Chen Con-Ling Tony v Quay Properties Pte Ltd
[2004] SGHC 31

Case Number : DCA 43/2003/F

Decision Date : 19 February 2004

Tribunal/Court : High Court

Coram : V K Rajah JC

Counsel Name(s) : Andrew J Hanam (PK Wong and Advani) for appellant; Shriniwas Rai (Hin Rai and Tan) for respondent

Parties : Chen Con-Ling Tony — Quay Properties Pte Ltd

Land – Sale of land – Devolution of rights before completion – Property sold subject to tenancy – Whether landlord in breach of fiduciary duty qua trustee to consult purchaser on termination of tenancy – Whether purchaser able to show consequential economic loss as result of not being consulted

Land – Sale of land – Vendor and purchaser relationship – Fiduciary duties – Scope of duty to consult

Landlord and Tenant – Termination of leases – Whether landlord-vendor of property had duty to consult purchaser when tenant purported to terminate prior to completion of sale

19 February 2004

V K Rajah JC:

1 This appeal raises a slender but significant point pertaining to the rights and obligations arising from the vendor and purchaser relationship, pending the completion of a sale and purchase agreement for land. The narrow issue as identified by the learned district judge was whether a vendor owes a legal duty to consult the purchaser upon receiving a notice to quit from the tenant. The tenant, in this case, had relied on what is commonly known in property parlance as a "diplomatic clause". This is a clause that allows a tenant to terminate a tenancy if the occupier no longer resides within the jurisdiction. The learned district judge characterised this issue as a "novel and interesting point of law". At the conclusion of the appeal, I disagreed with his characterisation of the issue as being novel, as well as his holding on the issue. I however dismissed the appeal on the factual matrix and varied his order for costs. There has been no appeal from my decision. Both counsel have urged me nonetheless to furnish the written grounds of my decision. Considering that both a senior practitioner and the learned district judge had made a fairly fundamental error, I have now articulated the reasons for my decision in the hope that they may afford some assistance to the conveyancing community.

The undisputed facts

2 The subject property is 64 Havelock Road #02-12 River Place, Singapore ("the property"). On 15 May 2001, the respondent entered into a tenancy agreement ("the tenancy") with Borouge Pte Ltd ("the tenant"). The tenancy was for a period of two years, commencing 15 May 2001. The monthly rental was $8,000.00. The tenancy was amended on 15 May 2001 by way of a letter inserting a "diplomatic clause". This particular diplomatic clause permitted the tenant to terminate the tenancy by giving the respondent two months' "notice to quit" upon satisfying certain conditions. The relevant portion of the letter stated:

> It is hereby agreed that the Tenant may terminate this Agreement by giving the Landlord not less

than two (2) months' prior notice in writing after twelve (12) months from date of commencement of the tenancy hereby created in the event that employee of the Tenant occupying the said premises at the commencement of the tenancy hereby created is:-

1) Deported from Singapore; or

2) Refused permission by the Singapore Government to reside in Singapore; or

3) Transferred or relocated from Singapore to another country; or

4) No longer employed by the Tenant.

Always provided that the Tenant shall have furnished the Landlord with *sufficient documentary or other evidence to the Landlord's satisfaction of any or all of the matters referred to in subclauses (1), (2), (3) and (4) herein*.

[emphasis added]

3 The respondent subsequently sold the property to the appellant pursuant to an option to purchase dated 1 April 2002 ("the option"). The option was exercised on 22 April 2002. Under the terms of the option, completion of the sale was to take place on or before 1 July 2002. The sale was subject to the tenancy. A copy of the tenancy was attached to the option. Notice of the tenancy and its terms was not an issue in these proceedings.

4 The appellant asserts that he "bought the property in large part due to the tenancy" and its potential rental income. The property was not intended to be his residence. This is also not in dispute.

