

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1992] SGHC 37

Originating Summons No 1260 of 1991

Between

San Rafael Properties Pte Ltd

... Plaintiff

And

Mainland Realty Co Pte Ltd

... Defendant

GROUND OF DECISION

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San Rafael Properties Pte Ltd v Mainland Realty Co Pte Ltd

[1992] SGHC 37

Originating Summons No 1260 of 1991
Chan Sek Keong J
24 February 1992

1 **Judgment:**

2 **Cur Adv Vult**

3 This is an application by the plaintiffs for, inter alia,

4 (a) a declaration that they are released from their obligation under clause
6 of the Option dated 2 May 1989 to pay the sum of \$130,152.00 or any other
sum as development charge in respect of the properties known as Nos 38/A/B/C
Jervois Road, Singapore ("the property"), which the defendants had purchased
from the plaintiffs, and

5 (b) a declaration that the solicitors for the plaintiffs be released from
their undertaking given to the defendants to hold the said sum as stakeholders.

6 The material facts are as follows. By an Option dated 2 May 1989, the
plaintiffs granted to the defendants an option to purchase the property at the
price of \$2.1 million. Clause 6 of the Option provided as follows:

7 "The sale is with in-principle planning approval for the erection of a block of 3- storey Flats (Total 9 units) with a density on site of 35 persons, with basement car parks and swimming pool on the property as per the Planning Department's letter of 7th January 1989 (a copy of which is attached hereto). The Vendor hereby covenants to pay the development charges in connection with the said planning approval when same is due and payable." (emphasis added)

8 Prior to giving the Option, the plaintiffs had obtained planning permission from the competent authority to develop the property in accordance with certain plans they had submitted with the application. On 27 April 1989, the Planning Department sent to the plaintiffs a letter in these terms:

9 "PROPOSAL: ERECTION OF A BLOCK OF 4-STOREY FLATS (TOTAL 9 UNITS) WITH PROVISION FOR A SWIMMING POOL ON LOTS: 125-18 TS 24 AT: JERVOIS ROAD

10 I refer to your application for determination of development charge dated 18.1.89 (received on 24.1.89) for the above proposal.

11 2. I am to inform you that a Development Charge of \$130,152/- (Dollars: One hundred and thirty thousand, one hundred and fifty-two only) is payable for the proposal as determined in accordance with Rule 3 of The Planning (Development Charges) Rules, 1980.

12 3. The above development charge as determined based on plan (A/B) in PD/DC 88/0747-1 is valid until the written permission is issued.

13 4. A Development Charge Order requesting payment of the above development charge payable will be issued to you when your proposal plans are in order for release of the formal Written Permission."

14 On 10 August 1989, the defendants' solicitors wrote to the plaintiffs' solicitors that they had received a reply from the Chief Planner which stated that the in-principle planning approval would expire six months from 7 January 1989, and that accordingly the expiry date had passed. In view of clause 6 of the Option, the plaintiffs were required to produce documentary proof that the in-principle approval was still alive.

15 It would appear that the in-principle approval had lapsed, as on 8 August 1989, the solicitors for the plaintiffs had written to the defendants' solicitors as follows:

16 "We refer to the above matter.

17 We are instructed by our clients that it has been mutually agreed as follows:-

18 (1)that your client will put in fresh plans based on a density on site of 35 persons;

19 (2)that your client will appeal against the Development Charge of \$130,152.00;

20 (3)that if the appeal is successful and there is a reduction in the amount of the development charge, the difference will go to our clients;

21 (4)that if however there is an increase in the amount of the development charge, the difference will be paid by your client;

22 (5)that we will hold the sum of \$130,152.00 as stakeholders from the completion monies pending issue of the Development Charge Order towards payment of the development charge;

23 (6)that we will write in to the Chief Planner and request for more time to enable your client to put in fresh submission;

24 (7)that completion will take place on 15th August 1989 as scheduled.

25 Kindly confirm the above and let us know whether our proposed letter to the Chief Planner annexed hereto is in order before we forward same to him."

26 On 14 August 1989, the defendants' solicitors replied to the said letter. The relevant parts of the reply are as follows:

27 "We thank you for your letter dated 8th August 1989, fax message dated 10th August 1989, letter dated 10th August 1989 and two telex dated 11th August 1989 and your letter dated 11th August 1989. As regards your letter dated 8th August 1989, our clients do not agree to the contents of items (1) to (4) and (5) to (7). Item (5) is agreed.

28 We would point out that contractually, your clients are selling the property with in-principle planning approval with a site density of 35 persons and in respect of which your clients agreed to bear the development charges payable thereon. In the premises your clients are liable to bear such development charges as are levied whether they be levied at less than equal to or higher than \$130,152.00.

29 As regards the question of the appeal against the development charge order when the same be made, our clients have no objection to the same on condition that:-

30 1. The costs and expenses incurred or incidental to the said appeal shall be borne by your clients.

