

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1992] SGHC 324

Suit No 23 of 1989

Between

GROUNDS OF DECISION

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**THE HONGKONG & SHANGHAI BANKING
CORPORATION v SAN'S RENT A-CAR PTE LTD**

[1992] SGHC 324

Suit No 23 of 1989
Chua F A J
22 December 1992

1 **JUDGMENT:**

2 **Cur Adv Vult**

3 The plaintiff sues the defendant for damages for breach of a contract allegedly entered into between the parties for the sale of a property known as No. 12 Sungei Kadut Avenue, Singapore (which I will call "the property"). The defendant denies liability on various grounds which may be categorised under the following heads.

4 (1) The plaintiff did not have legal title to the property but only an assignment of the right, title and interest of the licensee or equitable lessee of the property, Motor and Leasing Pte Ltd (which I will call "M & L").

5 (2) The plaintiff was not the party with whom the alleged contract was made, as the true intended vendors were the receivers and managers of M & L.

6 (3) The receivers and managers were, under the terms of the debenture charging the property to the plaintiff, the only party empowered to sell the property.

7 (4) The receivers and managers failed to disclose to the defendants the provisions and circumstances relating to the revision of rent for the property.

8 (5) If the defendant was in repudiatory breach of the alleged agreement, that repudiation was not accepted by the plaintiff up till the date of the issuance of the writ.

9 (6) One of the receivers and managers had misrepresented the rent for the property.

10 I will deal with each ground in turn.

11 1. Title to the property

12 It is not in dispute that, at the material time, the only document of title that existed for the property was a building agreement made between Jurong Town Corporation (which I will call "JTC") and M & L. No lease had yet been issued. The right, title and interest of M & L under the building agreement had been assigned by way of security to the plaintiff.

13 The alleged agreement is comprised in an exchange of letters. The first letter was an offer letter dated 1 September 1988 from the defendant addressed to the receivers and managers of M & L, and it began:

14 12 SUNGEI KADUT AVENUE SINGAPORE

15 We, San's Tours & Car Rentals of (address) 100 Kim Seng Shopping Centre, Singapore 0923 hereby offer to purchase the above JTC leasehold property for Singapore Dollars one million and fifty thousand only (\$1,050.00/-). < Emphasis added >

16 The offer letter also incorporated The Law Society's Conditions of Sale 1981 (which I will call "the Law Society's Conditions") as part of the terms of the offer.

17 The offer letter was purportedly accepted by a facsimile letter dated 2 September 1988 from Messrs Drew & Napier to the defendant's solicitors (Messrs Michael Khoo & B B Ong) in the following terms:

18 12 Sungei Kadut Avenue, Singapore

19 We refer to the telephone conversation this afternoon between your Mr Ong and the Writer and the Option dated 1 September 1988 from your clients to ours.

20 As solicitors for and on behalf of the Receivers and Managers of Motor & Leasing Pte Ltd and Hongkong and Shanghai Banking Corporation, we have been instructed to accept the offer contained in the letter.

21 Please note that on completion, our client will execute an Assignment of their rights in the Building Agreement made between Jurong Town Corporation of the one part and Motor & Leasing Pte Ltd of the other part.

22 Regards,

23 c.c. client Attention : Mr Ansari Fax : 5326766

24 The defence is simple. The offer letter did not contemplate an assignment of M & L's rights in the building agreement. Accordingly, the letter from Drew & Napier, not being an acceptance upon the terms set out in the offer letter, amounted in law to a refusal of the offer coupled with a counter-offer.

25 Messrs Michael Khoo & B B Ong responded to Drew & Napier's letter on 6 September 1988, stating that the defendant did not wish to proceed with the purchase as JTC had informed the defendant that the annual rent for the property was much higher than the figure represented by the receivers and managers. I will deal with the misrepresentation issue later but, putting this letter in the context of the present defence, it amounted to a rejection of the plaintiff's counter-offer, if in fact Drew & Napier's letter could be construed as such.

26 There was another facsimile letter written on 2 September 1988 by one of the receivers and managers to the defendant purporting to accept the offer, but this letter was expressed to have been sent by the receiver and manager for and on behalf of M & L, and it is not pleaded that this letter amounted to an acceptance, but merely a confirmation of Drew & Napier's acceptance.

