

IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1992] SGCA 54

CA 22/1989

Between

Mun Hean Realty Pte Ltd

... Appellant

And

Fu Loong Lithographer Pte Ltd

... Respondent

GROUND OF DECISION

Land — Sale of land

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Mun Hean Realty Pte Ltd v Fu Loong Lithographer Pte Ltd

[1992] SGCA 54

CA 22/1989

Goh Joon Seng J; L P Thean J; Yong Pung How CJ

31 August 1992

1 Cur Adv Vult

2 The defendants were the developers of a flatted factory building (‘the building’) known as Mun Hean Building on Lots 243-2 and 244-2 Mukim 17 at No 53 Kim Keat Road, Singapore. The development was one to which the Sale of Commercial Properties Act 1979 (‘the Act’) and the Sale of Commercial Properties Rules 1979 (‘the Rules’) applied.

3 By an agreement dated 8 October 1980 (‘agreement I’) the defendants agreed to sell to the plaintiffs and the plaintiffs agreed to purchase from the defendants the mezzanine floor subsequently known as #02-01 and #02-02 of the building with a floor area of 7,830sq ft. The material terms of agreement I were:

(i) cl 3 which provided that the area of the property as described in the schedule was only an estimate. In the event of a difference between the estimated and the actual area, there was to be an adjustment of the purchase price on the date of completion of the sale and purchase;

(ii) cl 4(2) which provided that the sale was in respect only of all the property described in the schedule thereto and the plaintiffs should have no claims or objections to another building to be erected on the said Lot 243-2 and 244-2 or any extension of the building;

(iii) cl 16(1) which provided that the defendants were to deliver possession of the property sold within 14 days of the issue of the temporary occupation licence ("TOL"). If TOL was not issued by 28 February 1981, the defendants would pay interest on all moneys by then paid by the plaintiffs at the rate of 9%pa; and

(iv) cl 19 which provided that completion of the sale and purchase was to take place 14 days after the receipt by the plaintiffs or their solicitors of the notice to complete served by the defendants' solicitors. The clause contained no date by which such notice to complete had to be served.

4 Miss Jeanny Ng ('Miss Ng'), an advocate and solicitor, acted for both parties. She also acted for the plaintiffs in their proposed mortgage of the said property to DBS Finance Ltd ('DBS Finance') to secure a loan of \$1.5m. For that purpose, on 13 January 1981 she forwarded all relevant documents including agreement I to DBS Finance. Thereafter DBS Finance's solicitors drew Miss Ng's attention to the fact that agreement I was not in accordance with the prescribed form and did not comply with the requirements of the Act in that, inter alia, it did not contain a date for service by the defendants of the notice to complete. With the agreement of both parties, Miss Ng thereupon prepared a second agreement ('agreement II') in accordance with the prescribed form and the parties executed agreement II on 25 February 1981 but backdated it to 8 October 1980 as it was meant to replace agreement I of 8 October 1980.

5 So far as is material agreement II differed from agreement I as follows:

(i) it provided by cl 14(2) for notice to complete to be given by or on behalf of the defendants to the plaintiffs or their solicitors on or before 31 December 1983 failing which the defendants would pay liquidated damages at the rate of 9 percent (9%) per

annum on a sum equal to 85 percent (85%) of the purchase price;

(ii) it contained no date by which the defendants had to procure the issue of TOL;

(iii) it contained no provision for adjustment in the price in the event of a difference between the estimated area stated in the First Schedule to agreement II and the actual area on completion; and

(iv) it contained no provision similar to cl 4(2) of agreement I.

6 Although agreement II did not contain any stipulation on the date of issue of TOL and for possession of the property to be delivered to the plaintiffs, the defendants undertook to deliver to the plaintiffs possession of the property sold by 7 May 1981, failing which they would pay damages for delay. This undertaking was confirmed in writing by Miss Ng in her letter of 25 February 1981 addressed to the plaintiffs. The letter which was confirmed by the plaintiffs read:

Dear Sirs,

Re: Purchase of mezzanine floor, Mun Hean Building, Singapore

Please be informed that we have taken our clients [sic] Mun Hean Realty Pte Ltd instructions and they have agreed on the following:

(a) that the temporary occupation licence date will be scheduled as at 7 May 1981 failing which the vendors will pay you interest at 9% per annum on the 85% or whatever amounts you have already paid to date.

(b) the vendors will not charge you further interest on whatever sums outstanding from you to them after 28 February 1981; and the balance of the purchase price will be disbursed by DBS Finance to the vendors direct.

