IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1998] SGHC 17

OS 1057/1997

Between

Promenade Properties Pte Ltd

… *Plaintiff*

And

Gabriel Peter
Another

… *Defendant*

GROUNDS OF DECISION

Contract — Contractual terms; Legal Profession — Client account; Legal Profession — Duties

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Promenade Properties Pte Ltd v Gabriel Peter and Another

[1998] SGHC 17

OS 1057/1997
Choo Han Teck JC
16 January 1998

1 **Judgment:**

2 **CHOO HAN TECK JC**

3 Cur Adv Vult

4 The plaintiff is a company incorporated in Singapore. The first and second defendants were at all material times advocates and solicitors practising as partners in the firm known as Gabriel Peter & Partners (GP). On 14 September 1996 the shareholders of the plaintiff resolved to sell the plaintiff`s property known as the `Promenade`, and that GP be appointed to act jointly with another law firm, Wee Ramayah & Partners (WR), for the plaintiff in the sale. GP was notified of its appointment by two letters, one of which was by Asok Kumar signing as a director of the plaintiff, and the other from WR to GP. Both letters were dated 16 September 1996. Asok Kumar`s letter stated that,

> *[p]ursuant to the shareholders resolution dated 14 September 1996, we hereby confirm your appointment as solicitor of the company, jointly and severally with Wee Ramayah & Partners in the proposed sale of the property known as `The Promenade`. Please proceed to act on behalf of the company.*

5 A dual appointment in such cases is unusual. It was not made known in the affidavits as to how this joint appointment was to work, or why it was even necessary other than that the appointment was made pursuant to a shareholders` resolution. WR`s letter was in similar terms and asked, inter alia, for GP`s acceptance of the appointment.

6 2.GP wrote directly to the plaintiff by letter dated 18 September 1996 signed by the second defendant. That letter accepted the appointment to act for the plaintiff on the condition that they were not required to disclose particulars of the negotiations and the proposed buyer until the sale agreement has been signed. It also expressed GP`s puzzlement over their appointment jointly and severally with WR and asked the plaintiff for an explanation.

7 3.By letter dated 20 September 1996 Raj Kumar and Asok Kumar, who were at all material times directors of the plaintiff, wrote to GP informing the firm that they were directors of the plaintiff, and referred to GP`s condition that they do not disclose particulars of the negotiation and the purchaser as absurd and unacceptable. The defendants maintain in these proceedings that that was not a letter of the plaintiff, but written by the Kumar brothers in their personal capacity. That letter was not written on the letterhead of the plaintiff but nonetheless, GP responded on 25 September 1996 to the plaintiff accepting their appointment and withdrew the condition they imposed in their letter of 18 September. The plaintiff was also reminded to explain why GP was appointed jointly and severally with WR. In this letter, GP also stated that their fee would be 0.2% of the sale price, a claim later disputed by the plaintiff but is of no significance in this summons.

8 4.A sale and purchase agreement (the sale agreement) dated 25 September 1996 was executed between the plaintiff as vendor and Hallgaden

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Investment Pte Ltd (now known as Orchard 300 Pte Ltd) as purchaser. The purchase price was $270,865,000. In accordance with the terms of the sale agreement, $27,086,500 (being 10% of the purchase price) was deposited into a fixed deposit account. Gabriel Peter from GP and Tan Choo Leng from Lee & Lee (solicitors for the purchaser) were the joint signatories to the account.

9 5.WR wrote to GP by letter dated 9 October 1996 requesting for copies of various records relating to the sale. In the penultimate paragraph they asked GP to `confirm to our mutual clients that the interest earned on the said 10% deposit is for the account of our mutual clients and shall be paid to them on each maturity date of the fixed deposit, which is presumably placed on a monthly basis with an automatic renewal of the principal amount.`

10 6.GP replied on 17 October 1996 and, in reference to the question of the 10% deposit, merely stated that they were `unable to confirm the same`. Consequently, on 5 November 1996 the plaintiff wrote a letter to GP signed by four of seven directors. The signatories were the two Kumar brothers Raj and Asok, Timothy Chia Chee Ming and Wee Chong Jin. By this letter the plaintiff sought to clarify some matters relating to the obligations of GP and WR under the joint appointment, a matter which ought to have been made clear at the outset but was not. The last two paragraphs are important. They state:

> *In particular we are concerned with respect to the status of the 10% deposit paid by the purchaser to your firm as stakeholders. We require that the interest on this amount be held for the benefit of the vendor ie Promenade Properties Pte Ltd. Please confirm your acceptance.*
>
> *If you are not prepared to act on any of the above terms please discharge yourself.*

11 This letter is being challenged by the defendants as ultra vires.

12 7.Two more letters were sent to GP, namely on 10 and 17 December 1996. These two letters were signed by Asok Kumar as director of the plaintiff. They reiterated the demand for the interest earned on the 10% deposit. GP wrote to Asok Kumar in reply on 18 December 1996 stating, inter alia, that it (GP) was entitled to the interest as stakeholders, and questioned Asok Kumar`s authority to write on behalf of the directors of the plaintiff.

13 8.The sale was due for completion on 15 January 1997 and a draft letter was sent by GP to Lee & Lee for Tan Choo Leng to withdraw as a co-signatory to the fixed deposit account, but the two Kumar brothers and Tan Yong Nang (an alternate director to Timothy Chia) wrote on behalf of the plaintiff to object to Tan Choo Leng`s withdrawal and also instructed GP not to give any directions in respect of the sale or the collection of payment of the purchase price without instructions from the plaintiff.

14 9.On 10 January 1997 four of seven directors, namely the two Kumar brothers, Timothy Chia and Wee Chong Jin signed a directors` resolution to resolve, inter alia, that steps be taken to transfer the stakeholdership from GP to WR and recover the interest earned thus far from GP. This summons was consequently taken by the plaintiff for a declaration that, inter alia, the interest on the stakeholding money belongs to the plaintiff.

15 10.The main ground of the plaintiff`s claim is that there was an agreement between GP and themselves that the interest held by GP belongs to the plaintiff. It was not disputed by counsel, however, that in the absence of such agreement, GP as stakeholder, is entitled to the interest by virtue of a Law Society of Singapore`s practice direction, stated in a question-and-answer form in para 39(3) of its rulings and replies. The ruling states as follows:

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> *Question as to who should be entitled to the interest on moneys held by a solicitor as stakeholder was entirely a matter of contract. If contract is silent then solicitors can retain interest for his own benefit.*

16 11.In my judgment, this practice rule of the Law Society will shelter a solicitor from disciplinary sanctions if he retains the interest for himself, but strictly, it does not bind the client. It does, however, reflect the common law position. In **Potters v Loppert** [1973] Ch 399 the court considered at length the position of a stakeholder. Pennycuick VC accepted that if the stakeholder was a trustee of the money he would have to account for the profit. He concluded however, that in such cases, the stakeholder was not a trustee, but held the money purely on a contractual basis. After defining the term `contract deposit` as the deposit a party pays to a stakeholder after the contract for the sale of property had been concluded, he held:

> *I propose in the first place, to consider the law in relation to contract deposits. Looking at the position apart from authority, one might perhaps at first sight rather expect that where any property is placed in medio in the hands of a third party to await an event as between two other parties the third party receives that property as trustee, and that the property and the investments for the time being representing it represent the trust estate. Where the property is something other than money - for example, an investment - that must, in the nature of things, almost certainly be the position. But where the property is money - that is, cash or a cheque resulting in a bank credit - this is by no means necessarily so. Certainly the money may be paid to the third party as trustee, but equally it may be paid to him as principal upon a contractual or quasi-contractual obligation to pay the like sum to one or other of the parties according to the event. It must depend upon the intention of the parties, to be derived from all the circumstances, including any written documents, in which capacity the third party receives the money (p 472).*

17 12.The learned judge, relying on **Harington v Hoggart** [1830] 1 B & Ad 577 then held that apart from an agreement to the contrary a contract deposit paid to a stakeholder is not paid to him as trustee and he is therefore not

accountable for the profit. Thus, the Law Society`s rule on point is well supported at common law.

