IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1987] SGHC 38

OS 1178/1985

Between

Yeo Brothers Co (Pte) Ltd

… *Plaintiff*

And

Atlas Properties (Pte) Ltd

… *Defendant*

GROUNDS OF DECISION

Contract — Contractual terms; Land — Sale of land — Conditions of sale

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

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Yeo Brothers Co (Pte) Ltd v Atlas Properties (Pte) Ltd

[1987] SGHC 38

OS 1178/1985
Lai Kew Chai J
23 September 1987

1 Cur Adv Vult

2 In 1982 the defendants, who were duly licensed housing developers under the Housing Developers (Control and Licensing) Act (Cap 130) (hereinafter referred to as the Act), were developing for sale a residential condominium comprising two blocks of nine-storey apartments, three blocks of four-storey apartments and two blocks of four-storey maisonettes with certain communal facilities. The condominium estate was and is known as the `Goodluck Garden`. Titles to the individual residential units and the common property of the condominium were as in the ordinary way to be issued under the Land Titles (Strata) Act (Cap 158, 1985 Ed). By an agreement of sale and purchase dated 21 September 1982, which was in the statutorily prescribed form, the plaintiffs agreed to purchase a flat on the sixth storey `estimated to contain a floor area of 177.07 sq m (1,906 sq ft)`. On 13 March 1986, the Chief Surveyor approved the final survey plans of the condominium and the area of the flat was duly determined to be 158 sq m. There was therefore a shortfall in area of 19.07 sq m and the deficiency was 10.77%.

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3 In September 1985, the defendants through their solicitors purported to give notice under the agreement for sale and purchase to the plaintiffs to complete the sale and purchase without offering compensation by way of an abatement in the purchase price. The plaintiffs declined to complete without an abatement in the price and they took out these originating summons for the following reliefs:

> *1 A Declaration that*
>
> (a) … (since abandoned)
>
> (b) The tender by the defendant to the plaintiff of a subsidiary strata certificate of title showing that the property as comprised therein contains a floor area of 158 sq m is a breach by the defendant of the agreement and the terms and conditions thereunder and the defendant is not entitled to oblige the plaintiff to complete the sale and purchase, alternatively the defendant shall be entitled to do so only upon the defendant giving the plaintiff
>
> (i) an abatement in the purchase price amounting to $40,810.56 being compensation for the deficit in floor area such sum to be deducted from the balance of the purchase monies which would otherwise be payable to the defendant; and
>
> (ii) a further abatement in the purchase price comprising a sum of $2,522.80 and the further sum of $95.23 for every calendar month from 1 October 1985 until the date of actual completion of the sale and purchase being reimbursement of the interest incurred alternatively lost by the plaintiff on the sum of $28,568.06, such abatement sum to be deducted from the balance of the purchase price monies which would otherwise be payable to the defendant.

4 It will therefore be noted that the declarations sought under para 1(b) are in two parts which are sought in the alternative; namely, that the defendants, as vendors, could not compel the plaintiffs, as purchasers, to complete the purchase since the shortfall in the area is substantial which in law and equity would disentitle the defendants to an order for specific performance or, alternatively,

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the defendants could not ask for specific performance without an offer of the compensation as stipulated if the shortfall is not substantial.

5 It should also be noted, and I stress, that in these proceedings, there is no suggestion that any misrepresentation, innocent or fraudulent, was made by the defendants, their servants or agents This is a case of misdescription and the effect of this particular misdescription is considered here, and no more. Misrepresentation, if asserted and borne out by the facts in other cases, will of course entail very different consequences in law.

6 Before I consider the submissions of learned counsel for both parties, I will set out the factual matrix and the relevant terms of the agreement of sale and purchase. In marketing the residential units, the defendants advertised the sales in newspapers in both Chinese and English. The prices of individual units were quoted in lump sums. Price lists were made available to interested parties and these mentioned that the floor areas as described were `approx gross area per unit (sf)`. There was no suggestion that any unit within the condominium was to be sold on a per square foot or per square metre basis.

7 On 26 August 1982 and in response to the advertisements of the defendants, the plaintiffs obtained from the defendants, again in the statutorily prescribed form, an option in writing to purchase at the price of $378,937.00 a flat which was then under construction and was briefly described as Unit No 06-03, 6th storey, Plot 2, Goodluck Garden, Singapore (which, as well as when built, is hereinafter referred to as the flat). The plaintiffs paid the booking fee which was 10% of the purchase price as consideration for the option. The option was issued in accordance with the statutory form pursuant to r 10B(1) of the Housing Developers Rules 1976. These 1976 Rules were revoked and replaced by the Housing Developers Rules 1985 with effect from 4 January 1985. The

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plaintiffs were also handed a document headed `Purchaser Form` of the same date and, in the description of the flat, it contained the statement `Estimated Floor Area: 1,906 sf`.