Please be further informed that should the vendors elect [sic] any other building or structure on the said land you will have no legal interest on them whatsoever, save what you have purchased, ie mezzanine floor, Mun Hean Building.

Yours faithfully

(signed: Jeanny Ng)

7 At all material times, the plaintiffs were represented by their directors, Lim Eng Hwa, Pang Ah Keuw, Lim Meow Hwa and William Tan Boon Toon (‘William Tan’). Miss Ng dealt mainly with William Tan who was the plaintiffs’ executive director and the only one who could converse in English. The defendants’ managing director, Mok Wing Kee, represented the defendants.

8 As the prescribed form required a completion date to be inserted in cl 14(2) (whatever that date might be), 31 December 1983 was inserted by Miss Ng as the completion date somewhat arbitrarily. On this William Tan confirmed in evidence as follows:

Q: Why was there no discussion or query concerning 31 December 1983?

A: We were very anxious to obtain possession of the premises, to start our business. There was no discussion about date of legal completion. We were much more concerned about TOL because we wanted physical possession.

Q: Did the defendants inform you of their intention to construct phase II of the project?

A: Yes, we were informed of that.

9 William Tan is corroborated by Miss Ng:

Q: The completion date which you inserted in agreement II - how did you pick it, according to Mok’s instructions?

A: No. Nor the plaintiffs. I picked the date arbitrarily, and informed both parties. They did not object. The date was not related to any estimate on my part as to when phase II would be completed.

10 On the evidence there is no doubt that had the problems of the possible delay in the strata subdivision, application for and issue of subsidiary strata certificates of title caused by the phase II project been better appreciated, Miss

Ng would no doubt have inserted a completion date well after 31 December 1983. Such later date would have been equally acceptable to William Tan on behalf of the plaintiffs and Mok Wing Kee on behalf of the defendants.

11 In the events that followed, TOL was not issued until 27 July 1981. In compliance with the letter of 25 February 1981, the defendants paid to the plaintiffs the sum of \$12,742.40 for the delay in the issue of TOL calculated from 7 May 1981 according to Miss Ng's letter of 25 February 1981.

12 On 12 October 1983, some ten weeks before the defendants were to give notice to complete under cl 14 of agreement II, one Tan Han Yong acquired the whole of the issued share capital of the plaintiffs.

13 On 4 December 1985 the defendants through Miss Ng gave notice to complete enclosing a completion statement for:

- (i) \$125,280 being the balance 10% of the purchase price;
- (ii) \$38,939.20 for the excess by 243.37sq ft in the area in the subsidiary strata certificate of title over the area stated in agreement II at \$160 per sq ft for the said excess;
- (iii) \$5,455.75 being maintenance/service charges for the months of July to November 1985.

14 The plaintiffs through Tan Han Yong thereupon instructed Tan Kim Seng & Co to act for them in place of Miss Ng.

15 A claim for liquidated damages amounting to \$184,587.86 for delay in the service of the notice to complete was made. The plaintiffs also denied that the defendants were entitled to payment of \$38,939.20 for the excess area and the sum of \$5,455.75 for the maintenance and service charges. The plaintiffs subsequently paid the said sum of \$5,455.75 pursuant to an order of court in

Suit No 7702 of 1986. In the meantime as litigation became imminent, Miss Ng withdrew from acting for either party.

16 On 17 February 1986 the plaintiffs filed proceedings by way of originating summons claiming, inter alia, for the following reliefs:

(a) a declaration that pursuant to cl 14 of agreement II liquidated damages amounting to \$184,587.86 were payable by the defendants to the plaintiffs, the defendants having served the notice to complete only on 4 December 1985 instead of 31 December 1983;

(b) an order that the purchase price be abated by the said amount of damages and for interest at the rate of 12%pa on \$184,587.86 from 18 December 1985 to the date of judgment; and

(c) an order that the defendants do complete the sale and purchase and make payment of the sum of \$59,307.86 (being liquidated damages at \$184,587.86 less \$125,280 being the balance purchase price outstanding).

17 The originating summons came up for hearing before Punch Coomaraswamy J on 15 January 1987 who ordered the originating summons continued as if the action had been begun by writ pursuant to O 28 r 8 of the Rules of the Supreme Court 1970. He also gave leave for pleadings by way of points of claim, defence and reply to be filed.

