

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1992] SGHC 314

OS 1464/1985

Between

Swee Hong Investment Pte Ltd

... Plaintiff

And

Swee Hong Exim Pte Ltd
The Attorney-General

... Defendant

And

Kiaw Aik Hang Land Pte Ltd
The Attorney-General

... Third Party

GROUND OF DECISION

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Swee Hong Investment Pte Ltd v Swee Hong Exim Pte Ltd and Another (Kiaw Aik Hang Land Pte Ltd and Another, Third Parties)

[1992] SGHC 314

OS 1464/1985
L P Thean J
16 December 1992

1 JUDGMENT:

2 In this action the plaintiff, which is a development company, claims against (i) its associated or affiliated company, the first defendant, for damages for breach of contract and (ii) the Attorney-General, the second defendant, for damages for breach of statutory duty under the Planning Act (Ch 232) and/or negligence in the performance of such duty on the part of the Development & Building Control Division ('DBCD') of the Public Works Department, Ministry of National Development. Arising from this action, the first defendant in turn initiated third party proceedings against (i) the first third party claiming damages for breach of contract and (ii) the Attorney-General as the second third party claiming also damages for breach of statutory duty under the Planning Act and/or negligence in the performance of such duty by DBCD. The dispute involving these four parties has its origin in an uncomplicated transaction of sale and purchase of two plots of land which was completed in October 1984, but the cause of the dispute unfortunately lies in an error or errors on the part of

DBCD which had occurred much earlier, sometime in 1981 and further perpetuated in 1984.

3 On 17 September 1982, the first third party, which was then the owner of the two plots of land, lots 3361 and 3737 of Mukim 24 situate at Paya Lebar Road, Singapore ('the property') obtained written permission under s 9(1) of the Planning Act from the competent authority for the erection on the property of 'a part 7 / part 8-storey light industrial flatted factory building' subject to various terms and conditions therein stated. One of the conditions namely, condition (n), was that building plans were to be submitted to the building authority for approval within 4 months from the date of the grant of written permission. Subsequently, there was an amendment made to the proposed development which was approved on 19 February 1983, and the written permission was expressed to lapse on 16 September 1984. Presumably the first third party did comply with condition (n), as on 11 November 1983 the building authority issued a notice of approval of the building plan, BP 5263E/82/83, submitted on its behalf.

4 The first third party, however, did not proceed with the construction of the building pursuant to the written permission; instead, it proceeded to sell the property. By an agreement dated 12 June 1984 ('the sale agreement') it agreed to sell to the first defendant the property at the price of \$9,323,510 subject to terms and conditions therein provided. The material terms to which the sale was subject were, among others, cl 4 and 5 which provided as follows:

5 4. The said property is sold with planning approval for the erection of an eight (8) storey flatted factory building. As the said planning approval shall lapse on 16 September 1984, the Vendor undertakes to renew the written

permission before the completion date hereof and on completion, the Vendor shall hand over to the Purchaser the letter of approval from the relevant authority for the renewal of written permission. In the event that the renewed written permission is not obtained by the date fixed for completion herein, the parties hereto agree to a sixty (60) days' extension for completion provided that the Vendor shall give the Purchaser a fourteen (14) days' notice to complete the purchase upon receipt of the renewed written permission.

6 5. The Vendor shall be liable for any existing development charges (if any). The Vendor shall, on completion herein, obtain a letter of discharge from its architects and settle all architects' fees payable up to the date of the said discharge. The Vendor shall also hand over to the Purchaser or its solicitors all the approved plans documents and drawings.

