

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1999] SGHC 300

OS 152/1999

Between

Tan Hee Nam

... Plaintiff

And

Shop N Save Pte Ltd

... Defendant

GROUND OF DECISION

Land — Sale of land; Contract — Contractual terms; Contract — Contractual terms — Implied terms

This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

Tan Hee Nam v Shop N Save Pte Ltd

[1999] SGHC 300

OS 152/1999
Lim Teong Qwee JC
18 November 1999

1 : By this originating summons which was amended during the course of the hearing the plaintiff claims a declaration that the option in writing dated 20 May 1998 to purchase the shop unit at Blk 156 Bt Batok St 11 [num]01-06 granted to him by the defendant for a consideration or option fee of \$185,000 is null and void and the return of the option fee and other incidental reliefs. At the conclusion of the hearing on 6 September 1999 I dismissed the claim with costs. The plaintiff has given notice of appeal and these are my written grounds. [The appeal was withdrawn - Ed.]

2 The shop unit is comprised in an agreement for a lease between HDB as lessor and the defendant as lessee. It is in the `Local Shopping` zone under the Master Plan referred to in s 6 of the Planning Act and is approved for use as a mini-market under the Act. In about December 1997 the parties expressed an interest in the plaintiff purchasing the shop unit from the defendant and solicitors were separately instructed. In due course the option to purchase was settled by the solicitors and on 20 May 1998 the plaintiff (`purchaser`) paid \$185,000 which is 5% of the agreed price of \$3.7m and the defendant (`vendor`) signed and delivered the option.

3 Clause 2 of the option provides:

The Vendor hereby offers to sell to the Purchaser the Property upon the terms set out below, subject to the Vendor obtaining the necessary in-principle approvals from the competent authorities for the use of the Property for the retail of general merchandise ('the Approvals'). The Vendor shall obtain the Approvals by the Expiry Date (as hereinafter defined), failing which the Option Fee shall be forthwith refunded by the Vendor to the Purchaser and this Option shall be null and void and of no further effect.

4 `Expiry Date` is not defined but cl 3 provides:

The Option shall expire at 12 noon on 2nd January 1999 ('the Expiry Day') ...

5 Clause 17 provides:

This Option must be exercised not later than 12.00 noon on the Expiry Day ...

6 Apart from a reference later in this clause to `the aforesaid date` there is no reference in the option to `Expiry Date` or `Expiry Day` and I agree with Mr Leong that `Date` was written in by mistake and the word should have been `Day`.

7 The purchaser's case as disclosed in the amended originating summons is that the vendor failed to obtain the necessary in-principle approvals from the competent authority by 2 January 1999 or at all. It is not disputed that the reference to `Approvals` in cl 2 is a reference to approvals from the competent authority under the Planning Act. It clearly does not include the approval of the HDB to which the sale is subject under para 6(1) of the terms of sale under cl 3 of the option. Paragraph 6(2) provides for the application form to be signed by the purchaser within seven days of the agreement for sale and purchase which is expressed in cl 3 to come about only upon the option to purchase being accepted. Mr Leong said that the vendor had to obtain the approvals by 12 noon

on 2 January 1999 and this it had not done. It is also not disputed that approvals have not been obtained at all.

8 A point arose in the course of the hearing which may be shortly dealt with. The vendor had to obtain the approvals `by the Expiry [Day]` under cl 2 of the option. Mr Leong said it had to do so by 12 noon on 2 January 1999. He referred to **Aberfoyle Plantations Ltd v Khaw Bian Cheng** [1960] MLJ 47 where Lord Jenkins said at p 49:

Where a conditional contract of sale fixes (whether specifically or by reference to the date fixed for completion) the date by which the condition is to be fulfilled, then the date so fixed must be strictly adhered to, and the time allowed is not to be extended by reference to equitable principles.

9 This does not really address the question whether the vendor had until the end of the day bearing the date 2 January 1999 or only until 12 noon of that day. Later at the same page Lord Jenkins said:

... the reason for taking the date fixed for completion by a conditional contract of sale as the date by which the condition is to be fulfilled appears to their Lordships to be that until the condition is fulfilled there is no contract of sale to be completed, and accordingly that by fixing a date for completion the parties must by implication be regarded as having agreed that the contract must have become absolute through performance of the condition by that date at latest.

