

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1999] SGHC 293

Suit 765/1999

Between

Coastland Properties Pte Ltd

... Plaintiff

And

Lin Geok Choo

... Defendant

GROUND OF DECISION

Equity — Remedies — Specific performance

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Coastland Properties Pte Ltd v Lin Geok Choo

[1999] SGHC 293

Suit 765/1999
Choo Han Teck JC
09 November 1999

1 : The plaintiffs were the owners of a flat at River Valley Close. They contracted to sell the flat to the defendant purchaser for \$650,000 on terms set out in an option agreement dated 15 March 1999. This was not disputed although the pleadings from both sides made no mention of the date of the option agreement save in the plaintiffs' prayer in their statement of claim. At the time of the contract the property was mortgaged to the OCBC bank. Nothing was mentioned in the pleadings nor affidavits of evidence as to what the redemption amount was. The plaintiffs failed to complete and the defendant through her solicitor served the requisite notice to complete within 21 days. The plaintiffs commenced this suit before the expiration of the 21 days, claiming a declaration that the contract was null and void on the ground that the contract was subject to the mortgagee's consent which, in the event, was not forthcoming. The defendant counterclaimed and prayed for specific performance and/or damages in lieu of specific performance. The action came up for trial before me, scheduled for three days from 27 September 1999. By the second day, counsel for the plaintiffs accepted that his clients were in breach of contract and consented on his clients' behalf to judgment for damages to be assessed, but resisted the claim for specific performance. After hearing

submissions on the question of specific performance, I ordered that the plaintiffs' claim be dismissed, by consent, and for damages in lieu of specific performance be awarded to the defendant. Costs was ordered to follow the event, with no costs payable by the plaintiffs to the defendant in respect of the issue relating to specific performance. The defendant now appeals against my decision in refusing her an order for specific performance. [The appeal was withdrawn - Ed.]

2 Specific performance is an equitable and discretionary remedy. It is not a usual remedy. Damages is the usual remedy for breach of contract because it is regarded as the most convenient and readily calculable means to measure the innocent party's loss arising from a breach of contract. Specific performance on the other hand, is often difficult, if not impossible, to enforce. The courts have long maintained the sensible position that specific performance would not be granted unless the order can be enforced, and provided that the subject matter of the contract is a thing of intrinsic value by reason of which damages may not be a sufficient recompense. The Mona Lisa painting, for example, has such a value. Apart from exquisite fine works of art, real property has generally been accepted by the courts as having an intrinsic value. No two pieces of land are identical. Even two flats on the same block differ in the view that can be spanned from them, owing largely to the different elevation of the flats. That difference in view, and perhaps also, the reception of light, are some of the factors that represent the intrinsic difference between the two flats which grants to each a special value of its own. Nonetheless, it does not follow that damages can never be an adequate remedy, or are incalculable even in such cases. It may be difficult but not impossible to put a monetary value to the Mona Lisa, although the courts may incline towards specific performance so long as it is clear that the order can reasonably be enforced, and that it would be fair and just to make the order. In

addition to these simple and basic principles, I should add that since specific performance is a discretionary order, it is implicit that the court must feel comfortable in making the order. This simply means that there must be no residual doubt in the judge's mind that the order, if made, would not create any problems to any party, and not just to the litigants themselves. I pause to emphasize that the burden of proof is on the party claiming the order for specific performance. If he is unable to so satisfy the court he will not get the order.

3 In this case, I declined to grant an order for specific performance partly because I was not satisfied that to do so would be right and fair to all parties, including the mortgagee. The clinical approach of the common law may readily ignore the consequences to a person who is not a party to the proceedings, but the defendant is here crying for the hand of equity to intervene; and equity looks beyond the common law. The fault in this case lies largely, but I cannot say solely, with the lawyers who took charge of the conveyance as well as those who took charge of the trial. It is, therefore, inevitable that I have to describe the failings in their work because it is that which has led to my decision in rejecting the prayer for specific performance. This is not a task of pleasure, and so I hope to lay it gently as follows.

4 The trial began on 27 September 1999 with only two simple issues to be decided, namely, whether the sale was subject to the mortgagee's consent, and the possible consequential question whether the mortgagee has given or refused such consent. The first question may easily be determined from the contract itself and the oral evidence of the parties. So far as the second question is concerned, it does not require a brilliant legal mind to conclude that evidence from the mortgagee or their solicitor would be essential at trial since the parties were in sharp disagreement over it. Inexplicably, counsel for the litigants were also unable to agree as to whether the contract price was below the redemption

amount. This need hardly arise as an issue in the first place if the parties had written to the mortgagee, or produce the written record of the transaction, but none of this was done save for some documents scrappily produced mid-way through the trial, of which I shall revert shortly. It transpired that the lawyers for the defendant had neither written nor contacted the mortgagee bank or their solicitors even up to the first day of trial to make the basic and necessary enquiries, namely, whether the mortgagee bank had any objection or conditions to the proposed sale. When it became clear to her that that had to be done, Miss Tang then contacted the solicitors for the bank and returned on the second day of the trial to say that she had been informed by the bank that it agrees to complete at \$650,000 and that she had just received a letter from the bank that very day to say that the bank had been waiting for completion to take place on the agreed completion date which was 17 May 1999 but no one contacted them (or their solicitors). Miss Tang then informed me that the bank now wanted interest for late completion, and that she has to see the solicitors for the bank. In the meantime, the trial continued with the cross-examination of the plaintiffs' witnesses. Counsel for both parties were still unable to agree as to what the redemption amount was. The figure of \$738,079.11 claimed by Mr Lim for the plaintiffs was vehemently denied and disputed by Miss Tang. No evidence was adduced on this short and simple matter despite persistent enquiry from the court.