18 13.From the affidavits and documents exhibited, I can find no agreement that the interest on the stakeholding money is to go to any specific party. The relevant clause in the sale agreement states as follows:

> 2 Upon signing of this agreement, the purchaser shall simultaneously deliver to the vendor a cashier`s order for the sum of Singapore dollars twenty-seven million eighty-six thousand five hundred (S$27,086,500) being the equivalent of ten per cent (10%) of the purchase price (hereinafter referred to as `the deposit`) issued in the name of one of the vendor`s solicitors, Messrs Gabriel Peter & Partners to be held by them as stakeholders and shall be placed on fixed deposit pending completion of the sale and purchase herein. Provided that a solicitors each from Messrs Gabriel Peter & Partners and Messrs Lee & Lee shall be signatories to the moneys held in stakeholding and provided further that the said signatories shall act in accordance with the joint instructions of Messrs Gabriel Peter & Partners and Messrs Wee, Ramayah & Partners.

19 14.The above provides all the terms in respect of the stakeholding. There is no provision as to which of the three parties is entitled to the interest. Although it was not raised in submission, I have, however, considered whether the direction that the deposit be placed in a fixed deposit account is of any significance in this case. I find that it does not. Nothing more or further should be implied.

20 15.Notwithstanding the absence of an express term, the plaintiff subsequently sought unsuccessfully to extract an agreement from GP that it was holding the interest for the plaintiff`s benefit. Thus, as an alternative to the ostensibly weak argument based on an alleged prior agreement, counsel for the plaintiff sought to rely on the letter of 5 November 1996 (which stated that if GP refused to agree they should discharge themselves) as having created an

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agreement as of that date. Counsel argued that since GP did not discharge itself as solicitors for the plaintiff it must be deemed to have agreed to hold the interest on trust for the plaintiff.

21 16.A stakeholder receives the deposit of the stake for payer and payee pending the outcome of a certain event. The stakeholder is neither an agent nor trustee of either party. As the Court of Appeal held in **Thomson Hill Pte Ltd v Chang Erh** [1992] 2 SLR 769 , at p 774,

> *There is no need to further label the stakeholder as a trustee or agent. The position of the stakeholder is no doubt similar to that of a trustee, but they are not identical.*

22 In a sale and purchase of property generally, and in this case particularly, the stakeholding money will have to be refunded to the purchaser if the sale is aborted, but will be paid over to the vendor if it is completed (subject to any agreement to the contrary). Until then, neither party may claim it. The obligations of the stakeholder are regarded as purely contractual. The consensus must be formed before or at the time of the contract between the vendor, purchaser and the stakeholder. Each has an interest in the deposit. The vendor wishing to have it if the sale is completed; the purchaser wishing to recover it otherwise, and the stakeholder has to ensure that he retains the money securely so that it may be disbursed in due course to the party entitled to it. The trio may negotiate among themselves as to how the stake is to be held and if it is to be placed in an interest bearing account (as it usually is), who should be entitled to the interest. The tripartite nature of a stakeholding agreement is recognised in **Rockeagle Ltd v Alsop Wilkinson** [1992] Ch 47 where the English Court of Appeal held that in such a contract it will be implied that the vendor and purchaser are entitled to change the stakeholder if they both agree. That decision underlines the importance of the joint interest of the vendor and the purchaser

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in the stake until the event which required the stakeholding comes to pass. It follows that neither the vendor nor purchaser may unilaterally amend the contract. If the stakeholder subsequently agrees with the vendor to hold the interest for him, the purchaser is entitled to object on the ground that had that been discussed at the time of the contract he too would have claimed the interest or part of it. The parties might then have agreed to leave it as it was, or split the interest, either between vendor and purchaser, or in three parts by including the stakeholder. As Parke J said in ***Harington v Hoggart*** ,

> *One party was not competent by himself to alter the contract on which the money was placed in the defendant`s hands. If the plaintiff wished to vary that contract and make the fund productive to either party, according as one or other would be entitled to receive the money, whether the purchase was completed or not - if he had the intention of altering the terms of the contract, meaning to take the fund, whether it was diminished or increased at the end of the time - it was his duty to procure the consent of the other party (p 589).*

23 17.In his affidavit of 14 January 1998 Asok Kumar deposed at para 21 that,

> *the plaintiffs were also of the view that the issue of who was entitled to the Interest was a matter between the vendor plaintiffs and the stakeholder defendants and is clearly separate from the agreement of appointment of the stakeholder which is an agreement between the vendor plaintiffs and the purchasers.*

24 This was obviously a misunderstanding of the stakeholding agreement. Who is entitled to the interest is a matter between the three parties to the stakeholding and not just the vendor and the stakeholder alone. To do so is to assume that the vendor will receive the benefit of the stake in any event which, of course, is not necessarily the case.