31 2. Our clients shall be under no duty, responsibility or liability whatsoever to your clients in respect of the said appeal which is to be undertaken by our clients at the request of your clients on a goodwill basis and our clients shall have the sole and absolute conduct of the said appeal.

32 3. You are to hold the sum of \$130,152.00 as stakeholders pending the issuance of the Development Charge Order and to pay the same to the competent authority forthwith upon the said Order being made.

33

34 As the sale and purchase is with in-principle planning approval, we are instructed that completion scheduled for tomorrow will only be proceeded with upon your clients producing on completion the Chief Planner's letter confirming that the said application has not been disapproved and that a reasonable extension of time to comply with the Chief Planner's requirements set out in his letter dated 28th April 1989.

35 In the premises, kindly confirm by return that your clients are able to complete tomorrow and that they accept our clients conditions as regards the issue of appeal."

36 It would appear that the defendants' conditions were met as the sale and purchase was completed on those terms.

37 On 16 September 1991, the solicitors for the plaintiffs wrote to the defendants' solicitors to inquire whether the development charge order had been issued.

38 On 19 October 1989, the defendants' solicitors replied to this query as follows:

39 "We thank you for your letter dated 16th September 1991.

40 We are instructed that the relevant Development Charge Order has not been issued.

41 In order to settle the matter as regards the retention sum, our clients propose that one half of the sum of \$130,152.00 be paid to our clients in full and final settlement of any claim by our clients for development charges that may be payable in respect of the above captioned properties.

42 We trust your clients would be agreeable to the aforesaid proposal and we look forward to your favourable response in the near future."

43 On 24 October 1991, the plaintiffs' solicitors replied to this letter. Although the reply of 24 October is not in evidence, it is clear from the reply dated 31 October 1991 from the defendants' solicitors that (a) by this time, the plaintiffs had discovered that the defendants had sold the property; (b) that they had rejected the defendants' offer of a 50% settlement; and (c) the solicitors had threatened to release the stake to the plaintiffs. The reply of 31 October 1991 read:

44 "We refer to your facsimile letter dated 24th October 1991.

45 Whilst our clients do not deny that the above captioned properties have been transferred to City Developments Limited, our clients do not agree to the release by you of the stakeholder sum of \$130,152.00 which sum is to be held by you as stakeholders upon the agreed terms.

46 We would categorically state that it was not a term of your stakeholding that the moneys be released in the event our clients transfer the said properties.

47 Take Notice that your will be in breach of the terms of your stakeholding if you release the said sum and our clients shall be at liberty to hold you liable for all losses and damages.

48 As the proposed release by you of the monies held by you as stakeholder is disputed we trust you will advise your clients accordingly and confirm by return that you shall continue to hold the sum of \$130,152.00 as stakeholder upon the agreed terms."

49 On 25 November 1991, the plaintiffs' solicitors wrote to the defendants' solicitors as follows:

50 "We refer to the above and to your letter of 31st October 1991. To enable us to advise our clients properly as regards the stakeholder sum of \$130,152.00, we would be obliged if you will let us have a copy of the Agreement for sale and Purchase entered into between your clients and City Developments Limited/Option To Purchase given by your clients to City Developments Limited pertaining to the above property and also let us know whether the sale thereof to City Developments Limited is subject to the in-principle planning

approval as laid out in the Option To Purchase dated 2nd May 1989 given by our clients to yours. If the said sale is not subject to the said condition, kindly let us know what other condition or conditions relating to the planning approval thereof was/were made.

51 Please revert to us within seven (7) days from the date hereof."

52 A reminder was sent on 3 December 1991 in these terms:

53 "We refer to our letter of 25th November 1991 upon which we did not have the courtesy of a reply.

54 In view of your silence, we are forced to take it that your clients have sold the properties on conditions which would have resulted in the release of our clients from their obligation under Clause 6 of the Option.

55 We take it also that you still refuse to agree to the release of the sum of \$130,152.00 held by us to our clients. We consider your proposal to release half of the said sum to your clients as unreasonable. Our clients are now forced to apply to Court for the release of the said sum.

56 We shall be obliged if you could let us know within 3 days from date hereof as to whether you have instructions to accept service of process failing which we have instructions to serve the same on your clients direct."

57 On 3 December 1991, the defendants' solicitors replied as follows:

58 "We refer to your letters dated 25th November 1991 and 3rd December 1991.

59 The terms of our clients subsequent sale of the subject properties are irrelevant so far as concerns our respective clients. The terms of the agreement between our respective clients as regards the stakeholder sum of \$130,152.00 are clear and unequivocal.

60 Accordingly, our clients do not agree to the release of the said sum to your clients.

61 Lastly, we would inform you that we have instructions to accept service of process on behalf of our clients."

62 In this application, the facts as set out above are not in dispute. Counsel for the plaintiffs has argued that the re-sale of the property by the defendants has resulted in the frustration of clause 6 of the Option and that the development charge is no longer a liability payable by the plaintiffs. He has referred to a passage from the judgment of Lord Reid in *DAVIS CONTRACTORS LTD v HAREHAM UDC* < 1956 > AC 697, at pp 721-722 which I think is not relevant to the nature of the dispute between the parties.