8 The plaintiffs duly exercised the option and on 21 September 1982 a sale and purchase agreement in Form B as statutorily prescribed under r 11(1) of the Housing Developers Rules 1976 was signed between the parties to these proceedings for the sale and purchase of the flat.

9 The relevant clauses and provisions of the sale and purchase agreement are as follows:

> *Clause 1*
>
> *The Vendor shall sell and the Purchaser shall purchase free from encumbrances all that estate in perpetuity in part of the land comprising the flat* ***described in the First Schedule hereto*** *(hereinafter referred to as `the housing unit`) to be comprised in a Subsidiary Strata Certificate of Title under the provisions of the Land Titles (Strata) Act (Cap 277) being one of the strata units in the condominium project now being erected or erected by the Vendor upon the land described in the First Schedule hereto and known as Goodluck Garden (hereinafter known as the building project) subject to the following special conditions and to the Singapore Law Society Conditions of Sale 1981 as far as the name are applicable to a sale by private treaty and are not varied by or inconsistent with the special conditions herein. (Emphasis added.) ...*
>
> *The first schedule above referred to all that*
>
> *Flat on the 6th Storey of the Building known as Plot 2, Goodluck Garden now being erected or erected on part of the land in the District of Pandan in the Republic of Singapore estimated to contain a floor area of 177.07 sq m (1,906 sq ft) being part of the Government Resurvey Lot 1864 of Mukim V forming part of the land comprised in a Statutory Grant No 38771 which said housing unit is provisionally known as Unit No 06-03, Type A, 6th Storey, Plot 2, Goodluck Garden, Singapore. (Interposed here.)*

10 ...

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> *Clause 8*
>
> *(1) The housing unit and the building project together with all the common property thereto shall be constructed in a good and workmanlike manner in accordance with the specifications described in the Second Schedule hereto and in accordance with the plans approved by the Assistant Director, or other Competent Authority, which specifications and plans have been accepted and approved by the Purchaser as the Purchaser hereby acknowledges.*
>
> (2) No changes thereto or deviations therefrom shall be made without the consent of the Purchaser except as may be required by the Competent Authority or the Local Authority, or such as may be certified by the Vendor`s architect as expedient or necessary.
>
> (3) The Purchaser shall not be liable for the cost of such changes or deviations and in the event that the changes or deviations involve the substitution or use of cheaper materials or the omission of works originally agreed to be carried out by the Vendor the Purchaser shall be entitled to a corresponding reduction in the purchase price herein or to damages in respect thereof.

11 Clause 11 of The Singapore Law Society`s Conditions of Sale 1981, which was incorporated in the sale and purchase agreement by reference is also relevant and it reads as follows:

> *Mis-description*
>
> *11 The property is believed and shall be taken to be correctly described as to quantity and otherwise and is sold subject to all chief, quit, and other rents and outgoings and to all incidents of tenure, rights of way, and other rights and easements (if any) affecting the same and if any error, mis-statement, or omission (* ***not of a serious or vital nature nor considerably affecting the value of the property****) shall be discovered in the Particulars Special Conditions or Contract the same shall not annul the sale nor shall any compensation be allowed by or to either party in respect thereof. (Emphasis is added.)*

12 In the agreement, there were provisions for the payment of instalments of the purchase price in tandem with the progress of the construction of the flat. As envisaged under the agreement, the plaintiffs, upon the physical completion

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of the flat, took possession of it on or about 22 January 1985 before the legal completion of the sale and purchase.

13 On 7 September 1985, the solicitors of the defendants purported to give notice to the plaintiffs requiring legal completion of the sale and purchase under the agreement. As they refused to compensate the plaintiffs for the shortfall, the completion did not take place and the plaintiffs instituted these proceedings for the reliefs mentioned earlier.

14 I would now set out the position at common law and in equity, in respect of an open contract for the sale of land, that is the position apart from a contractual term such as cl 11 in the present agreement.