7 In all probability, at the time of the sale agreement, the first defendant had not had sufficient time to make the necessary searches and enquiries of the property, and accordingly the sale was subject to the first defendant receiving satisfactory replies to the requisitions from the government departments. Clause 11 of the sale agreement provided as follows:

8 11. The sale and purchase herein shall be subject to the Purchaser's Solicitors receiving satisfactory replies to the legal requisitions to the various government departments. If any of such replies are found to be unsatisfactory, then the Purchaser shall be entitled by written notice to the Vendor or its solicitors to rescind this Agreement and thereupon the sale and purchase herein shall be treated as cancelled and the deposit paid by the Purchaser shall forthwith be refunded to the Purchaser without any interest or deductions whatsoever and thereafter this Agreement shall be treated as void and of no

further effect, neither party hereto shall have any claims or demands whatsoever against the other for costs damages compensation or otherwise hereunder and each party to pay its own legal costs in respect of the abortive sale and purchase. PROVIDED THAT any reply to the legal requisitions shall not be deemed to be unsatisfactory if the Vendor is able to comply with the same.

9 Soon or immediately after the sale agreement, the first defendant's solicitors, M/s Thomas Tham & Partners, submitted two legal requisitions, one for lot 3361 and the other for lot 3737, to the development control branch of DBCD, and on or about 5 July 1984 the solicitors received replies to these requisitions. The replies to the two requisitions were identical and showed, among other things, that the written permission had been given for the development of a part 7 / part 8 storey flatted factory building and that the permission was to lapse on 16 September 1984. The replies also gave the following information, namely:

10 (a) on zoning: 'Lot 3737(SL) - Educational institution/lot 3361 - residential/school zone rezoned to general industry/major traffic route' and 'Educational institution will be rezoned to industry at the next Master Plan review.'

11 (b) on plot ratio: 2.49 (gross).

12 Pursuant to cl 4 of the sale agreement, the first third party through its architects, Lee Sian Teck Chartered Architects, on 28 August 1984 obtained an extension/renewal of the written permission which was then expressed to lapse on 16 September 1986. Thus, the first third party had fulfilled its obligation under cl 4 of the sale agreement.

13 Though the first defendant purchased the property, it was the intention of its directors that the purchase would be taken over by a new company to be formed. This was contemplated in the sale agreement, as by cl 12 thereof the first third party agreed to the first defendant nominating a company to complete the sale and agreed to execute a transfer of the property to such company. Hence, after the sale agreement was made, steps were taken to incorporate a new company, and the company was incorporated on 3 July 1984. That company is the plaintiff. About two months later, on 14 September 1984, the first defendant entered into a sub-sale agreement with the plaintiff whereby the first defendant agreed to sell to the plaintiff the property at the price of \$10,500,000 on terms and conditions therein provided. The material terms to which the sub-sale was subject were, among others, cll 4 and 5 which provided:

14 4. The said property is sold with planning approval for the erection of an eight (8) storey flatted factory building. On completion, the Vendor < i.e. the first defendant > shall hand over to the Purchaser < i.e. the plaintiff > the letter of approval from the relevant authority or the renewal of written permission.

15 5. The Vendor shall be liable for the following:

16 (1) any existing development charges in connection with the planning approval;

17 (2) stamp fee for the transfer of the said Property;

18 (3) legal costs for the sale and purchase herein; and

19 (4) levelling of the land to the level of the existing road and bear all costs and expenses in connection hereto.

20 As of the date of the sub-sale agreement, it was manifestly clear that there were in force a grant of written permission for the development of the light industrial building which had been extended to lapse only on 16 September 1986, and an approval of the building plan BP 5263E/82/83. There were also the replies from DBCD to the two legal requisitions which gave the relevant information on zoning and plots ratio that was consistent with the written permission then in force. Clearly on the basis of these documents the plaintiff and the first defendant entered into the sub-sale agreement, and completed the transaction. I do not think it is or can be seriously challenged that the parties had acted and relied on these documents. On 19 October 1984 the sale and the sub-sale of the property were both completed by the parties executing a tripartite instrument of transfer whereby the property was duly transferred to the plaintiff.

