IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1998] SGHC 213

DA 60/1996

Between

ERA Realty Network Pte Ltd

… Plaintiff

And

Puspha Rajaram Lakhiani
Another

… Defendant

GROUNDS OF DECISION

Agency — Estate agents

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ERA Realty Network Pte Ltd v Puspha Rajaram Lakhiani and Another

[1998] SGHC 213

DA 60/1996
Tay Yong Kwang JC
27 June 1998

1 **Judgment:**

2 **TAY YONG KWANG JC**

3 This is an appeal by the plaintiffs against the decision of the learned District Judge Laura Lau who dismissed the plaintiffs` claim for a commission with costs and awarded judgment to the defendants on their counterclaim for certain declarations.

4 2.The plaintiffs are property consultants and real estate agents. The defendants were the owners of an apartment known as 6 Cuscaden Walk [num]02-00 Cuscaden Tower Singapore 1024, which had an area of some 350 sq m.

5 3.On or about 18 March 1995, the defendants, through their authorised representative, Kersy Bhesania, orally agreed with the plaintiffs` representative, Shabana Abedeen Tyebally, to appoint the plaintiffs as one of their agents in the proposed sale of the abovesaid property. In this non-exclusive agency, it was agreed that the defendants would pay the plaintiffs a commission of 1% of the

selling price of the property if a purchaser was procured at a price acceptable to the defendants. This oral agreement was evidenced by a subsequent letter dated 24 March 1995 signed by the first defendant. It was not disputed that the first defendant was acting with the authority of the second defendant as well.

6 4.On 24 March 1995, Shabana found a purchaser, Asma Abdulkader Tyebally, who agreed to purchase the property for $3.6m. That same day, the defendants granted an option to Asma `and/or nominee` to purchase the property subject to tenancy. Again, this document was signed by the first defendant on her own behalf as well as on behalf of the second defendant.

7 5.Prior to the first defendant signing the option, Shabana informed her that Asma was her sister-in-law. Asma was also the executive officer of Marshall Realty Pte Ltd, a property investment company. Shabana`s husband, Abedeen Abdulkader Tyebally, was at all material times a director of the company. The option was eventually exercised by Marshall Realty Pte Ltd. Shabana`s husband and the company will feature again later in this judgment. At the trial in the district court, the defendants disputed that Shabana had informed them that she and Asma were related to each other. The learned District Judge found that Shabana had made that disclosure to the first defendant either directly or through Kersy and this finding has not been impugned.

8 6.The sale and purchase of the property was completed on or about 30 June 1995 and the commission of 1% (ie $36,000) became due to the plaintiffs. The defendants, however, refused to pay the plaintiffs the agreed commission on the following two grounds:

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> (1) the plaintiffs breached their fiduciary duties to the defendants by introducing a purchaser who was related to their representative, Shabana, without disclosing this relationship to the defendants. The plaintiffs had also failed to disclose that Shabana was the wife of Abedeen Abdulkader Tyebally;
>
> (2) the plaintiffs failed to disclose that it was commercially viable for the entire development, of which the property was a part, to be sold en bloc which would have resulted in a significantly higher price than a sale on an individual basis.

9 It was also alleged that Asma and/or Marshall Realty knew about the potential for an en bloc sale and that if the information about the en bloc sale potential had been disclosed to the defendants, they would not have sold the property pending a decision on the en bloc sale or, at any rate, at only $3.6m.

10 7.The defendants therefore claimed that the plaintiffs were not only not entitled to the commission, they were also liable to the defendants for all loss and damage suffered in respect of that sale. The defendants accordingly counterclaimed for: (1). a declaration that the plaintiffs were in breach of their duties to them and/or in breach of the agreement;

11 (2). a declaration that the plaintiffs were liable to the defendants for all loss and damage suffered by the defendants thereby; and

12 (3). damages to be assessed.