15 In law, one of the main duties of a vendor of property is to give a good title as to the quantity of the property. A deficiency in the smallest portion or interest in the subject matter of the sale is a breach of that duty and entitles the purchaser, at common law, to annul the sale, whereupon the purchaser is entitled to the return of all moneys paid plus the costs of the investigation of title. But generally, because of the rule in ***Bain v Fothergill*** (1874) LR 7 HL 158, the purchaser is not entitled to damages for any loss of the bargain. However, equity intervened and had somewhat ameliorated the rigours of the common law rule. If a misdescription is not substantial, and is made innocently by the vendor, the vendor is entitled in equity to obtain an order of specific performance on the condition which a court in exercise of its equitable jurisdiction imposes, that he compensates the purchaser usually by an abatement of the purchase price. Justice is done and the purchaser gets his bargain substantially.

16 On the other hand, where the misdescription is substantial, the vendor is unable to enforce the contract at common law or equity, even with an abatement

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of the purchase price: see Mr Voumard`s ***Sale of Land in Victoria*** (1939) at pp 195-200. In principle, this rule is sound for no court can force a purchaser to accept any property which is substantially different from the one he has contracted to purchase.

17 The effect of a misdescription in an open contract, quite apart from any specific terms of a contract and so far as the principles are relevant to these proceedings, is compendiously set out in ***Emmet on Title*** (19th Ed) para 4.022 as follows:

> *(1) If the misdescription is substantial the vendor will be unable to enforce the contract, even with an abatement of the price (* ***Flight v Booth*** *(1834) 1 Bing NC 370; see also* ***Re Weston and Thomas`s Contract*** *[1907] 1 Ch 244 - purchaser not compelled to accept personal indemnity from vendor). A misdescription will be substantial if it is as to a point `... so far affecting the subject matter of the contract that it may be reasonably supposed that, but for such misdescription, the purchaser might never have entered into the contract at all` (per Tindal CJ in* ***Flight v Booth****, ante, at p 377). This is not simply a question of value; Eve J has said: `A vendor could not fulfil a contract to sell Whiteacre by conveying Blackacre, although he might prove to demonstration that the value of the latter was largely in excess of the value of the former. Value, no doubt, is an element to be taken into account in determining whether an error in description is substantial or material, but it is certainly not the only element, nor, in my opinion, the dominant one` (* ***Lee v Rayson*** *[1917] 1 Ch 613 at p 618). It seems clear that the question whether a misdescription is substantial or not is one of fact for the court to decide in the circumstances of each particular case (* ***Watson v Burton*** *[1957] 1 WLR 19). Thus although in this case a forty per cent overstatement of the area sold was held to be a substantial misdescription, a different decision as to a similar overstatement had been reached in an earlier case where the purchaser had apparently wanted what he saw without relying on the stated area for the price that he would pay (* ***Re Fawcett & Holmes`s Contract****(1889) 42 Ch D 15). In* ***Dyer v Hargrave*** *(1805) 10 Ves 505, on the sale of a farm by auction, the particulars described the house as being in good repair, the farm as being in a high state of cultivation, and all within a ring fence; none of these descriptions was true but the vendor was nonetheless held able to enforce the contract subject to compensation. In* ***McQueen v Farquhar*** *(1805) 8 RR 212, on the sale of a large estate, a*

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> *purchaser was compelled to complete where the deficiency in description was six acres; and similarly in* ***Leslie v Tompson*** *(1851) 20 LJ Ch 561, where the deficiency was ten acres. In these three cases, in other words, the misdescription was held not to be substantial.*
>
> (2) If the misdescription is not substantial, then, provided that the misdescription was made innocently, the vendor will be able to enforce the contract, although subject to an abatement of the price by way of compensation for the insubstantial deficiency (***Jacobs v Revell*** [1900] 2 Ch 858). This is so even though the purchaser would prefer to rescind (***Re Brewer and Hankin`s Contract*** (1899) 80 LT 127).

18 I have so far recited the position in law and equity where there is a misdescription in an open agreement for the sale of land. The relevant principle is that where the misdescription is substantial, which is in every case a question of fact, the vendor is not entitled to a decree of specific performance even if he offers a compensation, and, of course, in the instant case, no compensation was offered at all.

19 It has now to be examined to see if the provisions of cl 11 alters the respective rights at law and in equity of the parties to these proceedings and to see if, as Mr Pollock contends on behalf of the defendants, cl 11 relieves the defendants to pay any compensation or if, as Mr Martin in his helpful written submissions contends, it does not. Clauses drafted with the tenor and along the lines as the provisions of cl 11 have been in use for many years. Their evident purposes were principally (a) to take away the right of a purchaser to annul on the slightest and most trifling misdescription; and (b) to take away the right to compensation, in equity (as cl 11 here was designed to do) in situations where the misdescription was `not of a serious or vital nature nor considerably affecting the value of the property`. Put in another way, cl 11 will not apply to relieve a vendor from the liability to an annulment of the contract by a purchaser if the misdescription is (a) of a serious/vital nature; and (b) one which

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considerably affects the value of the property. These two criteria which take a misdescription outside the ambit of cl 11 are, in effect, the same as the concept of a `substantial misdescription`.

