied from the conduct of the parties.

15 If there was a variation, the plaintiffs contended finally that the imposition of the full interest in effect was harsh and unconscionable, punitive and a clog on the equity of redemption. The defendants, it was argued, was only entitled to charge interest for six months and seventeen days. The plaintiffs alleged that to charge the additional sum of $22,660.43 on the loan of $200,000

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for the short period would mean that the defendants were charging interest at the excessive rate of forty one per cent per annum on a secured loan. The prevailing market rate, it was stated from the Bar, was between 14% to 17% per annum on a secured loan. What should be pointed out at once is that there is a basic flaw in this argument. The additional sum was imposed in exchange for the defendants` agreement to waive their rights under sub-cl 2(j). This was the sum the defendants would have earned if the loan had run its full course under the sub-clause.

16 In support of this contention, the plaintiffs relied heavily on ***Cityland*** and ***Property (Holdings) Ltd v Dabrah*** [1968] Ch 166. But there are several striking differences between Cityland and the facts in these proceedings. Parties there were not trading concerns. Goff J (as he then was) found that the borrower was in an unequal bargaining position and was only able to raise Â£600 on his own to help purchase from the lender the house, of which he was a sitting tenant. He only borrowed Â£2,900 but he was required to repay Â£4,553. An advanced premium, which was 57% of the loan, was imposed. Small wonder that it was held that the collateral advantage was harsh and unconscionable. The present case does not contain any of those elements which are morally reprehensible.

17 The law on clogs on the equity of redemption and collateral advantages were fully reviewed by the House of Lords in ***Kreglinger v New Patagonia Meat and Cold Storage Co Ltd*** [1914] AC 25: see the speech of Lord Parker at pp 49-50. At p 60, Lord Parker in summary said:

> *My Lords, after the most careful consideration of the authorities I think it is open to this House to hold, and I invite your Lordships to hold, that there is no rule in equity which precludes a mortgagee, whether the mortgage be made upon the occasion of a loan or otherwise, from stipulating for any collateral advantage, provided such collateral advantage is not either (1) unfair and unconscionable, or (2) in the nature of a penalty*

> *clogging the equity of redemption, or (3) inconsistent with or repugnant to the contractual and equitable right to redeem.*

18 A good illustration of how this enunciation of the law is worked out is to be found in ***Multiservice Bookbinding Ltd & Ors v Marden*** [1968] Ch 166 which the defendants should have cited in reply. Multiservice bears striking resemblance to the present case. It was a loan taken by a trading corporation which was secured by a mortgage dated 7 September 1966 of the borrower`s business premises. The loan was guaranteed by two directors of the borrower company. Interest was agreed to be two per cent per annum above the minimum lending rate of a bank named. As is well-known, this meant that the rates of interest had fluctuated from time to time. The mortgage also provided so far as are material as follows:

> (1) that interest was payable throughout the period of the loan on the whole sum of Â£36,000 notwithstanding the capital repayment made;
>
> (2) that the arrears of interest were to be capitalised after 21 days and were themselves to bear interest from that date to the date of payment;
>
> (3) that the loan could neither be called in nor redeemed during the first ten years; and
>
> (4) that it was made a condition, by cl 6, that any sum payable by way of principal or interest was to be `increased or decreased proportionately if (at the stipulated times) the rate of exchange between the Swiss franc and the pound sterling shall vary by more than three per cent from the rate of 12.075/8 Franc to Â£1`

19 The rate of exchange at the beginning of October 1976, when a redemption statement was prepared, was just over four Swiss franc to the pound. By that date, some $24,355.57 had been repaid on the capital account. But the payment only reduced the nominal amount of the debt by only Â£15,000. This left Â£21,000 of the loan to be discharged. Adding the Swiss franc uplift, the

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total redemption amount required was Â£63,202.65. The average rate of interest all told over the whole of the ten years would have worked out to 16.01% per annum.

20 The other way, although an artificial way, of looking at the figures would produce the effect of the borrowers having to pay 33.33% interest over the period of ten years on the loan of Â£36,000. It should be emphasised that this approach would have treated the Swiss franc uplift paid on the capital repayments as a charge on the loan which it was not.

21 Browne-Wilkinson J held that the Swiss franc uplift on the facts was not a premium, that the parties were of equal bargaining, power and that the terms, which might have been unreasonable, were not unfair, oppressive or morally reprehensible. He declined to intervene.

22 I also decline to intervene in all the circumstances of this case. The claims of the plaintiffs are accordingly dismissed with costs.

23 ***Claim dismissed***

Lai Kew Chai J

Ronald Lee Kum Seng (Ronald Lee & Co) for the plaintiffs
Seah Geok Keow (Lim Sin & Thiam Beng) for the defendants

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