13 8.The learned District Judge held that the plaintiffs had forfeited their right to the commission and granted the defendants the two declarations sought but made no order on the claim for damages to be assessed. She also found that the defendants were entitled to complete the sale and purchase notwithstanding the discovery of the material non-disclosures, while reserving their rights against the plaintiffs. This last finding was originally challenged by the

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plaintiffs in their petition of appeal but the point was abandoned before me. The appellants also rightly abandoned the argument that Shabana`s knowledge could not be attributed to the plaintiffs.

14 9.I summarize here the other findings of the trial court on the facts and the law: (1). since the plaintiffs had made out a prima facie case against the defendants who were relying solely on the matters pleaded in their defence and counterclaim to justify the non-payment of the commission, the onus of proof on such matters rested on the defendants;

15 (2). the relationship of principal and agent gave rise to particular and onenous duties on the part of the agent. The fiduciary relationship required the agent to act in the interests of his principal and to disclose matters of personal interest which might conflict with the interests of the principal. Where any transaction was entered into in violation of this rule, the principal may repudiate the transaction or may approve it and recover any profit made by the agent. For the above propositions, she relied on the cases of: (a) **Armstrong v Jackson** [1917] 2 KB 822; (b) **Dunne v English** [1874] LR 18 Eq 524; (c) **Lunghi v Sinclair** [1966] WAR 172;

16 (3). applying the law to the facts, she found, as mentioned earlier, that Shabana had disclosed to the first defendant directly or indirectly her relationship to Asma;

17 (4). it was an admitted fact that Shabana did not disclose that she was the wife of Abedeen Abdulkader Tyebally, a director of Marshall Realty, the eventual purchaser of the property. She found that Shabana knew of her husband`s and consequently the company`s interest in purchasing the property

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from the outset. As Shabana knew that her husband was the controlling mind behind the entire transaction, she was `under a duty to disclose to the defendants that her husband was the real ochestrator of the transaction, that he was the one who made the offers and the decision to purchase the property`. The plaintiffs breached their fiduciary duties by Shabana`s failure to disclose her husband`s and Marshall Realty`s interest and involvement in the transaction;

18 (5). it was no answer to plead that the transaction was concluded on a `willing seller and willing buyer` basis (**Aberdeen Rail Co v Blaikie Brothers** [1848-60] All ER Rep 249);

19 (6). although the effect of a nominee clause was to wipe out the materiality of the identity of the purchaser (**Alrich Development Pte Ltd v Rafiq Jumabhoy** [1995] 2 SLR 401), the plaintiffs were precluded from raising the issue of non-materiality of the purchaser`s identity as a defence to the counterclaim as it was not pleaded;

20 (7). the Urban Redevelopment Authority (URA) gazetted the River Valley Development Guide Plans on 25 March 1994, rezoning Cuscaden Tower into a high density residential zone and increasing its gross plot ratio to 2.8. It thus became viable for the individual owners to sell the whole development en bloc which would have fetched better prices for each unit. Shabana admitted she did not advise the defendants of this possibility. She claimed she did not know about it until late June 1995 when she saw the defendants` solicitors` letter.Even if Shabana was ignorant of the en bloc sale potential, the gazette notification imputed knowledge to the general public and it was no excuse to plead ignorance. It followed from the plaintiffs` duty to act with reasonable care, skill and diligence that they should advise the defendants of matters affecting

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the value of their property whether or not knowledge of such matters could be imputed to the defendants, unless the defendants had specifically informed the plaintiffs that they did not want such information or were already aware of it. The trial judge therefore found the plaintiffs were negligent and in breach of their duties as estate agents;

21 (8). the plaintiffs` breaches impinged on the fundamental duty of disclosure and the duty to act with reasonable care and skill and in good faith and went to the very root of the principal-agent relationship. The plaintiffs had therefore forfeited their right to the commission (**Keppel v Wheeler** [1927] 1 KB 577);

22 (9). the two declarations sought should be granted. The second declaration would be effective only as and when the defendants should suffer any loss or damage in the future, which event might not occur. As the defendants were not pursuing the claim for damages to be assessed and as there was no evidence of any damage sustained as at the date of trial, no order was made on this prayer.