20 The sole question, which is a question of fact for my determination, is therefore whether the misdescription of 10.77% (in percentage terms) or $40,810.56 plus $2,522.80 and the accruing interest (in money terms) as elaborated in the second part of prayer 1 (b) of the abovementioned relief is so substantial that the answer to the first part of prayer 1(b) must inevitably be in the affirmative.

21 The deficiency in both percentage and money terms in a purchase of the type of accommodation in Singapore under consideration is by no means something to sniff at. Literally, thousands of condominium flats like the flat are developed and sold in Singapore. No housing developer can be allowed to misdescribe the area to an extent which amounts to tens of thousands of dollars which mean a lot to the ordinary purchaser of a roof over his head. The purchase is of a condominium flat described to be of a certain area in a particular locality. In such purchases, the floor area of a flat is a matter of considerable importance. In all or nearly all such purchases, purchasers work out the per square foot or, since we turned metric, the per square metre price by the simple process of dividing the purchase price with the floor area and the unit price is nearly always compared with those of comparable properties, upon which, amongst others, the decision to purchase or not to purchase is often made. The exact floor area of a flat also determines the unit entitlement or share in the common property of the condominium, including the share of the purchaser`s tenancy in common of the estate in the land upon which the buildings in the condominium are erected. Any shortfall will permanently reduce that share. The self-same share also, on the other hand, determines the amount the purchaser has to pay for the monthly

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maintenance of the common parts of the condominium. This burden is usually but not necessarily always reduced by a shortfall in the floor area of a flat.

22 Mr Pollock, in arguments, stresses that under cl 8 of the agreement the defendants had agreed to build a flat of a certain specification and in accordance with the plans which had been `accepted and approved by` the plaintiffs as the plaintiffs in the agreement expressly in terms acknowledged. He says the defendants had done precisely that and that there was no suggestion to the contrary at all in this case. In these circumstances, Mr Pollock says that there is no misdescription as to assert otherwise would mean that the defendants had agreed to build a flat of 177.07 sq m on the one hand and on the other hand to build a flat according to the plans which would produce a flat with a floor area of 158 sq m. Mr Pollock argues that as a matter of construction, the court should accept that which is certain, that the court should not accept that the defendants had agreed to carry out two irreconcilable obligations; and that the plaintiffs as the purchasers should be fixed with constructive notice of the 158 sq m area, seeing that they (the plaintiffs) had agreed to cl 8 and accepted the plans.

23 In answer to these arguments, Mr Martin points out that the context and purpose of cl 8 had really nothing to do with the floor area but with the specifications, layout, orientation and locus of the flat within the building block. He stresses the `building element` and not the `estate element` of the clause, for which attention was drawn to the case of ***Chinachem Investment Co Ltd v Wong Lai-Ying & Ors*** Suit No 5 of 1978 dated 4 August 1978 (unreported). He lays stress on the operative words of cl 8 which imposed a contractual duty on the defendants to build the flat `in a good and workmanlike manner`. Also, he submits that in practical terms it was not envisaged by anyone that a purchaser had to be armed with the necessary instruments and measure the squares, rombus, trapexiums and other odd areas of a flat before a purchase is

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made. I accept the force of these arguments and, in my judgment, it was never intended that cl 8 was directed at the description of the floor area of the flat. For that, cl 1 and the First Schedule were designed to carry out that function.

24 I would now refer to the argument that a margin of error, arising out of the inexactitude of measurements and survey, of about 3% to 4%, should be allowed. Mr Pollock says that the defendants had `estimated` the area, ie had measured or calculated the area approximately, and in view of the use of this word of approximation, this court should allow an error of 5% so that, in effect, there was a shortfall of only 5.77% which in percentage and money terms must be less than substantial. In this regard, the case of ***Owmist Pty Ltd v Twynam Pastoral Co Pty Ltd*** [1983] 3 NSW LR 196 has to be considered. By the agreement for sale, the vendor agreed to sell a named property which was described, so far as the area was concerned, as `having an area of approximately 3,832 acres (1,500.81 hectares) ...` In fact, the area was 104 acres less than that described. Parties agreed that the description, `approximately 3,832 acres`, gave a margin of up to 25 acres as a permissible deficiency. The issue identified was this: `As a matter of principle is compensation to be assessed upon the basis of 104 acres, or of 104 acres less 25 acres?` Helsham CJ answered that compensation, to be truly compensatory, must be calculated on the basis of the total actual deficiency without reference to or reduction for any permissible or agreed approximation of error or misdescription.