5 It also transpires from the plaintiffs' evidence through Mr Chan Boon Sim that the plaintiffs were in no position to discharge the mortgage. It follows that the bank would be entitled to exercise its rights under the mortgage and sell the property. A letter from the bank's solicitors dated 2 September 1999 (AB 90) was subsequently and rather belatedly, admitted in evidence as an agreed document. This letter gave notice of default to the plaintiff and demanded that

unless payment was made within 14 days the bank would commence legal proceedings against them. Very significantly, this letter shows that the redemption amount to be higher than the purchase price. A letter to similar effect was written by the bank's solicitors to the defendants' solicitors dated 27 September 1999, the day this trial commenced. After reciting that they understood that completion for the transfer of the property scheduled on 17 May 1999 did not take place, the letter went on to say that:

Our clients [the bank] had, inter alia, expected completion to take place as scheduled and as this did not occur, our clients rights as mortgagees cannot be affected or prejudiced by the same. Our clients are not and cannot be involved in the disputes between your clients and the Company.

We have accordingly been instructed to inform you that our clients had taken steps to enforce their rights as mortgagees over the property. If our clients' claims under the mortgage are not settled, our clients intend to take action to recover possession of the property for the purposes of a mortgagee sale.

6 This letter was admitted as AB 91.

7 It was only after the close of the plaintiffs' case that Miss Tang saw an 'urgent need' to call evidence from the bank and applied for leave to call an additional witness for the trial. She submitted that the evidence intended was to show that 'at the time of completion the bank was prepared to complete at \$650,000'. This evidence could and ought to have been set out as part of the defence case from the outset but was not. I am of the view that its inclusion at this stage, especially in the light of the agreed document AB 90 and AB 91, will swing the trial onto a different path from that which had been pleaded and fought. If the defendant purchaser's solicitors had been taken the sensible step of contacting the mortgagee or its solicitors before completion, this action might not even have been necessary. But this evidence would still be of no assistance because there is no mention as to who was to pay the difference to the bank. If

it was to be the defendant, that fact was not pleaded nor set out in her affidavit of evidence-in-chief. If counsel for the defendant purchaser had seen the need from the outset and had taken steps to call the bank's officers or their solicitors as witnesses and pleaded their case accordingly, a different result might have been achieved. The omission was inexcusable and none was offered save that counsel saw no need for the evidence. In my view, the defendant does not deserve the reward of a second opportunity in these circumstances. I, therefore, refused leave for further witnesses to be called.

8 Reverting to the case proper, in situations where the purchase price is higher than the redemption amount, redemption of the mortgage will ordinarily take place at the same time as completion. The bank gets paid and the vendor gets the balance. In this case, where the purchase price is below the redemption sum (as evidenced in the agreed document AB90), redemption cannot take place unless someone agrees to pay the difference to the bank. Since the mortgagor-vendors were unable to discharge the mortgage, the purchaser has to do so. From the sparse evidence before me, I am led to conclude that at the material times, the purchaser was not prepared to do so. The defendant purchaser obviously felt that she had the property at a bargain and wanted it conveyed to her at \$650,000 but to have the vendor pay the balance due to the bank. In other words, she wanted to have her cake and eat it too. I am not satisfied that an order for specific performance will not prejudice the mortgagee, and accordingly, I do not think that such an order ought to be made. The purchaser must be content with an order for damages.

9 The defendant has also appealed against my decision not to grant leave for her to admit two letters namely one dated 31 March 1999 from the bank to the plaintiffs; and the other 28 September 1999 from plaintiffs to the bank. These letters were of no relevance to the issues before me. The letter of 28

September 1999 is a letter written long after the event. Its value relates to the motive or state of mind of the plaintiffs, namely that they deliberately intended to breach the contract. It might be relevant if equity required that evidence as a counter-weight in the balance of justice; but by the time Miss Tang sought to produce it, which was virtually at the end of the trial, it was no longer of any consequence because my decision was based on the way the case was conducted by the defendant's lawyers in the conveyancing transaction as well as the trial. So far as the letter of 31 March 1999 is concerned, it was not put to the plaintiffs' witnesses in cross-examination and was not in the bundle of documents.

10 **Outcome:**

11 Order accordingly.

Choo Han Teck JC

Lim Joo Toon (Joo Toon & Co) and Catherine Lim Chui Ling
(Catherine Lim & Co) for the plaintiffs
Susan Tang Mei Ling (Francis Khoo & Lim) for the defendant