21 After the acquisition of the property the plaintiff did not proceed with the construction of the building as approved. The main reason was that the property market was very unfavourable; in fact, as the plaintiff's architect, Mr Lim Chong Kwooi, said, there was a recession. After discussions with the architect, the plaintiff's directors decided to proceed with a much smaller development. On their instructions, the architect prepared plans for two blocks of 2 storey industrial building with mezzanine floors and a canteen. This development involved a plot ratio of 1.12. The architect submitted the necessary application to DBCD for approval on 24 October 1984. DBCD promptly responded and said that the proposal was deferred for a period of 6 months 'as the site < was then > under study'. Representations were thereupon made to DBCD and the plaintiff's directors and the architect had a meeting with officers of DBCD. Arising from the discussions at that meeting the plaintiff's architect on 14 January 1985 submitted a fresh application for the development of 1 block of 2 storey light industrial building with mezzanine floors and a canteen and

that development involved a plot ratio of 0.96. Soon thereafter, on 21 January 1985, there was a meeting held at the office of DBCD at which the directors of the plaintiff were informed for the first time, to their surprise, that the plot ratio in respect of the property was 0.44 and that a development charge would be payable in respect of their development.

22 On 25 January 1985, DBCD wrote to the architect of the plaintiffs as follows:

23 Dear Sirs

24 PROPOSED ERECTION OF A PART 7/PART 8 STOREY ON LOT
3361 & 3737 MK 24 AT PAYA LEBAR ROAD

25 We refer to the Written Permission dated 17.9.82 which was renewed on 28.8.84 to lapse on 16.9.86.

26 2. We wish to inform you that as you have not complied with condition (n) of the said Written Permission it is now deemed to be cancelled.

27 Yours faithfully

28 - SGD - MARIA CHAN (MISS) for DEPUTY DIRECTOR
DEVELOPMENT & BUILDING CONTROL DIVISION

29 Subsequently, on 13 March 1984 DBCD wrote to the plaintiff's solicitors, M/s Thomas Tham & Partners, stating that there was an error in the replies to the two legal requisitions and that the plot ratio was 0.44 (gross) and not, as previously stated, 2.49 (gross). The letter stated thus:

30 Dear Sirs

31 A LR NO 4301 PAYA LEBAR ROAD LOT 3361 MK 24 B LR NO
4302 PAYA LEBAR ROAD LOT 3737 MK 24

32 This is to inform you that an error has been discovered in the above 2
Legal Requisitions answered and returned to you on 5.7.84 in respect of
Question (6) regarding the plot ratio.

33 2 The said plot ratio should be 0.44 (gross) and not 2.49 (gross) since no
development charge has been paid for the latter and formal alteration of the
Master Plan plot ratio has not been effected.

34 3 The error is regretted.

35 Yours faithfully

36 - SGD - LIEW FOOK YAN for DEPUTY DIRECTOR
DEVELOPMENT & BUILDING CONTROL DIVISION

37 The plaintiff responded to that letter complaining of the error and
requested DBCD to advise on 'the quantum of development charge for the
approved proposal.' DBCD on 12 April 1985 wrote the following letter in reply:

38 M/s Swee Hong Investments Pte Ltd 10 Jalan Besar #13-08/09 Sim Lim
Tower Singapore 0820

39 Dear Sirs

40 A) LR NO: 4301 PAYA LEBAR ROAD - LOT 3361 MK 24 B) LR NO: 4302 PAYA LEBAR ROAD - LOT 3737 MK 24

41 Your letter dated 11 Apr 85 has reference.

42 2 Please be informed that, without prejudice, development charge payable for the previous approved part 7/part 8-storey light industrial flatted factory building on lots 3361 and 3737, MK 24, Paya Lebar Road, at a plot ratio of 2.49 (gross) amount to about \$6,820,254.00, basing on the in-principle approval dated of 28.9.81. The subject development charge arose from the increase in Master Plan plot ratio from approved 0.44 (gross) to the proposed 2.49 (gross).