5 On 3 May 2002, in accordance with the terms of the diplomatic clause, the tenant purported to give notice of termination to the respondent. The letter stated:

> In accordance with the Diplomatic Clause, we are enclosing the supporting document to provide you evidence that the occupant of the above apartment will be operating from our branch office in Abu Dhabi instead of the Singapore office. *Please note that he still remains our employee and we will not cancel his employment pass as he will still be coming to the Head Office in Singapore for reporting purposes and attending meetings. During his short visits, he will be staying in a hotel as it does not justify renting an apartment*. [emphasis added]

Enclosed with this letter was the new employment contract the tenant had sent to its employee/occupier ("employee"). Under the terms of the new employment contract the employee was to operate from the tenant's branch office in Abu Dhabi. The employee would report to the tenant's commercial manager in Singapore but he was now responsible for the Saudi Arabian market. He was no longer to be based in or a resident of Singapore.

6 On 21 May 2002, the respondent's solicitors sent a letter to the appellant's previous solicitors informing them that the tenant had served the requisite two months' notice to terminate the tenancy pursuant to the diplomatic clause and that the property would, pursuant to the notice, cease to be tenanted after 15 July 2002. The letter enclosed the tenant's letter to the respondent dated 3 May 2002. There was no attempt to seek the appellant's position on the issue, let alone consult him. The respondent appeared to take the position that the appellant's views on this matter were irrelevant.

7 On 22 May 2002, the respondent wrote to the tenant intimating that its request for an early termination of the tenancy was accepted. This letter was not copied to the appellant. In other words, the appellant was not directly informed by the respondent that it had unilaterally agreed to terminate the tenancy.

8 In response to the respondent's solicitors' letter of 21 May 2002, the appellant's solicitors wrote to the respondent's solicitors on 24 May 2003 voicing the appellant's strong objections to the tenant's request for an early termination of the tenancy. The letter bluntly stipulated that from "the perusal of the documentary evidence submitted by the tenant to you, none of the scenarios (1) to (4) stated herein applies to the tenant" and that the appellant "reserves all his rights to sue the tenant if the tenant insists on determining the tenancy prematurely".

9 The respondent's solicitors responded on 31 May 2002 asserting:

> The tenant has the right to invoke the diplomatic clause after 12 months from the date of commencement of the tenancy in the event that the employee of the tenant is transferred or relocated from Singapore to another country. ...
>
> In accordance with the diplomatic clause, the tenant has furnished satisfactory evidence to our clients, the landlord, in their employment letter of 28.3.02 addressed to their employee to their Branch Office in Abu Dhabi, Saudi Arabia.
>
> As scenario (3) applies to the tenant, the tenant is thereby entitled to exercise their right to terminate the tenancy pursuant to the diplomatic clause.

10 The appellant's solicitors staunchly maintained their stance in their response letter dated 4 June 2002. They asserted emphatically that the diplomatic clause could only be invoked by the tenant:

> PROVIDED that the tenant furnishes satisfactory documentary evidence or other evidence to the Landlord's satisfaction that the employee is to be transferred or relocated from Singapore to another country. *The satisfactory documentary evidence in support of this must be that the employment pass of the employee in question … be cancelled in Singapore.*
>
> ...
>
> My client insists that the full security deposit be transferred to him on completion. This issue as to whether the tenant is entitled to invoke the diplomatic clause *shall be dealt with by my client direct with the tenant and is therefore of no concern to your clients.*
>
> [emphasis added]

11 The respondent's solicitors in a brief response dated 6 June 2002 reiterated in turn their client's position. They made no reference whatever to their client's written acceptance of the notice to quit dated 22 May 2004. The appellant became frustrated. He felt, quite rightly, that the respondent was not being helpful. On 18 June 2002, he instructed his solicitors to communicate directly with the tenant. Only as a result of this communication was the appellant apprised of the respondent's written acceptance of the tenant's termination notice. The tenant further informed the appellant's solicitors on 19 June 2002 that it had already vacated the premises and handed possession of the property directly to the respondent. The appellant states that he was taken aback and dismayed to learn of this development. It was too late to turn the clock back. He then sensibly

decided to complete the purchase of the subject property. Acting on the appellant's instructions, his solicitors proceeded to duly complete the transaction, without prejudice to the appellant's right to claim for damages accruing from the termination of the tenancy.