10 In **Aberfoyle Plantations** it was a contract for sale of a leasehold interest in land which was subject to a condition that the vendor obtained a renewal of the lease. The completion date was fixed by the contract but there was no stipulation as to the date by which the condition had to be satisfied.

11 Although the case before me concerns an option to purchase I think the same principle applies. If the option becomes void through failure of the condition then there is no option to exercise. And if one substitutes `time` for

`date` it becomes clear that the condition must be satisfied by the time fixed for completion in ***Aberfoyle Plantations*** or the time fixed for the exercise of the option in the case before me. I think the condition as to approvals has to be satisfied by 12 noon on 2 January 1999 if the condition applies.

12 The vendor`s case is that the condition did not apply. The option was subject to the vendor obtaining `the necessary in-principle approvals` but such approvals were not necessary. The option was in this respect unconditional. As the option was not exercised before its expiry then by cl 17 of the option the option fee was forfeited to the vendor. Mrs Thio referred to ***Lancelot St Elmo Balbosa v Ayoub Ali*** [1990] 1 WLR 914.

13 In ***Lancelot St Elmo Balbosa*** the contract for sale and purchase of land was expressed to be `subject to the obtaining from the Town and Country Planning Division of all the necessary approvals for the transfer of the premises`. The vendor`s personal representative (the vendor having died) applied to the planning authority for the approvals some years after the completion date but the approvals were refused and he declined to complete. Having come to the conclusion that the approvals were not necessary Lord Oliver of Aylmerton (delivering the judgment of the Privy Council) said at p 919:

Clause 6 of the agreement in terms refers to `necessary approvals` and since no approval was necessary the clause never operated at all.

14 Specific performance of the contract was ordered. With respect I agree with this approach.

15 In the course of the hearing Mr Leong conceded (and I think quite properly so) that the approvals were not required. As noted above the shop unit is approved for use as a mini-market. Under the prevailing regulations which

were also applicable in January 1999 such approval extended to the use as a shop for retail or sale of goods including a departmental store and as a foodshop for retail or sale of take-away food including fruits and cakes. No change of use would be involved in the use of the shop unit for the `retail of general merchandise` and in the circumstances there were no **necessary** approvals to be obtained by the vendor. In my judgment the condition as to necessary approvals `never operated at all` and had no application to the option at all. There was no failure of this condition and in accordance with cl 17 of the option the option fee has been forfeited to the vendor and the purchaser is not entitled to the reliefs claimed.

16 The purchaser`s alternative case is that there was an implied term that the vendor must communicate to the purchaser by 12 noon on 2 January 1999 that the approvals were not required or that the vendor had obtained such approvals. Mr Leong submitted that such a term was necessary to give business efficacy to the transaction and that it was a reasonable term. He said that if such a term was not implied there would be no way for the purchaser to know the outcome of the vendor`s application for the approvals. Whatever its merits this last argument of course can only apply to a case where there were necessary approvals to be obtained by the vendor.

17 The shop unit was approved for use as a mini-market and no change of use would be involved in its use for the retail of general merchandise referred to in the condition. These are facts and circumstances which were known or ought to have been known as well to the vendor as to the purchaser. All the purchaser had to do was to make a search which was available to him and to consider or be advised as to the regulatory provisions. I cannot agree that in order to give business efficacy to the transaction it is necessary to imply the

term urged upon me in its reference to approvals being not required. The transaction works perfectly well without any need for such a term to be implied.

18 It cannot be said that without such a term `the whole transaction would become futile, inefficacious and absurd`. See **Liverpool City Council v Irwin & Anor** [1977] AC 239 at p 263 per Lord Salmon. A term is not to be implied by reason only that it is a reasonable term or that it is reasonable to imply such a term. See at pp 253, 254 per Lord Wilberforce and at p 262 per Lord Salmon. In my judgment where the condition had no application at all because there were no **necessary** approvals to be obtained it is not necessary to imply any such term as set out in the amended originating summons in order to make the transaction work.

19 The option fee has been properly forfeited to the vendor and the purchaser`s claim is dismissed.

20 **Outcome:**

21 Plaintiff`s claim dismissed

Lim Teong Qwee JC

Victor Leong Wai Meng (Chan Kam Foo & Associates) for the
plaintiff
Sia Moon Joon and Thio Ying Ying (Kelvin Chia Partnership) for the
defendant