27 A further letter from Michael Khoo & B B Ong on 13 September 1988 formally raised its present defence that Drew & Napier's letter was a counter-offer; hence there was no binding agreement.

28 In its amended statement of claim, the plaintiff contends that the defendant's offer letter was an offer to purchase the plaintiff's right, title and interest in and to the property, and this was the offer that was accepted.

Plaintiff's counsel contends that nothing in the offer letter or in the history of events leading up to the offer letter specifically touched on the question of the existence of a lease, as opposed to a building agreement. The defendant's representatives showed no real interest in the existence of the lease as such, except as a document from which the rent for the property (which was the real area of the defendant's interest) could be ascertained.

29 As mentioned earlier, the terms of the offer letter were to purchase "the above JTC leasehold property". The law is that, where a vendor offers to sell a property, he is offering to sell the whole legal and equitable title to the property unless the terms of the offer provide otherwise, either expressly or by necessary implication. This is trite law, and has been reaffirmed by the Court of Appeal in *Chua Sock Chen v Lau Wai Ming* < 1992 > 2 SLR 465 at 470-471. (See also *Kevin Tate & Anor v Sihan Sadikan*, judgment of G P Selvam JC dated 25 June 1991 in OS No 1270 of 1990, as yet unreported). It is, or should be, standard conveyancing practice in Singapore that, where sale agreements are entered into in respect of properties where legal title has not yet been issued, express reference is made in the sale agreement to the fact that the sale is of the equitable interest only, and that on completion there will not be a conveyance or transfer, but an assignment of right, title and interest.

30 Plaintiff's counsel has submitted that the two cases cited above are not authority that the equitable interest in a property (as distinct from the legal title) cannot be sold. With respect, this submission misses the point of the two cases. They are authority that, where the contract is expressed to be for the sale of a property, the prima facie inference is that the sale is of the legal as well as the equitable title, and the obligation to deduce good title is not satisfied simply by showing a good equitable title. There is no documentary or evidential basis for

the plaintiff's contention that the proposed sale in the present case was of the plaintiff's beneficial interest only, and I must construe the defendant's offer letter in the normal way, particularly in view of the incorporation of the Law Society's Conditions. Condition 24 requires a proper conveyance or transfer of the property to be executed upon completion. Although, by condition 31, the term "conveyance" includes an assignment, this is clearly to cover the case of a legal assignment of a leasehold title under the common law regime and not an assignment of right, title and interest, since nothing in the Law Society's Conditions refers to the sale of equitable interests.

31 The plaintiff's counsel relies on the lack of interest shown by the defendant's representatives in the legal title. With respect, this is irrelevant to the issue. The obligation to show and give legal title is implied in every sale of a property unless expressly or impliedly excluded. The actual intentions of the parties are of no importance, unless that intention has been incorporated into (or can be inferred from) the contractual documents (and it is not suggested that the contract in this case is otherwise than in writing).

32 In the circumstances, I accept the defence as valid. For the reasons I have already stated, the defendant's offer letter was, on its true construction, an offer to purchase both the legal as well as the beneficial title, and Drew & Napier's response was clearly not an acceptance of the offer on the terms set out in that letter. It could therefore only amount to a counter-offer (see Chitty on Contracts, 26th Ed 1989, Vol I para 95) which was never accepted by the defendant.

33 I have not forgotten the receiver and manager's letter of 2 September 1988 but, as pleaded, it did not purport to be an acceptance, and the evidence is that it was sent after the letter of Drew & Napier. Since the defendant's offer

had already been rejected by the plaintiff's counter-offer, there would have been nothing left to accept, even if the receiver and manager's letter could be construed as an acceptance on behalf of the plaintiff. Furthermore, the receiver and manager's letter purported to accept the defendant's offer letter without qualification, which would have meant a contract for the sale and purchase of a leasehold title, in contradiction of the plaintiff's case as pleaded.

34 This is sufficient to dispose of the plaintiff's claim, and I will therefore deal with the remaining defences very briefly except for the ground of misrepresentation, as to which I will set out my findings in fuller detail, in case this matter should proceed to the Court of Appeal.