12 It is not in dispute that the respondent took no steps at all, pending completion, to seek the appellant's views on how it should have dealt with the tenant's termination notice. Nor is it disputed that no steps were taken by the respondent to look for a new tenant, pending completion. Immediately upon completion, the appellant engaged a property agent to look for a new tenant. The property market was weak. A new tenant was only found on 15 October 2002. A tenancy agreement for a two-year period commencing 15 November 2002 was subsequently entered into. The new rental was substantially lower. The appellant was understandably aggrieved. He felt that the respondent had acted irresponsibly. He felt he had suffered a substantial financial loss. Had he been consulted by the respondent, he would have rejected the termination notice and indemnified the respondent against any claims by the tenant. He wanted the termination notice litigated. In essence, he complained that he had been denied an opportunity to possibly succeed in a claim against the tenant for the "wrongful" termination of the tenancy. This signified for him the loss of a valuable right. The respondent had disregarded his "legitimate expectation". On 3 December 2002 he initiated proceedings for damages in the district court.

The pleadings

13 The appellant has pleaded that the respondent:

(a) failed to take reasonable care to ensure that the tenancy agreement was not terminated otherwise than in accordance with the terms thereof;

(b) failed to take reasonable care not to do or omit to do anything which might result in the appellant losing his entitlement to and benefit under the tenancy agreement upon completion of the sale; and

(c) failed to observe its fiduciary duties of good faith and did not act in the best interests of the appellant, pending completion of the sale.

14 The respondent countered that it had acted reasonably in accepting the tenant's notice to quit. There was a sufficient basis for the tenant to invoke the diplomatic clause. It denied having any fiduciary duty to consult the appellant.

The hearing at first instance

15 In the course of the trial proceedings, the appellant took issue with the fact that the employee had been relocated. He claimed that he suspected the tenant had used the employee's purported change of responsibilities as a smokescreen to terminate the tenancy. This he adamantly maintained was just a tactical ploy by the tenant to find alternative premises in Singapore with lower rental. On being cross-examined it emerged that:

(a) he would only be satisfied that relocation had taken place if the employee's employment pass was cancelled;

(b) he had no evidence that the employee had continued residence in Singapore since the surrender of the tenancy;

(c) he had made no attempt to follow up on his initial suspicions about the wrongful termination of the tenancy.

16 The respondent's assistant director of sales testified confirming that the employee had vacated the property well ahead of the expiry of the termination notice. The termination notice expired on 14 July 2002, but the employee quit the premises around the end of May 2002. She also testified that the respondent took pains to ensure that their corporate tenants were reliable. There was no reason to doubt that the termination notice was issued in anything other than good faith in this case. While it was accepted that the respondent had deprived the appellant of an opportunity to object to the tenant's notice of termination, she persuasively reasoned that it was implausible that the tenant had improperly invoked the diplomatic clause to escape an expensive tenancy. Had the tenant in fact been inspired by such an ignoble motive, the employee would, in all likelihood, have remained in occupation of the property until the expiry of the termination notice. The fact that the employee quit the premises well ahead would therefore seem to lend credence to the tenant's assertion that the employee was in fact relocated out of Singapore.

The district court's decision

17 Counsel for the appellant had argued that the duty owed by the vendor to the purchaser to consult the purchaser should be similar whether it applied to reletting the premises or terminating an existing tenancy. The district judge disagreed with this. He reasoned that in the case of a reletting, it could be said that the purchaser of the property entered into a contract without consenting to the possibility of a potential new tenancy being created. In other words, the change of circumstances entailed by a reletting could not have been initially envisaged. Such a new tenancy would be a post-completion fetter on the purchaser's rights. Surely, he added, the consent of the purchaser for such a post-tenancy agreement must be obtained.

