IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1999] SGHC 158

Suit 1839/1998, RA 168/1999

Between

MP-Bilt Pte Ltd

… Plaintiff

And

Edy Yumianto

… Defendant

GROUNDS OF DECISION

Contract — Frustration — Sale of land; Statutory Interpretation — Construction of statute; Statutory Interpretation — Construction of statute; Words and Phrases

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MP-Bilt Pte Ltd v Edy Yumianto

[1999] SGHC 158

Suit 1839/1998, RA 168/1999
Choo Han Teck JC
18 June 1999

1 : The defendant signed a sale and purchase agreement dated 16 August 1996 to purchase a flat known as 9 Ardmore Park [num]10-04 (`the flat`) from the plaintiffs at the price of $4,890,578. The payment of the purchase price was to be paid in instalments and the terms are set out in cl 3 of the agreement. It will be useful to set out cl 3(1) of the agreement. This clause reads as follows:

> *Subject to paragraph (4), the purchase price shall be paid by the Purchaser to the Vendor by instalments in the following manner:*
>
> (a) immediately upon the signing of this Agreement by the purchaser or within Eight (8) weeks from the date of the Option to Purchase, whichever is the later, a sum equal to 20% of the purchase price; such sum to include the booking fee (if any) paid;
>
> (b) within 14 days after receipt by the Purchaser of the Vendor`s notice in writing that the foundation work has been completed a sum equal to 10% of the purchase price;
>
> (c) within 14 days after receipt by the Purchaser of the Vendor`s notice in writing that the reinforced concrete framework of the building unit has been completed, a sum equal to 10% of the purchase price;
>
> (d) within 14 days after receipt by the Purchaser of the Vendor`s notice in writing that the brick walls of the building unit have been completed, a sum equal to 5% of the purchase price;

(e) within 14 days after receipt by the Purchaser of the Vendor`s notice in writing that the ceiling of the building unit has been completed, a sum equal to 5% of the purchase price;

(f) within 14 days after receipt by the Purchaser of the Vendor`s notice in writing that the doors and window frames are in position, the electrical wiring (without fittings) and plumbing and internal plastering of the building unit have been completed, a sum equal to 5% of the purchase price;

(g) within 14 days after receipt by the Purchaser of the Vendor`s notice in writing that the Vendor`s architect has certified that the car park, roads and drains serving the housing project have been completed, a sum equal to 5% of the purchase price;

(h) within 14 days after receipt by the Purchaser of the Vendor`s notice to take possession and a photographic copy of the temporary occupation permit issued by the Building Authority certified as a true copy by the Vendor`s solicitors together with the certificate of the Vendor`s architect that the building unit and all roads, and drainage and sewerage works serving the housing project have been completed and that water, electricity and gas supplies have been duly connected to the building unit, a sum equal to 25% of the purchase price;

(i) on completion of the sale and purchase of the premises in accordance with cl 14, the balance of the 15% of the purchase price which shall be dealt with as follows:

(A) 2% of the purchase price shall be paid forthwith to the Vendor;

(B) the remaining 13% of the purchase price shall be paid to the Purchaser`s solicitors as stakeholders to be dealt with as follows:

(i) 8% of the purchase price shall be paid to the Vendor within 7 days of the receipt by the Purchaser or his solicitors of the certificate of statutory completion for occupation of the building issued by the Building Authority, or a photographic copy thereof duly certified as a true copy by the Vendor`s solicitors; and

(ii) 5% of the purchase price or any balance thereof (after any deduction has been made in accordance with cl 18 and for moneys owing to the Purchaser) shall be paid to the Vendor on the expiry of 12 months from the date of notice to take vacant possession to the Purchaser.

2 The defendant has paid the 20% required and due under cl 3(1)(a). On 8 September 1998 the plaintiffs gave notice to the defendant that the works

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described under cl 3(1)(b) have been completed and asked for payment of a further 10% as the next instalment. The defendant failed to pay and consequently the plaintiffs commenced this action to recover the sum of $489,057.80 being the 10% due under cl 3(1)(b), and interest thereon. The plaintiffs obtained summary judgment on this claim and the defendant now appeals before me.