23 10.I will first set out my findings on the facts. I see no reason to disagree with the trial judge`s finding that Shabana did disclose to the first defendant directly or otherwise the fact that she and Asma were related to each other. I also agree that Shabana was obviously cognisant of her husband`s (and hence Marshall Realty`s) interest and intention to purchase the property in question. She was actually brought into the picture by her husband for the very purpose of finding out whether the property was still available for sale and what the defendants` expected price was.

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24 11.As for the en bloc sale potential, apart from knowledge imputed by the publication of the gazette, I am satisfied on the evidence that Shabana knew about the increase in plot ratio and consequently the possibility that Cuscaden Tower could be sold more profitably en bloc. Her husband`s company was a property investment company. It bought one unit in Cuscaden Tower in April 1994 and the penthouse unit a day before the defendants` option at $2.75m and $5.7m respectively. Marshall Realty being a company so deeply involved in property investment and Shabana`s husband having decided to park more than $12m in the three units in Cuscaden Tower, it would be extremely naive to think that he was not aware of the then hottest phenomenon in town, ie en bloc sale potential, or that he did not consider that possibility when making the foray into Cuscaden Tower. Shabana has been a real estate agent since 1992. She was engaged by her husband to help him secure the property in question. It would be highly unusual that no discussion of any sort about the en bloc sale potential took place between husband and wife in those circumstances. Equally, I find it hard to accept that Kersy, described by counsel for the respondents as `the defendants` financial advisor` and someone who `deals with the defendants` property transactions` would be totally ignorant of the en bloc sale potential of Cuscaden Tower. The defendants did not appear to be novices either in property matters.

25 12.I note that the defendants did not contend that $3.6m was, apart from any en bloc sale potential, anything other than a fair market price then.

26 13.I cannot disagree with the learned judicial pronouncements and the academic treatises on the law of agency. I doubt, however, whether all the principles relating thereto are applicable en bloc to the case of an estate agent

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in Singapore and to the facts of this particular case. Section 6 of the Auctioneers` Licences Act (Cap 16) defines a `house agent` as follows:

> 6 Every person, firm or company who -
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> (a) as an agent for any other person, for or in expectation of any fee, gain or reward of any kind, advertises for sale or letting any furnished house or part of any furnished house;
>
> (b) by any public notice or advertisement or by any inscription in or upon any house, shop or place used or occupied by him, or by any other ways or means, holds himself out to the public as an agent for selling or letting furnished houses; or
>
> (c) lets or sells or makes or offers or receives any proposal or in any way negotiates for the selling or letting of any furnished house or part of any furnished house,
>
> shall be deemed to be a person using and exercising the business, occupation and calling of a house agent, and shall be a house agent within the meaning of this Act.

27 A house agent is required by s 7 of the Act to take out a licence. Other than this licensing requirement, there does not appear to be any other statutory provision regulating house or estate agents.

28 14.In Singapore, it is not unusual to find an estate agent acting on behalf of a vendor and a purchaser in respect of the same property, in the same way as he could be acting for a landlord and a tenant for the same premises, with the result that he can collect commissions at both ends. Equally, an estate agent could have been appointed by several owners of adjoining properties or of units in the same block or development to procure buyers. Such market practices do not seem to have been considered abhorrent or objectionable in principle. If the law of agency is applied to estate agents in its full rigour, as the learned District Judge appeared to have done, no estate agent could safely carry on such generally accepted activities. For instance, a prospective buyer could have

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instructed his estate agent to help him procure two or more adjoining properties because of his desire to redevelop the properties or perhaps due to his wish to have his children live close to him. This confidential information would no doubt be material to the owners of the various properties as such a buyer was likely to be willing to pay more for the second and subsequent properties. If the estate agent managed to persuade the owners to appoint him as their agent to sell the properties or if he had already been appointed as such, non-disclosure of the buyer`s intention would be a breach of his fiduciary duties to the sellers. On the other hand, disclosure would be a breach of his fiduciary duties to the buyer.

