IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1996] SGHC 28

OS 817/1994

Between

Lee Hin Realty Pte Ltd

… *Plaintiff*

And

Lee Tah Wee David

… *Defendant*

GROUNDS OF DECISION

Contract — Remedies — Damages

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Lee Hin Realty Pte Ltd v Lee Tah Wee David

[1996] SGHC 28

OS 817/1994
Lim Teong Qwee JC
14 February 1996

1 **Judgment:**

2 **LIM TEONG QWEE JC**

3 On 13 January 1995 I dismissed the plaintiff`s claim for a declaration that the defendant had wrongfully repudiated an agreement for saleof the land at lot 235-2 mk 17 by the defendant to the plaintiff and for the return of the deposit paid and for other reliefs. I held that it was the plaintiff which had wrongfully repudiated the contract in not complying with the terms of the notice to complete within the time limited time being of the essence of the contract. The defendant counterclaimed a declaration that the deposit had been forfeited to him, damages and other reliefs. After hearing further arguments on 20 July 1995 I gave judgment for the defendant for damages in the amount of $540,000 less the costs which would have been payable by him to his solicitors in and about his purchase of the property from the original vendor and his sale to the plaintiff.

4 The agreement for sale is subject to The Singapore Law Society`s Conditions of Sale 1981 and condition 29(4) provides:

> *If the purchaser does not comply with the terms of an effective notice served by the vendor under this condition, then -*
>
> *...*
>
> (b) Without prejudice to any other rights or remedies available to him at law or in equity, the vendor may -
>
> *(i) forfeit and retain for his own benefit the deposit paid by the Purchaser, and*
>
> ... .

5 The defendant claimed his loss of profit by way of damages. He agreed to buy the property from Realworth Development Pte Ltd for $11m and agreed to sell it to the plaintiff for $11.6m. He received from the plaintiff a deposit of $1,160,000 (including $116,000 paid for the option) out of which he paid to Realworth Development a deposit of $1,100,000 (including $110,000 paid for the option) which Realworth Development forfeited so that the defendant stood to gain $60,000 if he in turn forfeited the deposit paid by the plaintiff. If the agreement for sale to the plaintiff had been completed he would have made a profit of $600,000. After allowing for the gain of $60,000 he claimed the loss of profit of $540,000.

6 Mr Ramakrishnan said that the defendant had elected to forfeit the deposit and was accordingly not entitled to claim any other sum by way of damages notwithstanding condition 29(4)(b) of the conditions of sale. He referred to ***Talley & Anor v Wolsey-Neech*** (1979) 38 P & CR 45. The vendors forfeited the deposit and claimed damages for breach of contract by the purchaser in failing to complete his purchase. The agreement was subject to condition 19(4) which is in pari materia with condition 29(4) of the conditions of sale. The deposit which the vendors had forfeited exceeded the loss on resale of the property and incidental expenses provided under condition 19(4) and damages under these heads were not allowed but the court allowed by way of

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damages interest on the deposit until it was forfeited and on the balance of the purchase price also down to that date. The purchaser appealed. In allowing the appeal Browne LJ said at p 53:

> *... the plaintiffs, having chosen to exercise their rights and remedies under condition 19(4)(c), are only entitled to recover the `liquidated damages` defined by that condition, and, accordingly, this appeal must succeed.*

7 I respectfully agree. A vendor can choose between various rights and remedies when the purchaser has made default in failing to comply with the terms of an effective notice served by the vendor under condition 29 of the conditions of salebut if he elects to exercise his rights under condition 29(4)(b) then he is not entitled to recover any loss of profit or any other loss or expense by way of damages other than that provided for in condition 29(4). The opening words in condition 29(4)(b) do not give to the vendor any right to damages for the same breach of contract, ie the failure to comply with the terms of an effective notice in addition to those defined in condition 29(4). If the defendant had forfeited the deposit in exercise of his right under condition 29(4)(b) then he would not be entitled to claim loss of profit as well.