43 Yours faithfully

44 - SGD - MARIA CHAN (MISS) for DEPUTY DIRECTOR DEVELOPMENT & BUILDING CONTROL DIVISION

45 On 16 April 1985, the architect on instructions from the plaintiff submitted a third application or proposal for a development consisting of 2 blocks of single story industrial building involving a plot ratio of 0.42. This proposal obviously was to conform to the plot ratio of 0.44 and to avoid payment of any development charge. This application was approved and the buildings were eventually built.

46 On 11 December 1985, the plaintiffs instituted these proceedings by way of Originating Summons against the two defendants, and the first defendant subsequently took out third party proceedings against the first third party and also against the second defendant as the second third party. On 27 April 1987

an order was made that these proceedings be continued as if the action had been commenced by a writ of summons and the parties were ordered to deliver pleadings. Pleadings were subsequently delivered, and eventually the action came on for trial.

47 The plaintiff and the first defendant are associated or affiliated companies, and are really parties on the same side. However, the plaintiff had to sue the first defendant, as it has no cause of action against the first third party; it is the first defendant who has a cause of action against the first third party. Therefore, the first defendant on being sued took out third party proceedings and brought a claim against the first third party for damages for breach of contract and also a claim against the second defendant as the second third party for the same reliefs as claimed by the plaintiff. Essentially, there are only two claims in this action: first, there is the claim by the plaintiff and the first defendant against the second defendant, and second, there is the claim by the plaintiff through the first defendant against the first third party. As the causes of action in respect of these claims and the defences raised by the second defendant and the first third party respectively are separate and distinct, I propose to consider and determine, first, the claim against and the defence of the second defendant and thereafter the claim against and the defence of the first third party.

48 As against the second defendant, the claims of the plaintiff and the first defendant have been framed substantially along the same line. In substance, their pleadings averred as follows. Prior to the execution of the sub-sale agreement, there were issued the following:

49 (a) the grant of written permission dated 17 September 1982 by the competent authority under the Planning Act for the erection on the property of

a part 7 / part 8 storey light industrial flatted factory building subject to the conditions therein mentioned and the written permission was renewed on 28 August 1983 and was expressed to lapse on 16 September 1986;

50 (b) approval dated 11 November 1983 by DBCD of the building plan for 8 storey flatted factory on the property subject to compliance with the provision of the Building Control Act, and

51 (c) replies by DBCD to the legal requisitions of the plaintiffs' solicitors stating, among other things, that the plot ratio for the development of the property was 2.49 (gross).

52 Relying on these documents the plaintiff and the first defendant entered into the sub-sale agreement and completed the purchase of the property by taking a transfer thereof from the first third party. Subsequently, the plaintiffs were informed that the plot ratio of the property was 0.44 (gross) and not 2.49 (gross) and that no development charge had been paid for the latter plot ratio and a formal alteration of the Master Plan in respect of the plot ratio had not been effected. As no development charge had been determined, paid or secured pursuant to s 29(4) (now s 32(3)) of the Planning Act, the planning permission granted was void. In the alternative, if the planning permission granted was valid, the plaintiff after completion were unable to proceed with the development of the property (as approved) without payment of a development charge under s 31 (now s 35) of the Planning Act. The plaintiffs therefore averred that DBCD had acted in breach of statutory duty in the grant of written permission and in the replies to the legal requisitions and/or had been negligent in relation to those matters and claimed damages for breach of statutory duty and/or negligence.

53 In his defence, the second defendant denied breach of statutory duty and/or negligence in the grant of the written permission and in the replies to the legal requisitions. He averred that the written permission was validly granted and it was subject to certain terms and conditions including conditions (n); that so long as the written permission was in force the plot ratio for development on the property was 2.49; that the plaintiff had failed to comply with condition (n) in that they had failed to submit building plans to the building authority by 16 January 1985, and that accordingly on 25 January 1985 the competent authority had cancelled the written permission and upon such cancellation the plot ratio 'reverted' to 0.44. The second defendant further averred that the plaintiffs did not proceed with the development of the property as approved under the written permission (and had never intended to do so) because of financial problems and unfavourable market conditions at the material time and that the plaintiffs had on their own volition reduced the development on the property to a plot ratio of 0.96 on 4 January 1985. Lastly, the second defendant relied on s 7(1) of the Government Proceedings Act (Ch 121) and averred that that section precluded proceedings against the Government for anything done or omitted to be done by the Government or any public officer in the exercise of the public duties of the Government.