35 2. Who were the true vendors

36 While there was clearly confusion in the documents emanating from the receivers and managers and their solicitors, I accept that the true situation at the end of August 1988 was that, as between the plaintiff and the receivers and managers, it had been agreed that the latter would act as agents for the plaintiff in the proposed sale of the property to any intending purchaser. While the evidence is that the position of the receivers and managers as agents of the plaintiff was not made known to the defendant, if there had been a contract constituted by the exchange of correspondence referred to earlier, the legal effect would be that a contract had been entered into between the defendant as purchaser and the plaintiff as vendor (being the undisclosed, or possibly unnamed, principal of the receivers and managers).

37 3. Who had the power to sell

38 I am unable to accept the interpretation sought to be placed on cll 16, 17 and 18 of the debenture by defence counsel. The irrevocable appointment of the receivers and managers as attorney under cl 17 was made by M & L as owner, and not by the plaintiff as mortgagee. All this meant was that the directors of M & L would not be able to challenge the authority of the receivers and managers to deal with the assets subject to the charge created by the debenture. This clause could not in any way limit the power of sale of the plaintiff as equitable mortgagee, and cl 18 merely underlined that point. There was therefore no legal impediment to the plaintiff being the vendor in this case.

39 4. Non-disclosure

40 Although formerly pleaded, no submissions were made by plaintiff's counsel on this point. As this is a controversial topic, and it is not necessary for me to express any views in view of my earlier finding, I will leave this point for proper consideration by a court which has heard arguments from both sides.

41 5. No acceptance of repudiation

42 Although submissions were made by both counsel on this topic, I did not, with respect, find them adequate for me to come to a fully considered judgment on this issue. The topic is one fraught with difficulty, and a number of relevant cases were not considered by either counsel. Should it be necessary to canvass this issue in the Court of Appeal, I commend to counsel an article by Associate Professor Francis Dawson entitled *Metaphors and Anticipatory Breach of Contract* < 1981 > CLJ 83, especially at p 103, where footnote 62 contains the ominous words:

43 The cases are hopelessly divided on this issue.

44 6. Misrepresentation

45 The issue is whether, at the meeting of 1 September 1988, immediately before the defendant signed the offer letter, oral representations were made by Mr Mick Aw, one of the receivers and managers, that the annual rent for the property charged by JTC was about \$214,000. It is not in dispute that the actual rent was about \$327,000, which would be increased to \$393,000 after the sale of the property. The evidence indicates that the defendant only ascertained the true position from JTC after 1 September 1992.

46 In general, I accept the evidence of Mr Mick Aw and his former assistant, Mr M A Ansari, in preference to that of the defendant's managing director, Mr James Ang, and the defendant's solicitor, Mr Michael Ong. I do so for the following reasons.

47 (1) Mr Ansari kept an attendance note which was subsequently reviewed and corrected by Mr Aw. The figure appearing in this note as the rent represented by Mr Aw was "280,000+". This was not the original figure inserted by Mr Ansari (although it was something in that region) but the original figure was changed by Mr Aw to "\$280,000+" a few days after 1 September, when he reviewed Mr Ansari's draft note. Although the defence strongly challenged the authenticity of the attendance note, I accepted the evidence of Mr Aw and Mr Ansari on this point. It is entirely reasonable to believe that, when Mr Aw and Mr Ansari attended the meeting on 1 September 1988, at least one of them would have had a writing pad for the purpose of taking notes, since they had to report on the outcome of the meeting to the plaintiff, as well as give instructions to their solicitors. Since Mr Ansari was the junior of the two, it would have been natural for him to have fulfilled this function, particularly when Mr Aw would

have to do the negotiating. I would have been extremely surprised if neither Mr Aw nor Mr Ansari had kept any notes of the meeting. Furthermore, if the attendance note had been concocted, there would have been no need for Mr Aw and Mr Ansari to have given evidence as to their disagreement over the figure actually mentioned by Mr Aw; instead, I would have expected the note to have stated the actual rent of \$327,000, or something closer to it than what in fact appeared in the attendance note.

48 (2) The original defence pleaded that the representation was made to Mr Ang, Mr Ong and Mr Albert Heng (the property broker). Subsequently, the defence was amended to delete the reference to Mr Heng as one of the representees and, although Mr Heng was available outside the court room to give evidence on behalf of the defendants, defence counsel eventually decided not to call him, despite a warning from plaintiff's counsel that the latter would ask the court to draw an adverse inference from Mr Heng's non-appearance. From these circumstances, I can only infer that Mr Heng, although present at the meeting, would not have supported the defence version of what was said by Mr Aw.