25 Helsham CJ said at pp 197G-198D:

> *It seems to me that, as a matter of principle, bearing in mind the purpose of the condition and how it is worded the approach adopted by Mr Butt is the more correct one: although it needs qualification. The purpose of compensation is to recompense the purchaser for not getting the whole of what he contracted to buy. `Substantially, compensation is given for some diminution or deterioration in the value of the property contracted to be sold:*

> *the purchaser `has not got the whole of what he contracted to buy` ... `: per Starke J in* ***King v Poggioli*** *(1923) 3 CLR 222 at 246. In the present contract, as in most other cases of this kind, there is an agreement to sell a certain property, a composite whole, having as part of its description a reference to acreage (or whatever else it may be); there is not, in such cases, an agreement to sell so many acres simpliciter, whether approximately, more or less, or otherwise. A deficiency of acreage in such a case (unless it is of such a nature that in the circumstances of the case it provides a purchaser with other remedies) gives a purchaser a compensatory right only; the qualification `approximately` applied to this part of the description of the property only decreases the ambit of the purchaser`s compensatory right; it allows a greater latitude to the vendor before it can be said that he misdescribed his property, or was in error as to its area. But once the ambit of this latitude has been passed, the purchaser has his same right to compensation - ie the diminution in value of the property contracted to be sold. The fact that he has not received a property with an acreage that can be said to be properly described as `approximately` so many acres is merely the trigger that releases a contractual right to compensation.*

26 In my judgment, the same principle applies: the actual and total deficiency (without any allowance for any margin of error) must be looked at in considering the question whether it is substantial.

27 Taking all the circumstances into consideration, the deficiency in area in this type of property is, in my judgment, substantial. Accordingly, the answer to the first part of prayer 1(b) must be in the affirmative. If, contrary to my finding of fact, the deficiency is not substantial, then indisputably clause 11 of the agreement would relieve the defendants from paying any compensation at all. In view of my decision, it follows logically that a declaration in terms of the second part of prayer 1(b) should not be made. There will be an order accordingly. The defendants are also ordered to pay the costs of the plaintiffs.

28 I am not unmindful that my decision will cast upon the plaintiffs and other purchasers like them the problem of electing whether to annul and call off

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the agreement for the purchase of their flats or whether to negotiate anew with the defendants with a view to accepting a compensation to be freely agreed between the parties. The latter course was discussed in ***Watson v Burton***

29 . One of the problems, I imagine, is the fact that purchasers such as the plaintiffs might, since taking physical possession of their flats, have made improvements to their flats or have since settled into them as their homes. This court has no power to rewrite contracts between the parties and must leave them to act according to their best interest and legal advice.

30 Before I part with this judgment, I should mention that the problems encountered in this case will not arise in respect of an agreement for the sale of a unit in a housing project which is governed by the Housing Developers Rules 1985 which came into operation on 4 January 1985. In respect of such a sale the agreement for sale will be in Form E as prescribed by r 12(2) of the 1985 Rules. The provisions of cl 19 of the said Form of Agreement, which are entirely reproduced below, would govern and resolve the difficulties raised in this case:

> *(1) No error or mis-statement as to the description of the area of the building unit shall annul the sale or entitle the Purchaser to be discharged from the purchase.*
>
> (2) Any error or mis-statement as to the description of the area of the building unit shall give the Purchaser an entitlement to an adjustment of the purchase price in accordance with the provisions of this clause.
>
> (3) If on completion of resurvey by the Government it is found that the area of the building unit ascertained by such resurvey is less than the area mentioned in the First Schedule hereto (`the scheduled area`), there shall be an adjustment of the purchase price for the difference (if any) in excess of three (3) per cent of the scheduled area calculated at the rate the Purchaser paid for each square metre of the building unit.
>
> (4) The Vendor shall not be entitled to any adjustment of the purchase price if the area of the building unit ascertained by the Government resurvey exceeds the scheduled area.

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31 ***Claim allowed***

Lai Kew Chai J

Roderick E Martin and Teo Ching Leun (Ramdas & Wong) for the plaintiffs
Gordon Pollock QC and Richard Tan (Lee & Lee) for the defendants

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