54 On the pleadings, the issues before me are (i) whether there was any breach of statutory duty and/or negligence on the part of DBCD and (ii) whether s 7(1) of the Government Proceedings Act applies. I shall consider the second issue first, for if that section applies, that would be a complete defence to the claim, irrespective of whether or not there was any breach of duty and/or negligence as alleged or at all. Indeed, before me Mr Fong for the second defendant in his argument relied on this section as the principal defence.

55 It is convenient to set out here the provision of s 7 of the Government Proceedings Act (Ch 121) which is as follows:

56 7.-(1) Notwithstanding any other provisions of this Act to the contrary, no proceedings, other than proceedings for breach of contract, shall lie against the Government on account of anything done or omitted to be done or refused to be done by the Government or any public officer in exercise of the public duties of the Government.

57 (2) For the purposes of subsection (1), "exercise of the public duties" includes -

58 (a) the construction, maintenance, diversion and abandonment of railways, roads or bridges;

59 (b) the construction, maintenance and abandonment of schools, hospitals or other public buildings;

60 (c) the construction, maintenance and abandonment of drainage, flood prevention and reclamation works; and

61 (d) the maintenance, diversion and abandonment of the channels of rivers and waterways.

62 (3) Nothing in this section shall prevent the bringing of any suit for damages or compensation arising out of negligence or trespass in the execution of any works of construction or maintenance undertaken by the Government in the exercise of the said public duties.

63 The claim here against the second defendant is not one involving a breach of contract or one falling within sub-s (3) of the s 7. The acts or omissions of DBCD complained of by the plaintiff and the first defendant were the following:

64 (a) the grant of the written permission;

65 (b) the omission to determine the development charge prior to the grant of the written permission and have it paid or secured to the satisfaction of the competent authority, and

66 (c) the replies to the two legal requisitions.

67 The grant of the written permission and the replies to the legal requisitions were acts done and authorised under the Planning Act. I now turn to the relevant provisions. To avoid any confusion, I shall refer the relevant sections of the Planning Act then in force at the material time which are found in the 1985 ed.

68 Under s 9(1) of the Planning Act no person shall, without the written permission of the competent authority, develop any land, and under s 9(11) the competent authority is required within three months on receipt of application for permission to develop any land either grant or refuse the application, and shall, where the application is granted subject to conditions or is refused, give his reasons in writing for his decision. Section 26(1) of the Planning Act requires the payment to the competent authority of a development charge for written permission granted under s 9(1) which permits, inter alia, a development such as that in the present case involving an alteration of a Master Plan plot ratio from 0.44 (gross) to 2.49 (gross), and s 26(3) expressly provides that the

competent authority shall not grant written permission until the development charge, if any, has been determined under s 28(2) and has been paid or secured to his satisfaction.

69 In granting the written permission under s 9(1) on 17 September 1982 the competent authority was undoubtedly exercising the public duty of the Government. There was an omission on his part and/or on the part of other officers concerned in complying with s 28 by not determining the amount of development charge payable and ensuring that it was paid or secured to his satisfaction. In respect of the replies to the legal requisitions, they were made pursuant to r 7(5) of The Planning (Development) Rules 1981. The officer concerned who provided the replies to the requisitions was again exercising the public duty of the Government. He had given the incorrect information on the zoning and plot ratio of the property. All these were acts by public officers in exercise of the public duties of the Government and, in my opinion, what they did or did not do fall squarely within the provisions of that section. No argument has been advanced by either Mr Chui for the plaintiff or Mr Chung for the first defendant to the contrary.