8 Mr Ramakrishnan did not direct my attention to any evidence of the defendant having forfeited the deposit. The affidavits say nothing about his having done so. However, there is a letter from his solicitors to the plaintiff`s solicitors dated 2 July 1994 which says:

> *Under cl 29(4) ... [he] is* ***entitled to and he shall forfeit*** *and retain for his own benefit the 10% deposit paid by your clients. This is, of course, without prejudice to any other rights or remedies available to him at law or equity. [Emphasis added.]*

9 On the same day the defendant`s solicitors received a letter from Realworth Development`s solicitors which says:

> *[O]ur clients have pursuant to the conditions of sale forfeited and retained for their own benefit the 10% deposit paid by your clients.*

10 That was what in all probability prompted the defendant`s solicitors to write their letter of 2 July 1994 which was the second of two letters from them that day. I think if they had meant that their client ***was*** forfeiting the deposit they would have said so and not used the expression `shall forfeit` and qualifying it with the statement that it was without prejudice to any other rights or remedies available to him. The plaintiff`s solicitors responded with a simple denial that the defendant was entitled to forfeit the deposit. There was no claim for it to be returned. Nothing more was said about the deposit. I think the defendant`s solicitors meant by their letter first to claim a right to forfeit and secondly to intimate an intention to exercise that right and the plaintiff`s solicitors understood them to be saying precisely that and were content merely to deny that the defendant had such right. I find that the defendant had not elected to forfeit the deposit and in my judgment he is entitled to recover damages other than forfeiture of the deposit.

11 Mr Rajah submitted that the plaintiff knew of the profit the defendant would make if the contract were completed. Indeed there can be no dispute about that. The defendant obtained an option to purchase the property for $11m and the same day granted the plaintiff an option to purchase it for $11.6m. By cl 1 of the terms of sale in the plaintiff`s option the sale was subject to the terms and conditions contained in the defendant`s option. The parties had agreed that upon exercise of the plaintiff`s option the plaintiff would give a cheque for the balance of the deposit to the defendant`s solicitors and the defendant`s solicitors would undertake to give a cheque for the balance of the deposit in the sale by Realworth Development to the defendant and the defendant would exercise his option to purchase. The defendant was to receive only the difference. This was

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confirmed by letter from the plaintiff`s solicitors. I have referred to this letter and quoted from it in my grounds of judgment on the dismissal of the plaintiff`s claim. If the contract between the parties were completed the contract between the defendant and Realworth Development would also be completed at the same time and thedefendant would make a profit of $600,000. I was referred to ***Seven Seas Properties Ltd v Al-Essa & Anor (No 2)*** [1993] 3 All ER 577 where the defendants agreed to sell to the plaintiffs and the plaintiffs agreed to sell to a sub-purchaser but at the time when the contract between the plaintiffs and the defendants was made it was not known to the defendants that the plaintiffs intended to on-sell the properties. On learning of the sub-sale the defendants refused to proceed with the sale and the plaintiffs claimed damages for breach. Gavin Lightman QC (sitting as a deputy judge of the High Court) said at p 582:

> *[A] plaintiff is entitled to recover by way of damages all loss which at the date of contract the defaulting party was on notice might be occasioned by the breach such that he may fairly be held, in entering into his contract, to have accepted the risk.*

12 Lord Upjohn in ***Koufos v C Czarnikow Ltd*** [1969] 1 AC 350 at p 421 put it this way:

> *Damages should be such as in the special circumstances of the case known to both parties may be reasonably supposed to have been in the contemplation of the parties, as the result of a breach, assuming the parties to have applied their minds to the contingency of there being such a breach.*

13 I was referred to ***Goffin v Houlder*** (1920) 90 LJ Ch 488 where the defendant sold to the plaintiff and the plaintiff sold to a sub-purchaser at a higher price and on the defendant`s breach the plaintiff recovered damages in the amount of the profit that was lost. Eve J said at p 489:

> *It is not immaterial to note that the defendant appreciated that the plaintiff did not contemplate purchasing the house for herself, but obtained the option with the intention of disposing of the property to someone else at a profit.*

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14 The actual decision, however, was that the value of the property at the relevant date was the price at which it was sold to the sub-purchaser and the case is not really helpful. The measure of damages was the difference between the contract price and the market price which was higher and not the loss of profit, which did not depend on whether the market price went up or down. Mr Rajah also referred to the sale of goods case of ***Trans Trust SPRL v Danubian Trading Co Ltd*** [1952] 2 QB 297 where the defendants agreed to buy from the plaintiffs and the plaintiffs agreed to buy from the original seller. The plaintiffs were required to provide a confirmed letter of credit available to the original seller but both the plaintiffs and the defendants depended on the buyer to whom the defendants had agreed to sell to provide the letter of credit. In the event the letter of credit was not provided and the defendants repudiated the contract. The plaintiffs claimed the loss of profit as damages. Denning LJ said at p 306:

> *The foreseeable loss was the loss of profit, no matter whether the market price of the goods went up or down. It is, therefore, the proper measure of damages.*

15 He also referred to ***Wadsworth v Lydall*** [1981] 2 All ER 401 which was concerned with a breach of contract to pay money.