18 The district judge then ventured to reason that such a duty to consult was not applicable when the termination of an *existing* tenancy was involved. A purchaser would in any event have been aware of the terms of the tenancy; he must know that tenancies by their very nature could be terminated prematurely. A purchaser had to be bound by "all the equities" the tenant could enforce against the vendor. In his strained attempt to define the extent of the vendor's obligations to the purchaser, he relied on *Barnsley's Conveyancing Law and Practice* (3rd Ed, 1988) at 151 where it is stated:

> The receipt by the vendor of a notice to quit *should be disclosed*. [emphasis added]

19 This authority was drawn to his attention by the respondent's counsel, a senior property practitioner. The thrust of counsel's argument was that anything more than a duty to disclose would "eat into" the legal rights of the vendor pending completion. In agreeing with the submissions of the respondent's counsel, the learned district judge observed in his judgment ([2003] SGDC 234 at [18]) that "[u]nlike the cases of reletting, notice that in termination of tenancies, there is no reference to the need for the vendor to consult the purchaser" and "in my opinion the proper duty owed is only to disclose and not to consult the [purchaser] on a request to terminate". He did however accept that the respondent owed a duty to the appellant to act reasonably in accepting the request to terminate the tenancy pursuant to the diplomatic clause. He held on the facts the respondent had indeed acted reasonably in light of the following:

(a) First, the respondent had disclosed the tenant's intention to determine the tenancy;

(b) Secondly, the respondent's solicitors had explained to the appellant's solicitors the basis

for accepting the tenant's determination of the tenancy;

(c) Thirdly, there was no evidence that the tenant's exercise of the diplomatic clause was a "scam".

Applicable law

The vendor and purchaser relationship

20 It is settled law that upon the signing of a binding contract for the sale of land, which may be enforced by specific performance, the relationship between the vendor and the purchaser is constituted: *Lee Christina v Lee Eunice* [1993] 3 SLR 8. The purchaser is then recognised as the equitable owner of the property. The vendor however remains the legal owner of the property until completion. The vendor is entitled to a lien on the property, commonly known as a vendor's lien, until receipt of the purchase price. The purchaser is entitled to have the legal title transferred to him upon payment of the purchase price.

21 The transfer of risk is the key facet of this now varied relationship. The observations of Jessel MR in *Lysaght v Edwards* (1876) 2 Ch D 499 at 507–508, are unquestionably the quintessential authority in this area:

> If anything happens to the estate between the time of sale and the time of completion of the purchase it is at the risk of the purchaser. If it is a house that is sold, and the house is burnt down, the purchaser loses the house. He must insure it himself if he wants to provide against such an accident. If it is a garden, and a river overflows its banks without any fault of the vendor, the garden will be ruined, but the loss will be the purchaser's. In the same way there is a correlative liability on the part of the vendor in possession. He is not entitled to treat the estate as his own. If he wilfully damages or injures it, he is liable to the purchaser; and more than that, he is liable if he does not take reasonable care of it. So far he is treated in all respects as a trustee, subject of course to his right to being paid the purchase-money and his right to enforce his security against the estate. With those exceptions, and his right to rents till the day for completion, he appears to me to have no other rights.

22 The purchaser has however no rights, pending completion, to enforce his equitable interest against third parties. The Contracts (Rights of Third Parties) Act (Cap 53B, 2002 Rev Ed) does not appear to have addressed this issue with any clarity. The vendor remains the custodian of legal title and enforcement rights. He is considered to be a trustee.

The nature of the trusteeship

23 The vendor's trusteeship is unique. He is not a passive trustee as he has concurrent rights in the property pending completion. Equity has long recognised the dual property rights of vendor and purchaser in this transitional period. If the purchaser fails to comply with his obligations to complete the sale transaction, the vendor has an option to rescind the contract and reclaim his equitable ownership or to seek the assistance of equity in enforcing specific performance. In this regard, I can do no better than to refer again to yet another observation of Jessel MR in *Lysaght v Edwards* at 508:

> [T]he trustee, was not a mere dormant trustee, he was a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest if anything should be done in derogation of it. The relation, therefore, of trustee and

cestui que trust subsisted, but subsisted subject to the paramount right of the vendor and trustee to protect his own interest as vendor of the property – that interest being, as I said before, a charge or lien upon the property for the amount of the purchase-money.