3 Mr Harry Elias SC on behalf of the appellants presented two grounds of appeals. First, he submitted that the notice for payment dated 8 September 1998 did not constitute a good notice because it purported to certify that payment was due under cl 3(1)(b) of the agreement on the basis that `the foundation work` has been completed when it is not proved that this was so. Mr Elias takes this point because he argues that the term `foundation work` as it appears in cl 3(1)(b) must mean the foundation work of the entire housing project and not just the foundation work of the `building unit`, namely, the appellant`s flat. His submission on this ground is based on two points. First, the learned counsel submitted that cl 3(1)(b) is the only provision in the agreement that refers to work that is not specifically identified to the building unit. Secondly, he argues that the term `foundation work` in the standard form contract under the Housing Developers Rules was amended in 1997 to read `foundation work of the building unit`. Thus, Mr Elias argues, the intention must surely be to correct the previous position and that can only be that the term previously refers to the foundation work of the entire housing project.

4 Mr Elias then invited me to find that these two arguments raise sufficient triable issues for the matter to proceed to trial. I agree that at this stage of the proceedings, it is not the function of the court to make any findings of fact without the benefit of the full trial. However, if the issue is one of interpretation of a contractual document or law, the court can deal with it in a summary way.

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In so proceeding, the court need only satisfy itself that no oral evidence or any part of the pre-trial process such as interrogatory and discovery is necessary. In this regard, I think that the court should lean in favour of trial if there is any indication of such necessity.

5 In this case, Mr Elias sought to persuade me that the evidence of the Controller of Housing`s evidence is necessary because he has to explain why the standard form agreement was amended the way it did in 1997. I have no hesitation in agreeing with Ms Engelin Teh SC that the Controller of Housing`s evidence is not necessary. I accept that his evidence may be interesting and relevant, but that is not the absolute way of approaching this point. The standard form agreement in question is embodied as part of the Housing Developers Rules, which is a piece of subsidiary legislation. It is not the practice of the courts that whenever the meaning of a piece of legislation, principal or subsidiary, is in question, the maker must be called to testify. This reluctance emanates from the dichotomy of functions between the lawmakers who make the law, and the courts whose function it is to interpret the law. It is my duty, therefore, to find what the Controller of Housing meant by the term `foundation work` in the pre-1997 form with just the aid of the form, the rules of interpretation and, I should add, the assistance of counsel.

6 I am afraid that I cannot agree with counsel for the appellant that the addition of the words `of the building unit` in 1997 must necessarily mean that the pre-1997 form without those words refers to the foundation work of the entire housing project. It is also possible that the addition of the words was intended to clarify but not change the position prior to the amendment. My task is to determine which of the two is more likely the case.

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7 I revert to Mr Elias`s argument that cl 3(1)(b) is the only provision that deals with a part of the building project that is not specifically identified as the `building unit`. It is always necessary to look at the meaning of a term in its context. In this case, cl 3 of the agreement deals solely with the question of instalment or progress payments as they are commonly known. These are instalment payments of the purchase price. It is common ground that a purchaser of a condominium flat, such as this, will have a share in the common property. It is part of the concept of condominium ownership. However, the purchase price in this case ($4,890,578.00) is clearly the consideration for the `building unit` alone. Clause 1 says that the vendor shall sell and the purchaser shall purchase `all that estate in fee simple in part of the land comprising the flat described in the First Schedule hereto (hereinafter referred to as `the building unit`). The First Schedule, in turn, specifies the building unit as `all that flat (type A3) on the 10th storey of the building known as Block 1 in the housing project known as Ardmore Park now being erected or erected on part of the land in the Republic of Singapore estimated to contain a floor area of 268 sq m (including air-conditioner ledge) being part of the Government Resurvey Lot 909 of Town Subdivision 25 comprised in a grant from the Crown and registered as Indenture No 23, District of Claymore, which said flat is provisionally known as Block 1 Ardmore Park [num]10-04, Singapore`. This description clearly refers only to the flat. It does not include the common areas. Thus, whilst the purchaser gains a share in the common property, his purchase price is specifically for his own flat alone. It follows that any instalment or progress payment must relate only to the stage of completion of his flat and the block upon which his flat is sited unless there is clear and express wording to the contrary. An example of such express language may be found in cl 3(1)(g) which refers to `the car park, roads and drains serving the housing project`.