18 The matter eventually came up for hearing before Grimberg JC. The defendants denied the plaintiffs' claim relying on promissory estoppel and waiver on the part of the plaintiffs. At the hearing the defendants abandoned their claim for payment for the excess area. By order of court dated 27 February 1989 the learned trial judge granted the plaintiffs' claim for liquidated damages in the sum of \$184,587.86 with interest at 9%pa from 18 December 1985 until judgment or payment [see [1989] 2 MLJ 80]. The defendants were also

ordered to complete the sale and purchase and make payment to the plaintiffs of the sum of \$59,307.86 after setting off the balance purchase price of \$125,280 against the liquidated damages of \$184,587.86. The learned trial judge also awarded the plaintiffs costs and other consequential reliefs. The defendants' counterclaim for \$125,280 being balance of the purchase price and interest on the said sum of \$125,280 was dismissed with costs.

19 In his grounds of decision the learned trial judge, after reviewing the evidence, stated at p 85:

I conclude, on the evidence, that the plaintiffs' conduct gave rise, prima facie, to a promise or assurance on their part that they would not hold the defendants to the completion date of 31 December 1983 stipulated by cl 14(2) of agreement II.

20 Were the defendants, as a consequence of that promise or assurance, induced to alter their position to their detriment?

21 The reason why a date for completion had been omitted from agreement I was because phase II of the defendants' project was contemplated and there was no telling, in October 1980, when it would be possible to amalgamate the lots upon which Phases I and II were to be constructed for the purposes of procuring individual titles. That remained the position in February 1981. By their promise or assurance that the 31 December 1983 completion date would not bind the defendants, the plaintiffs induced the defendants to act upon it and to alter their position by proceeding upon the basis that nothing stood in the way of phase II, in the form of a deadline for giving the plaintiffs title to the property. Mr Mok Wing Kee said:

If the plaintiffs had insisted on compliance with the legal completion date of 31 December 1983, we may or may not have proceeded with the extension (ie phase II). Had they insisted, we would have had to see if we could meet the deadline. We decided to proceed with phase II because the plaintiffs had already

agreed that the completion date of 31 December 1983 was of no importance.`

In the event, the defendants embarked in earnest on phase II at the end of 1981, and it was ultimately completed at the end of 1985. The evidence, therefore, supports the proposition that the defendants, acting upon the plaintiffs` assurance or promise, altered their position.

22 The learned judicial commissioner therefore found, first, that the plaintiffs by their promise or assurance had held out that they would not hold the defendants to the completion date of 31 December 1983 and, secondly, the defendants acted upon such promise or assurance and altered their position by proceeding with the phase II development. Such conduct on the part of the plaintiffs gave rise to an estoppel against them, but the learned judicial commissioner held that such estoppel could not succeed because, first, it was defeated by virtue of the Act and the Rules and by the wider considerations of public policy, and secondly, the doctrine of estoppel cannot be invoked to render valid a transaction which the legislature has, on grounds of general public policy, enacted to be invalid. He said at pp 86-87:

*I therefore conclude that whereas the pleas of estoppel and waiver are prima facie supportable on the evidence, and would otherwise have succeeded, they are defeated by virtue of the Act and the Rules, and by the wider considerations of public policy. The provisions of the Act are different from those to be found in the Housing Developers (Control and Licensing) Act and the rules made under it, which fell to be considered in **Foo Kee Boo & Anor v Ho Lee Investments (Pte) Ltd** [1988] 3 MLJ 128 . The latter Act, for one thing, does not contain a section equivalent to s 5.*

23 I am also obliged to reject the plea of estoppel, and the related plea of waiver, because it is a general principle that the doctrine of estoppel `cannot be invoked to render valid a transaction which the legislature has, on grounds of general public policy, enacted ... to be invalid ... `: 16 **Halsbury`s Laws of England** para 1515.

24 In **Bradshaw v McMullan** [1920] 2 IR 412, the House of Lords held that a contract was void as being contrary to a provision of the Local Government (Ireland) Act 1898. The defendant relied upon certain events as giving rise to an estoppel. The plea was rejected. In the course of his speech, Lord Shaw of Dunfermline said:

‘Further, my Lords, I desire to make this observation. I do not see my way to sanction the application of this specific plea of res judicata or the more general plea of estoppel, to any transaction such as the present, which is in plain defiance of statutory injunction. Such a plea, if allowed, would place the courts of the country in open conflict with the determination of the legislature.’

25 It is this part of the decision of the learned trial judge on which the appeal has been directed. It is convenient at this stage to set out the provisions of s 5 of the Act and rr 6 and 7 of the Rules:

(5) (1) Every agreement for the sale and purchase of a commercial property shall contain such terms and conditions of sale as may be prescribed by rules made under this Act.

(2) Any term or condition of sale in an agreement of sale and purchase referred to in subsection (1) which is inconsistent with the terms and conditions of sale prescribed by rules made under this Act shall to the extent of the inconsistency be null and void.