70 It is helpful to refer to the Malaysian case of *Government of Malaysia and anor v Akasah bin Ahad* < 1986 > 1 MLJ 396. There, the plaintiff operated a petrol station along the federal highway. The Government decided to build a highway and build an interchange near the petrol station. This necessitated the closure of the access road to the plaintiff's petrol station because the ramp to the bridge was higher than the access road. The Government offered to build a new access road but the offer was rejected. As a result, the business of the plaintiff came to a standstill with the complete cut-off of accessibility to the petrol station. The plaintiff brought an action against the Government claiming

damages for negligence, and s 7 of the Government Proceedings Ordinance, 1956 was pleaded in defence. Section 7 of the Ordinance is in pari materia with s 7 of our Act. It was held by the Supreme Court of Malaysia that under s 7 of the Government Proceedings Ordinance, the Government could not be sued in the exercise of its public duty except for breach of contract, negligence or trespass, and that on the evidence adduced the plaintiff had failed to establish negligence.

71 The present case is a fortiori a clear case for the application of s 7(1) of the Government Proceedings Act. In my judgment, this section provides a complete defence to the claims of the plaintiff and the first defendant against the second defendant. Their claims therefore fail. My decision on this issue is sufficient to dispose of the claims against the second defendant, and it is unnecessary for me to consider and determine the first issue which I have earlier set out.

72 I now turn to the claim against the first third party. It is a simple and straightforward claim for damages for breach of contract and is based on the provisions of cll 4 and 5 of the sale agreement (which I have set out in full) and also on the following letters from DBCD:

73 (i) the letter dated 13 March 1985 to M/s Thomas Tham & Partners which stated, among other things, that the plot ratio in respect of the property was 0.44 (gross) and not 2.49 (gross) and no development charge had been paid for the latter plot ratio and formal alteration of the Master Plan plot ratio had not been effected, and

74 (ii) the letter dated 12 April 1985 which stated that the development charge payable for the development approved under the written permission amounted to about \$6,820,254 'basing on the in-principle approval date of 28 September 1981.'

75 On the evidence before me, I can find no breach by the first third party of either cl 4 or cl 5 of the sale agreement. Clause 4, in substance, provided that the property was sold with the benefit of the planning permission for the erection of part 7 / part 8-storey light industrial factory building and that the first third party undertook to renew the planning permission before the date of completion. At the time of the execution of the sale agreement there was in force a grant of written permission which was to lapse on 16 September 1984. Pursuant to the provision of cl 4, the first third party on 28 August 1984 obtained a renewal of the written permission which was then expressed to lapse on 16 September 1986. At the date of completion the written permission continued to remain in force and the benefit of the written permission had passed to the plaintiff. As for cl 5, it provided, inter alia, that the first third party was to be liable for any development charge. As of the date of completion and thereafter there was no development charge imposed or levied at any time by the competent authority. Mr Chung for the first defendant relied on the letter dated 12 April 1985 from DBCD and submitted that a development charge of \$6,820,254 had been imposed by the competent authority. That clearly is untenable. That letter merely gave an estimate of the development charge in response to a request made by the plaintiff. The competent authority has not made any determination of a development charge under s 28 of the Planning Act and no order for payment of any development charge has been issued pursuant to that section. In my judgment, there was no breach by the first third party of either cl 4 or cl 5 of the sale agreement.

76 For the same reasons I have given, there was no breach by the first defendant of any terms or conditions of the sub-sale agreement.

77 In the result, I dismiss the claim of the plaintiff against the defendants and the claim of the first defendant against the third parties. I now wish to hear arguments on the question of costs.

L P Thean J

Chui Kan Yuen for the plaintiff
K S Chung for the First defendant
Fong Kwok Jen assisted by Srivathsan for the Second defendant and
Second third party
Peter Yap for the First third party