49 (3) I was inclined to accept the evidence of Mr Ansari as the most reliable of the four witnesses. He was no longer associated with the receivers and managers' accounting firm, and I did not detect any excessive loyalty on his part to Mr Aw. I also had to bear in mind that, in the witness box, Mr Ong demonstrated that he was a little hard of hearing, which would make his evidence of what Mr Aw was alleged to have said a little less reliable.

50 (4) Mr Ang and Mr Ong both said that, when Mr Ong asked what the annual rent was, there was difficulty in supplying the figure, and Mr Ansari

went out of the room to look for the lease. He then returned, and said that the lease was not available, at which point Mr Aw said that the rent was about \$214,000. Given that Mr Aw and Mr Ansari were uncertain about the rent, which led to Mr Ansari's departure from the room, it is strange that Mr Aw, on Mr Ansari's return without the lease, was able to confirm the rent at \$214,000.

51 I am also unable to accept the evidence of Mr Ang and Mr Ong that they considered the existing annual rent important enough to make the difference between buying or not buying the property. Although both of them said that they were aware JTC would revise the rent as soon as the property was sold (without being aware of the exact formula), they nonetheless insisted that the existing rent was important as a basis upon which the revision was made. Mr Ang's reasoning was that the higher the base, the higher the revision. Mr Ang was not inexperienced in property matters in September 1988, and Mr Ong was a relatively senior conveyancing lawyer. It is quite possible that before inviting offers for purchase, the receivers and managers would have made some inquiries from JTC as to what the revised rent would be if the property were sold. What was surely important to Mr Ang was the ultimate rent that the defendant would have to pay, and the sensible question to have asked was whether Mr Aw knew what this would be. If Mr Aw had said that he had not made any inquiries on this point, and did not know the answer, Mr Ang might then have asked what the existing rent was as a general indication. No good reason was given why the first (and only) question asked about the rent related to the existing rent.

52 In fact, apparently unknown to all the parties at the meeting, the applicable formula adopted by JTC at the material time (as disclosed by a witness from JTC) was that, upon a sale, the annual rent would be revised to a

figure half-way between the current rent and the market rent, with a further 7.6% uplift if the date for revision of rent was due within three months. Since the parties did not know the actual formula, Mr Ang had no special reason for assuming that the revised rent would bear a direct correlation to the existing rent; it might equally well have been JTC's policy to revise it to full market rent or to a discounted figure from the market rent without reference to the current rent.

53 Furthermore, when (according to Mr Ang and Mr Ong) Mr Ong had asked for the lease agreement which could not be produced and Mr Aw then stated the rent figure, it must have been clear that Mr Aw's figure (if it was given at all at that stage) could not have been given with certainty, and it would be unsafe to rely on it as a basis for the proposed sale and purchase.

54 Above all, I considered it strange that a seasoned businessman such as Mr Ang, accompanied by an experienced lawyer, would be prepared to accept oral representations of important information if they were in fact to influence the defendant's decision to purchase the property. I did not accept his explanation that he relied on Mr Aw as a professional accountant, when Mr Aw had demonstrated his unfamiliarity with the question. If the information as to current rent was truly that important to Mr Ang, he should have:

55 (a) deferred signing the offer letter until the information as to rent had been verified; or

56 (b) asked for the insertion of the existing rent in the offer letter as a contractual warranty.

57 Mr Ang and Mr Ong said that they were waiting for the lease to come in the next one or two days so that the rent could be verified. However, Mr Ong admitted that he knew that the current rent was unlikely to be found in the actual building agreement, since the rent would have been revised one or more time since the date of the original building agreement.

58 I am therefore unable to accept the contention that, even if the alleged representation was made, the defendant was induced by it to sign the offer letter. In my judgment, whatever was said about the rent was treated as incidental information by the defendant, and was not critical to Mr Ang's decision to make the offer.

59 This finding is of course only of relevance if I am wrong on my first finding.

60 I dismiss the plaintiff's claim with costs.

Chua F A J