26 Rules 6 and 7:

(6) The agreement for the sale of any commercial property to which the Act applies shall be in the Form B set out in the Schedule to these Rules.

(7) No amendment, deletion or alteration to the option or the agreement for sale referred to in rules 5 and 6 shall be made except with the approval in writing of the Controller of Housing.

27 Agreement II was in accordance with Form B. All that Form B requires is the insertion of a date (not which date) by which the notice to complete shall

be given by the vendor, failing which the purchaser shall be entitled to liquidated damages. The Rules do not prescribe a formula by which the date for giving notice to complete is to be determined. That is left to the parties; they are at liberty to agree to any date. That date agreed upon is meant for the protection of the purchaser, and it must equally be open to the purchaser who has agreed to that date to agree to extend the date or by conduct to represent to the vendor that he would not hold the vendor to the date as agreed upon, and such holding out, if acted upon to the detriment of the vendor must be binding on the purchaser. *Bradshaw v McMullan* 1 is not applicable here. There, by a proposal in writing and subsequently accepted, McMullan agreed to take from Bradshaw certain business premises for a term of 31 years at the yearly rent of £240 *including all rates and taxes as at present existing or assessed on the said premises*. McMullan also agreed to pay 5/7ths of all future or increased taxation caused by the alterations and improvements stipulated for in the agreement.

28 In an action for rent by Bradshaw, McMullan claimed credit for the amount of poor-rate paid by him on the ground that the £240 yearly rent was inclusive of taxes. However s 52 of the Local Government (Ireland) Act 1898 provided as follows:

(1) The poor-rate shall be made upon the occupier, and not the landlord ...;

(2) The occupier of a hereditament shall not be entitled to deduct from his rent any part of the poor-rate, **and any contract to the contrary respecting such deduction shall be void**. ... (Emphasis added.)

29 As the provision of s 52 had the effect of throwing upon the lessee the burden of ultimately paying the poor-rate the agreement by the lessor to bear

poor-rate was contrary to s 52 and by s 52(2) specifically rendered void and as such there could not be any estoppel. Viscount Finlay at p 414 stated:

Section 52 sub-s 2 prohibits the deduction by the occupier from his rent of any part of the poor-rate, and goes on to provide that any contract to the contrary respecting such deduction shall be void. The appellant contends that the lessor's agreement to bear the rate in consideration of the rent stipulated is void as being a contract to the contrary within the meaning of the second subsection, and that therefore she is entitled, in spite of her contract to the contrary, to throw the burden of the rate upon the respondent. In my opinion the statute has the effect contended for by the appellant.

30 We find that the decision in **Elsden & Anor v Pick** [1980] 3 All ER 235[1980] 1 WLR 898 is of assistance on the matter before us. In that case, the plaintiffs were the landlords of two farms of which the defendant was the tenant. Section 23(1) of the Agricultural Holdings Act 1948 provided that ***` a notice to quit an agricultural holding or part of an agricultural holding shall (notwithstanding any provision to the contrary in the contract of tenancy of the holding) be invalid if it purports to terminate the tenancy before the expiration of twelve months from the end of the then current year of tenancy`***. By the terms of the lease the requisite notice was one year's notice in writing expiring on 6 April in any year. In 1977 the tenant got into financial difficulties and on 4 April he approached the landlords' agent and warned him that he might have to quit the farms. The agent, being sympathetic to the tenant's plight, suggested that the tenant take some more time to make a final decision and that if the tenant decided within the next five days to terminate either or both tenancies he would accept a notice to quit backdated to 4 April. The tenant agreed and having reconsidered, decided to quit one farm only. Accordingly on 7 April he gave the agent a notice to quit backdated to 4 April to expire on 5 April 1978. The agent accepted the notice. The tenant later changed his mind and requested that his notice be disregarded. The landlords refused and brought

proceedings for recovery of possession. The tenant contended that the notice was invalid since it did not comply with s 23(1) of the Agricultural Holdings Act in that it purported **‘to terminate the tenancy before the expiration of twelve months from the end of the then current year of the tenancy’**. The judge upheld this contention on the ground that s 23(1) was a mandatory provision and dismissed the landlords’ claim. The landlords appealed to the Court of Appeal. The Court of Appeal allowed the appeal holding that on the true construction of s 23(1) of the Agricultural Holdings Act which merely made notices which did not comply with its provisions ‘invalid’ and not ‘unlawful’, a party to a tenancy agreement was not prevented from waiving his strict right to insist on a notice to quit of at least 12 months’ duration and accepting the termination of the tenancy before the expiration of that period. The suggestion of the landlords’ agent that the notice to quit be backdated and his acceptance of the notice despite the fact that the notice thereby given was less than 12 months was an effective waiver by the landlords of the requirements regarding length of notice. In giving his judgment, Shaw LJ said at p 240:

Another argument for the plaintiffs was founded on estoppel. In this court it was enlarged so as to take in the subtle ramifications of promissory estoppel. Counsel for the defendant, who appeared before the deputy judge as well as on this appeal, met this with the retort that estoppel cannot aid a party to overcome what was a statutory prohibition. This was indeed the essential theme of the defendant’s case in refutation of every contrary argument. It was the simple statement that s 23(1) precluded the efficacy of any notice to quit which was of less than 12 months’ duration and that was the end of any argument.

31 I therefore turn back to the section itself in order to examine its language and to deduce its clear tenor. It is clear that it is designed principally to protect the tenant farmer from peremptory or unduly prejudicial ejectment on the part of the landlord. Nonetheless it serves also to protect a landlord from the abandonment of a tenancy in circumstances which may cause a discontinuity in

cultivation or a lapse from proper standards of husbandry. Thus the time for the ending of a tenancy is a matter of common interest both to a landlord and to his tenant. It may suit them both to determine a tenancy without waiting for what may be as long as nearly two years to bring it to an end. No statute could have so absurd an intention as to constrain a landlord and a tenant of an agricultural holding to remain bound in that relationship at a time when neither desires that it should endure. If they are in accord, can it matter whether they demonstrate that accord by an agreement to surrender or an agreement to accept short notice?

32 I have read s 23(1); the first matter to observe is that the subsection uses the word 'invalid' and not 'unlawful'. Thus there is no penal prohibition; it is simply that provision in the tenancy agreement for a shorter notice than 12 months is nugatory. So also any variation of a tenancy agreement in relation to an agricultural holding which purports to make a shorter period of notice than 12 months effective will fail of its purpose. This produces the situation that there can be no operative provision whereby notice can in prospect be made effective if it is less than 12 months; but a notice is of course a unilateral act available to one party or the other without the ad hoc consent of the party to whom the notice is given. There seems to me to be no impediment created by s 23(1) to the party in receipt of a notice to quit to waive his strict right that the notice should expire on a particular day or that it should be of a particular duration. A contractual provision which inures for the benefit of a party can be waived by that party albeit that his right to that benefit is reinforced by statute. There may be circumstances which might qualify this situation, as where an element of public interest is involved, but in such a case one would expect the statutory provision to speak in terms of illegality (thus: 'It shall be unlawful') rather than of mere invalidity.

33 Agreement II was in compliance with the Act and the Rules; it contained a completion date in cl 14(2). By Rule 7 ` **no amendment, deletion or alteration** ` to the agreement for sale ` **referred to in rules 5 and 6** ` shall be made without the approval of the Controller of Housing. The parties here have not made any ` **amendment, deletion or alteration** ` to agreement II. What transpired here was that the plaintiffs had by their conduct assured the defendants that the latter would not be held to the completion date as stipulated in agreement II. That date, as we have said, was for the protection of the plaintiffs and they are at liberty to vary or extend it or waive compliance thereof by the defendants. Neither the Act nor the Rules make such variation, extension or waiver illegal or void.

34 The learned trial judge has found on the evidence before him that the plaintiffs` conduct gave rise to a promise or assurance on their part that they would not hold the defendants to the completion date of 31 December 1983 and that the defendants had, acting on this assurance or promise, altered their position, that is, they had proceeded with the phase II development which resulted in their delay in completion. We agree with this finding of fact. The plaintiffs are therefore estopped from insisting that the defendants adhere to the date of completion as stipulated in cl 14(2). We do not agree that the effect of such estoppel would defeat the intentions of Parliament and give rise to an illegal contract and by virtue of s 5 is void. In our opinion, on the facts, the plea of estoppel is sustainable.

35 Accordingly we allow the appeal. The orders of the court below are set aside and we allow the defendants` counterclaim for \$125,280 being balance of the purchase price and interest thereon at 12%pa from 19 December 1985 to the date of judgment in accordance with cl 6 of agreement II. We also award the defendants costs of this appeal and costs in the court below.

36 **Outcome:**

Goh Joon Seng J
L P Thean J
Yong Pung How CJ

Tan Tee Jim (Allen & Gledhill) for the appellants
Cheong Yuen Hee and Andrew Chua (Tan Kim Seng & Partners) for
the respondents