29 15.Indeed, a scenario akin to the above arose in the case of **Kelly v Cooper** [1993] AC 205, the facts and holding of which are summarized compendiously in the headnotes:

> *The plaintiff instructed the defendants, a firm of estate agents, to sell his house and agreed to pay them a percentage of the selling price as commission. The owner of an adjacent house also instructed the defendants to sell that house. The defendants showed both houses to a prospective purchaser, whose offer to purchase the adjacent house was accepted. He then offered to buy the plaintiff`s house. The defendants did not inform the plaintiff of the agreement to buy the adjacent house. The plaintiff accepted the purchaser`s offer. Sales of both houses were completed. The plaintiff then instituted proceedings against the defendants claiming damages for their breach of duty in failing to disclose material information to him and placing themselves in a position where their duties and interests conflicted. The defendants counterclaimed for their commission on the sale of the plaintiff`s house. The judge awarded the plaintiff damages and declared that the defendants were not entitled to commission. The Court of Appeal of Bermuda allowed the defendants` appeal and gave judgment for them on their counterclaim.*
>
> *On the plaintiff`s appeal to the Judicial Committee:*
>
> *Held, dismissing the appeal, that since it was the business of estate agents to act for numerous principals, several of whom*

> *might be competing and whose interests would conflict, a term was to be implied in the contract with such an agent that he was entitled to act for other principals selling similar properties and to keep confidential information obtained from each principal and that the agent`s fiduciary duty was determined by the contract of agency; that since the plaintiff knew that the defendants would be acting for other vendors of comparable properties and would receive confidential information from them, the agency contract could not have included terms requiring them to disclose that confidential information to him, or precluding them from acting for rival vendors, or from trying to earn commission on the sale of another vendor`s property; and that, accordingly, although the purchaser`s interest in acquiring both properties was material information which could have affected negotiations for the sale price of the plaintiff`s house, the defendants were not in breach of their duty in failing to inform the plaintiff of the agreement to buy the adjacent house, which was confidential to the owner thereof, and the defendant`s financial interest in that sale did not give rise to a breach of fiduciary duty.*
>
> *...*
>
> *Per curiam. Even if a breach of fiduciary duty by the defendants had been proved, they would not thereby have lost their right to commission unless they had acted dishonestly, and the plaintiff did not allege, nor did the judge find, any bad faith by the defendants.*

30 16.If an estate or housing agent can act for numerous principals (be they sellers or buyers), several of whom might have competing and conflicting interests, then he cannot be said to be a true agent as that term is commonly understood in the law pertaining to principals and agents. Where existing market practice is not contrary to public policy, then the law should recognize that market practice. The estate agent in Singapore is, in reality, a canvassing or introducing representative seeking to bring seller and buyer to an agreement at a mutually acceptable price. Whether or not the estate agent has been given an exclusive agency to market a property does not, in my opinion, alter the position. Neither does the fact that he has participated in the negotiations on the price. This position may of course be qualified by specific terms agreed between the estate agent and the seller/buyer.

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31 17.Coming back to the facts of the present case, Shabana`s duty was to procure a buyer willing to pay $3.8m. That did not mean that she was not entitled to put forward offers which were below the stated price. Sellers often set an inflated price in order to allow for a bit of haggling. Even if they really wanted a particular price, often they would relent and settle for something less if no better offer was forthcoming and/or time was not on their side. In the words of the first defendant`s affidavit of evidence-in-chief, `My instructions to [Kersy] was that we had no objection to the same so long as the plaintiffs were able to locate a suitable buyer with an acceptable offer`. She was there stating her reply to Kersy who had informed her that he had been approached by the plaintiffs with an offer to act as the defendants` agent. Shabana could be considered to be acting as agent for both the seller and the buyer here.