16 Mr Ramakrishnan submitted that it offended justice and was unfair to allow loss of profit to be recovered as damages. He also submitted that the deposit forfeited by the defendant should be taken into account. I have found that the deposit was not forfeited but I have also dismissed the plaintiff`s claim for the deposit to be refunded.

17 In **Hong Fok Realty Pte Ltd v Bima Investment Pte Ltd and another appeal** [1993] 1 SLR 73 ,Warren LH Khoo J (delivering the judgment of the Court of Appeal) said at p 80:

> *The starting point is that the plaintiff is entitled to be placed, so far as money can do it, in the same position as he would have been in had the contract been performed.*

18 This is not unlike para (1) of the propositions of Asquith LJ in ***Victoria Laundry (Windsor) Ltd v Newman Industries Ltd (Coulson & Co Ltd, third parties)*** [1949] 2 KB 528 at p 539. In para (6) he said at p 540:

> *Nor, finally, to make a particular loss recoverable, need it be proved that upon a given state of knowledge the defendant could, as a reasonable man, foresee that a breach must necessarily result in that loss. It is enough if he could foresee it was likely so to result.*

19 I am not sure that it is helpful to say that a defendant is liable for a loss `if he could foresee` that it was likely to result. I think that in the circumstances of the case before me it is sufficient to have regard to the second branch of the `rule` in ***Hadley v Baxendale*** (1854) 9 Exch 341. The damages should be `such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it` and I would apply it. See also ***East Ham Corp v Bernard Sunley & Sons Ltd*** [1966] AC 406 and see in particular the speech of Lord Reid in ***Koufos v C Czarnikow Ltd*** .

20 There can be no doubt that it must have been in the contemplation that if the plaintiff failed to complete the purchase the probable result was the loss of profit of $600,000. Mr Ramakrishnan submitted that the defendant had himself to blame for the loss. His argument is that he should have completed his purchase notwithstanding the plaintiff`s failure to do so. I do not agree that the loss is too remote on this account. While there were two distinct agreements for sale and purchase that between the plaintiff and the defendant was made `subject to the terms and conditions contained in the option dated 17 March 1994 from [Realworth Development] to the [defendant]`. The terms and conditions

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included the payment of the balance of the price on completion and the last day for completion of the defendant`s purchase was 9 June 1994. The last day for completion of the plaintiff`s purchase was 8 June 1994. The deposit was to be paid by the plaintiff and out of the amount paid by the plaintiff the defendant would pay the deposit payable by him to the original vendor. I think that the parties contemplated that completion of both agreements would take place simultaneously and that the completion money would be provided by the plaintiff and I find accordingly. It was consistent with what subsequent to the making of the agreements the parties attempted to do. The plaintiff`s solicitors prepared the transfer in the form appropriate for a transfer through an intermediate purchaser. Realworth Development and the defendant were described as the transferor and the original purchaser and the plaintiff was described as the transferee. The completion account and the request for separate bank orders showed that the plaintiff would provide the completion money and there was no objection from the plaintiff. Even if the defendant had the resources and could find the completion money to complete his purchase his failure to do so did not render the loss too remote. In my judgment the proper measure of damages in this case is the loss of profit. That is $600,000. The plaintiff paid a deposit but part of it was paid as a deposit to Realworth Development which has forfeited it. Only $54,000 is left in the defendant`s hands. $116,000 was earlier paid for the option but of that $110,000 was paid to Realworth Development and of that only $6,000 is left and that is also in the defendant`s hands. So the defendant has in his hands $60,000 and I have dismissed the plaintiff`s claim to a refund of any part of it. I would take that into account and reduce the sum to be allowed to $540,000. If the plaintiff had completed the purchase the defendant would have had to pay legal fees in respect of his purchase and the sub-sale. The sum to be allowed should further be reduced by the amount of legal fees and I accordingly gave judgment for $540,000 less that amount of

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legal fees and I allowed interest from 9 June 1994 the date when the sale and purchase ought to have been completed down to the date of the judgment at 6% pa.

21 ***Plaintiff`s claim dismissed; defendant`s counterclaim allowed.***

Lim Teong Qwee JC

V Ramakrishnan (V Ramakrishnan & Co) for the plaintiff
VK Rajah, Gopal Perumal and C Trinel (Gopal & Tan) for the defendants

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