63 Counsel for the defendants argues, on the other hand, that the defendants' subsequent sale, ipso facto, does not discharge the plaintiffs' covenant under clause 6. He says that there must be evidence that the development is no longer payable, and that since the plaintiffs are unable to adduce such evidence, the application must fail. He also argues that since the in-principle approval was a benefit which could be passed on to City Developments Ltd, the factum of re-sale to them could have resulted in the same having been passed on. He says that the price paid by the defendants must be considered as the net purchase price of the property, i.e., the true price was the development charge of \$130,152.00 plus the stated consideration.

64 In my view, the true construction of clause 6 of the Option is that the covenant of the plaintiffs thereunder to pay the development charge was not unconditional. Otherwise, the sum of \$130,152.00 would have been deducted from the balance of the consideration paid on completion of the purchase. The covenant is conditional in two respects. First, it is referable to the development for which in-principle approval was given, and not any other approval. Secondly, it is payable only when "same is due and payable", i.e., when the property is developed in accordance with that in-principle approval. The covenant is a benefit in the hands of the defendants, and one which they may assign to a subsequent purchaser, subject however to the same conditions. Therefore, the only issue before me is whether the evidence before me is sufficient to prove that the development charge is no longer payable with respect to the in-principle that was granted to the plaintiffs with respect to the property.

65 The plaintiffs' case is that the development charge is no longer payable as the defendants have sold the property to another party. The defendants say, quite logically, that the mere fact of a subsequent sale does not mean that the development charge is no longer payable as the defendants could have sold the property to City Developments Ltd with the benefit of the plaintiffs' covenant in clause 6. Counsel says that the plaintiffs cannot prove this by inference from the subsequent sale.

66 The defendants have not filed an affidavit to disclose the material terms of their contract with City Developments Ltd to show whether they have passed the benefit of the covenant to the new owners of the property. Counsel says that this is unnecessary as the defendants do not dispute the facts relied on by the plaintiffs. The defendants have not even asserted that the development charge is or may still be payable. They simply put the plaintiffs to proof of their case.

67 The defence of the defendants is therefore based entirely on the logic of their counsel's argument. The argument is that it cannot validly be deduced from the re-sale of the property that the development charge is no longer payable or that defendants are no longer liable to pay the same.

68 It is not disputed that at the date of hearing, the development charge is not due yet. Otherwise, the defendants would have surely demanded payment of the stake from the stakeholders. So far as the defendants are concerned, they can never be directly liable to pay the development charge as they have sold the property. That leaves only an indirect liability through City Developments Ltd, provided that they have a claim against the defendants in respect of the development charge, if and when the same is payable by them, or even their successors in title. On these matters, the defendants are unable to adduce any evidence and the plaintiffs will not do so.

69 The standard of proof is only that on a balance of probabilities. Section 3 of the Evidence Act provides that "A fact is said to be proved when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act on the supposition that it exists. In my view, the plaintiffs have proved that the development charge will never become due. The circumstances of this case are such that no prudent man ought to suppose it will become payable. The defendants made an open offer on 19 October 1991 to accept 50% of the amount of the development charge in full and final settlement of any claim by the defendants to such charge as may be payable. The offer made no commercial sense if there was any prospect of the development charge becoming due. Whether or not it would ever become due and payable was a fact within the knowledge of the defendants as they must know the terms of which they had sold the property to City Developments Ltd. The defendants were not

at risk as to the ability of the plaintiffs to pay, and so there was no risk in that respect. However, it made good commercial sense for them to accept 50% of the stake if they had no expectation whatever of at least 50% the development charge being payable at all.

70 It is a short step from this for the Court to infer that no part of the development charge would be payable at all. It is well to remember from time to time Justice Holmes' aphorism: "The life of the law has not been logic: it has been experience." Section 116 of the Evidence Act encapsulates the pith of Justice Holmes' statement, and Illustration (S) thereto illustrates it well. It says "The court may presume that evidence which could be and is not produced would be unfavourable to the person who withholds it." In the circumstances of this case, I make the presumption in the case of the other 50% liability. The defendants are property developers, not altruists.

71 Counsel for the defendants has also contended that the plaintiffs are not entitled to the second declaration as the solicitors are not their agents but stakeholders. He cites *SORRELL v FINCH* < 1977 > AC 728. I do not understand the point of this argument unless it is that the stakeholder is the proper party to seek this declaratory order, and not the plaintiffs. In my view, this is another technical argument which is misdirected. If the first declaration is granted, it must follow that the moneys held by the stakeholders is no longer a stake. In that event, the defendants have no locus standi with respect to the second declaration and cannot object to it.

72 For the above reasons, I grant the declarations (1) and (2) as prayed for by the plaintiffs. The defendants will pay the plaintiffs' costs of the application.

Chan Sek Keong J

Giam Chin Toon with Alice Seah (Seah & Co) for the plaintiffs
Laurence Wee (Wee Ramayah & Partners) for the defendants