25 18.Counsel for the plaintiff further submitted that since GP did not discharge itself as the vendor`s jointly appointed solicitors, it must be deemed

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to have accepted the vendor`s terms. This argument assumes that the appointment of GP as stakeholders under the sale agreement was a concurrent and inseparable appointment of GP as the vendor`s solicitors. That is also an erroneous assumption. There is also no evidence that GP was appointed as stakeholder in this case strictly as agent for the vendor. On the contrary, the circumstances indicate that GP was appointed as stakeholder for the vendor and purchaser. See ***Thomson Hill Pte Ltd v Chang Erh*** where the distinction between a person holding money as another`s agent and as stakeholder was emphasized. The plaintiff may complain (elsewhere) that GP continued to act as its solicitors notwithstanding that it had, under the circumstances (a point disputed by GP), being discharged as the plaintiff`s solicitors. Even if that was the case, it, did not, however, affect GP`s appointment and obligations as stakeholder. Similarly, even if GP had breached the Solicitors` Accounts Rules and commingled clients` money (the stake) with its own (the interest), as counsel for the plaintiff submitted, that can only give rise to a separate complaint elsewhere, but does not in itself give the vendor a right to the money. In any event, if there was a commingling of funds, it means that the interest belongs to the solicitors not the vendor and the plaintiff would have no right to it anyway. In his affidavit of 14 January 1998 Asok Kumar deposed at para 23 that the plaintiff would have changed the stakeholder or dismissed GP if it had known that GP was going to retain the interest. This statement belies the truth that at the time the stakeholding agreement was made there was no consensus as to who should retain the interest. If the plaintiff proceeded on the basis of its own mistaken belief, for whatever reason, that is no ground to justify the relief claimed. Even if it had discovered the mistake before completion, it could only change the stakeholder with the consent of the purchaser.

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26 19.It may be that the plaintiff would have insisted in writing that the interest should be paid over to it upon completion of the sale if it had been properly advised, but that is a separate issue and beyond the scope of this summons. However, it may be futile to pursue that line against GP since the latter was not the only firm of solicitors acting for the plaintiff in the transaction. Without deliberating on whether there is any duty on the part of a solicitor to advise his client on the question of who gets the interest in a stakeholder`s account, I see no reason why in future, a simple clause which would require no more than five minutes to draw up and explained to the client should not be made a standard feature of a stakeholding contract. Subject to modifications as the parties may desire, it would be sufficient to include a statement that the interest from the fixed deposit account shall be paid over to the stakeholder in any event as his fee (or in addition to his fee); or to the vendor if the transaction is completed, but to the purchaser if it was aborted; or be shared in equal parts by the trio. Such a clause will avert the kind of litigation exemplified in this case.

27 20.Counsel for GP submitted that the letter of 5 November 1996 from the plaintiff was ultra vires because it was in breach of a deed of covenant which required that a director of Probo Pacific Ltd (PPL) be included in the plaintiff`s board of directors to form a quorum. That letter was not signed by any director of PPL. PPL was involved with the plaintiff as well as its parent company in certain financial dealings which are of no concern in this action. The said deed of covenant, however, was not put in evidence and for the reasons I have given above, it was unnecessary for me to determine the validity of the 5 November 1996 letter.

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28 21.For the reasons above, I find that the plaintiff is not entitled to the interest earned from the stakeholding money, and its claim is accordingly, dismissed. I will hear parties on the question of costs at a later date.

Choo Han Teck JC

Lawrence Quahe (Harry Elias & Partners) for the plaintiff
Suresh Damodara and Dixon Ng (Gabriel Peter & Partners) for the defendants
Laurence John Wee (Wee Ramayah & Partners) on watching brief for Royal Pte Ltd

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