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8 If Mr Elias is right in that the standard form after 1997 refers to the foundation of the building unit whilst the pre-1997 form refers to the foundation work of the entire project, then it means that the terms relating to progress payment by different purchasers in the same housing project will not be the same, depending on whether they bought before or after 1997. In the absence of any logic or evidence to the contrary, I think that such a result could not reasonably have been intended by the Controller. I think that it was more likely that the change was to clarify and make express what was previously left to be assumed. It could not be intended to create two systems of instalment payments. For the reasons above, I find that this ground of the appellant`s appeal must fail. I now turn to the second ground.

9 The appellant stated in his affidavit of 30 November 1998 that when he signed the agreement on 16 August 1996 `the economy of Asia in general, and Indonesia in particular, was enjoying an unprecedented boom.` He added that as a result, his business was doing well and he believed that he would be able to fulfill the payment commitments under the agreement. The appellant then referred to events in South East Asia from 2 July 1997 when the government of Thailand floated its currency. He referred to the resulting financial crisis in Asia and the US$38b `bailout package` by the International Monetary Fund. He deposed that by December 1997 the Indonesian rupiah lost 60% of its value against the US dollar. The resulting inflation led to `rioting and unrest` in Indonesia and consequently, the resignation of President Suharto. The appellant concluded that he was affected by these events and his business suffered severe losses which meant that he could no longer pay the instalments under the agreement. By reason of all this his counsel argued that the sale and purchase contract was frustrated and rendered incapable of performance.

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10 The general principles relating to the doctrine of frustration at common law are straightforward. The doctrine itself was formulated to ameliorate the harshness of the contract law requirement that a promisor performs his promise to the letter. The doctrine `operates to excuse from further performance where: (1) it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the basis of the contract will take place; and (2) before breach, an event in relation to the matter stipulated in (1) above renders performance impossible or only possible in a very different way from that contemplated`: 9(1) ***Halsbury`s Laws of England*** (4th Ed) para 897.

11 As is the case with general principles the doctrine of frustration, as formulated generally above, admits within its definition far more than it should and thus, as with most general principles, its application must necessarily be guided by qualifications and exceptions to its rule. Foremost of all, it must not be forgotten that the doctrine of frustration is itself an exception to the rule - that contractual promises are meant to be kept. It is this that prompted Lord Radcliffe to declare that `frustration is not to be lightly invoked as the dissolvent of a contract`. **Davis Contractors Ltd v Fareham Urban District Council** [1956] AC 696, 727. The learned Law Lord went on to propound how he thinks that the doctrine should be applied [at p 729]:

> *There is, however, no uncertainty as to the materials upon which the court must proceed. `The data for decision are, on the one hand, the terms and construction of the contract, read in the light of the then existing circumstances, and on the other hand the events which have occurred` (* ***Denny, Mott & Dickson Ltd v James B Fraser & Co Ltd*** *[1944] AC 265, 274 per Lord Wright). In the nature of things there is often no room for any elaborate inquiry. The court must act upon a general impression of what its rule requires. It is for that reason that special importance is*

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> *necessarily attached to the occurrence of any unexpected event that, as it were, changes the fact of things. But, even so, it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.*

12 Mr Elias drew upon a number of cases as examples of how the doctrine of frustration was and could be applied. He referred to **Magenta Resources (S) Pte Ltd v China Resources (S) Pte Ltd** [1996] 3 SLR 62 [1997] 1 SLR 707 , at first instance and on appeal respectively. He made a comparison of the break-up of the Union of Soviet Socialist Republic in that case with the political and economic problems in Indonesia in this case and argued that there is sufficient similarity of circumstances to regard the agreement in this case as incapable of performance by reason of frustration.