32 18.There was no duty on Shabana`s part to inform the defendants that Asma was related to her but she did upon being asked. To require her to further inform that Asma was in fact a front for Marshall Realty is to take the matter much too far. What the defendants were asking for in reality was that the estate agent reveal on her own accord the plans of the potential buyer as well. Why else would it matter to them that Shabana`s husband was a director of Marshall Realty or that Marshall Realty was the true purchaser? Marshall Realty, like any other buyer, was entitled to buy using a front-person to avoid having sellers ask for a higher price once they knew that a property investment company was involved. They took the precaution of having the option granted to Asma `and/or nominee`. The sellers, if the identity of the buyer was so material to them, could have objected to the inclusion of this nominee clause but they did not. Shabana could even have bought for herself or her family despite being the estate agent. The first defendant obviously contemplated this possibility when she asked Shabana, `out of curiosity`, whether she was going to stay in the property. In

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my opinion, unless it has been specifically expressed otherwise, the buyer`s identity is immaterial in a property transaction. This is clearly the situation here and the presence of a nominee clause testified quite incontrovertibly to this.

33 19.On the procedural point, I respectfully disagree with the trial judge that the non-materiality of the buyer`s identity could not be raised by the plaintiffs on the ground that it was not pleaded. It appears to me from a reading of the pleadings as a whole, especially para 3 of the reply and defence to counterclaim, that this was the averment of the plaintiffs although they should have been more precise when admitting para 8b(i) of the defence and counterclaim. In any event, the defendants did not appear to have been taken by surprise in any way in the conduct of their defence and counterclaim.

34 20.As I have stated earlier, I doubt that Kersy and the defendants were not aware of the en bloc sale potential of the property. Even if they were really ignorant of that fact, the truth was that they did not ask the plaintiffs for advice as to the price the property could reasonably command. Here again, commercial reality must play a prominent role. Must an estate agent, on being informed by a seller of his bottom-line price, question the wisdom of setting that price if he is of the opinion that it is too low? For whatever their reasons, the defendants had been trying to sell their property since 1994 at more than $4m. They found no takers above $4m. Indeed, they found none at $3.8m. Sellers could have an infinite number of reasons why they wish to sell a particular property. If they set what they deem to be an acceptable price, why should an estate agent assume the role of an appraiser and risk incurring civil liability for negligence and criminal liability for carrying on the business of an appraiser without having taken out a licence? After all, en bloc sales are a mere possibility which could, at the material time, be blocked by the refusal of the owner of any one unit in

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Cuscaden Tower. Even if they do materialize, that may take time and not all sellers are willing to adopt a wait and see attitude. The reality again is that no en bloc sales of the development went through over the past three years. It is also probable that the same property if marketed in today`s circumstances may not fetch any price close to $3.6m. Could the plaintiffs have been sued for negligent advice if Shabana had informed the defendants that they should hold on to their property or ask for a much higher price?

35 21.In respect of the relief granted by the trial judge, I find it difficult to understand why the second declaration was granted if the claim for assessment of damages had been abandoned and in the light of the finding that there was no evidence of any damages sustained. A declaration should not be granted if there is no purpose to be served by it. It should not be granted to be held in suspense like the sword of Damocles over the plaintiffs` head indefinitely.

36 22.What I have stated in the foregoing paragraphs applies only to the typical situation where an estate agent is engaged to find a buyer/seller in respect of a property for an expected price without more. As noted by the Privy Council in Kelly`s case cited earlier, the scope of the fiduciary duties owed by estate agents to a buyer/seller is to be defined by the terms of the contract of agency. There is no general duty to advise or to disclose all material matters. However, the estate agent cannot be fraudulent or negligent. There can be no doubt also that the plaintiffs could have been successfully sued by the defendants if Shabana had concealed or omitted to mention the fact that another party had made an offer higher than that of Asma, as happened in the case of Keppel v Wheeler, because there would be either fraud or negligence in such a case. No such allegation arose here. Shabana was entitled to tell her husband or any other

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potential buyer what the bottom-line price was unless expressly prohibited from doing so.

37 23.The facts of this case revealed a willing seller-willing buyer situation without any breach by the estate agent. For the above reasons, I allowed the appeal and granted judgment to the plaintiffs for the commission of $36,000 and interest thereon at 6% per annum from the date of writ to date of judgment. I also dismissed the defendants` counterclaim and ordered them to pay the costs of the whole action both here and below.

Tay Yong Kwang JC

Michael Khoo SC and Josephine Low (Michael Khoo & Partners) for the
Philip Ling (Wong Tan and Molly Lim) for the respondents/defendants

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