13 With due respect, I am unable to agree with that proposition. In the ***Magenta*** case, the event in question which rendered the contract incapable of performance was the inability of the supplier to ship a cargo of urea because of the political upheaval and the resulting confusion caused by the break-up of a country. In this case, the subject matter of the contract was (and still is) safely under construction in Singapore. The crisis in Indonesia did not affect the subject matter. It might have affected the personal financial resources of the purchaser, but if a line has to be drawn as to what can properly be included as `an inability to perform` under the doctrine of frustration, I would draw that line to exclude cases, save in exceptional circumstances, where the inability to perform concerned the inability to pay. It is probably true that when the parties signed the agreement they did not contemplate that the Asian financial crisis would have developed as rapidly and extensively as it did. Nonetheless, it cannot be assumed that they had mutually contemplated that the contract would be vitiated if the purchaser runs into financial problems. In cases like ***Magenta***

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, on the other hand, the parties had contemplated the shipment of a cargo from a specified place which place became so chaotic that the shipment became impossible of performance. The national crisis in Indonesia are certainly no fault of the appellant. In the same vein, if the appellant`s factory was burnt down by pranksters no blame ought to be attached by him; but in neither case can he say that he need not be bound by his contract with a third party by virtue of his personal financial disaster, however blameless he might be in that regard.

14 Mr Elias drew my attention specifically to the runaway inflation in Indonesia, but as Lord Roskill said, `A recurring theme in the various cases is that it is not sufficient that the contract has become more burdensome or performance more expensive. The test is a much higher one. It must therefore be rare to find a situation in which the depreciation in the value of money through inflation could give rise to frustration of a contract. Viscount Simon has said in **British Movietonews Ltd v London and District Cinemas** [1952] AC 166, 185, the parties to a contract are often faced with a turn of events they did not anticipate, such as a wholly abnormal rise or fall in prices or a sudden depreciation of the currency, but this does not of itself affect the bargain they have made. That inflation could in appropriate circumstances bring about frustration was, however, recognised by Stephenson LJ in **Wates Ltd v Greater London Council** [1984] 25 Build LR 1, 35, although not upheld in that case:

> *Things may have turned out differently from what the parties contemplated in that inflation increased not at a trot or a canter, but at a gallop. But that difference in degree and tempo was not so radical a difference from the inflation contemplated and provided for as to frustrate the contract.*

15 Thus, frustration by reason of rampant inflation was considered in the above cases, as well as the New Zealand case of **Power Co Ltd v Gore District Council** [1997] 1 NZLR 537. The doctrine was not applied.

16 I will not speculate as to under what circumstances inflation might bring about frustration. It seems to me, and the learned judges in the authorities cited, that that can only arise in very exceptional circumstances. In any event, inflation and depreciation of currency are only a part of the overall circumstances which the court must consider in deciding whether frustration can be called in aid. The terms and nature of the contract themselves are equally important factors. In an agreement such as the one before me, the financial capacity of the purchaser is a matter strictly of his own concern. He might have the money already set aside or he might not have a cent, relying solely on borrowings from friends, relatives and banks. When he commits himself to the purchase of the flat he must assume the risk that he may run into financial difficulties and fortify himself with some contingency plans. However, he cannot walk away from his obligations only because financial difficulties had come upon him - even if they had charged at him at a gallop. The matters pleaded by the appellant in this case are diffused and do not bond sufficiently to form any substance which could assist Mr Elias`s otherwise effusive submission. For the above reasons this ground of appeal also fails. As the submissions were based on law, no evidence was required at this stage. If this point was held in the appellant`s favour, then the matter need proceed for further inquiry on the facts necessary to back up his claim.

17 The appeal is, therefore, dismissed. I will hear the question of costs at a later date if parties are unable to agree between themselves.

18 **Outcome:**

19 Appeal dismissed.

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Choo Han Teck JC

Engelin Teh SC and Jill Tan (Engelin Teh & Young) for the plaintiffs
Harry Elias SC and Chris Wong (Harry Elias Partnership) for the defendant

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