24 It has been held that the duty of trusteeship extends to taking reasonable care that the property does not deteriorate pending completion: *Clarke v Ramuz* [1891] 2 QB 456. In that case, Lord Coleridge CJ referred to the obligation as having "to use reasonable care to preserve the property in a reasonable state of preservation, and, so far as may be, *as it was when the contract was made*" [emphasis added] (at 459–460). This principle has been applied in a number of different situations. These situations cover a wide spectrum of events ranging from physical damage to the property to potential economic loss arising from some contractual relationship pertaining to the property.

25 The yardstick that the law will apply in relation to the vendor's conduct *qua* trustee is that of a reasonably prudent owner. While he is not expected to exert himself to enhance the value of the property, pre-existing property rights ought to be preserved pending the transfer of the bare legal title to the purchaser. In recognition of the purchaser's corresponding rights in the property, equity obliges the vendor to consult the purchaser before he takes any steps in relationship to the property, which might impinge upon the purchaser's legitimate expectation to receive the property in the exact state it was when the contract was entered into.

The duty to consult

26 The vendor's obligations in relation to existing tenancy agreements have received some judicial attention. In *Earl of Egmont v Smith* (1877) 6 Ch D 469 at 476, Jessel MR opined:

> Whether the vacancy happen in the ordinary course of determining the tenancy either by the landlord or the tenant, or whether the vacancy happen because the landlord gave the notice at the request of the purchaser, appears to me as regards the subsequent liability wholly immaterial.
>
> *I think it is the proper course that the vendor should give notice of the impending vacancy to the purchaser, and ask him what he wishes to be done*; because if the purchaser says I am willing to run the risk of the farms being unlet, and I will guarantee you against any loss that will arise to you in case the purchase goes off, it might be a proper thing to allow them to remain unlet.
>
> [emphasis added]

27 In a somewhat different context, the Privy Council was invited in *Mohamed Haji Abdulla v Ghela Manek Shah* [1959] AC 124, to rule upon the right of a vendor to relet property which fell vacant pending completion. After deciding that the position under Kenyan law was substantially similar to English law, it held:

> [I]t seems plain that the vendors had no right *without consultation* with the purchasers to diminish the value of the property as it was after the surrender by reletting. [emphasis added]
>
> [*per* Lord Somervell of Harrow at 132]

28 Evidence had been led, in that case, to show that owing to insufficient available accommodation, the property was more valuable to the purchaser unlet than let. The Privy Council was of the view that the reletting of the property, without consulting the purchaser, had "the same

effect *in relation to value* as the leaving vacant of agricultural land" [emphasis added] (at 133). I find the reference to "value" important. It appears to me that the cornerstone of the decision was that the purchaser's interest in the property had not been adequately respected. The vendor's rights *qua* trustee did not allow him to disregard the purchaser's equitable interest. If the purchaser had been consulted, and had, as a result, requested the vendor to keep the property vacant, the vendor's proper course of action would have been to seek an indemnity for the rental due pending completion. The right to be consulted in this case was not a mere formality. It was a valuable right of the purchaser in the circumstances of that case.

Analysis of fact and law

29 It appears to me that the learned district judge fell into error when he drew an artificial bifurcation between the vendor's obligation *qua* fiduciary in (a) reletting and (b) termination. This is plainly wrong. The vendor is under an obligation at *all* times, pending completion, to behave as a prudent owner. He owes an obligation to the purchaser to preserve the value of the property – that is, without exerting himself to enhance the value of the property. His reliance on the particular extract from *Barnsley*, is puzzling, to say the least. On perusing the current edition (4th Ed, 1996) of *Barnsley*, I noted, with interest, that the passage he had relied on was contained in chapter 6 of the book. Chapter 6 deals with "Contents of Formal Contracts" and the particular extract relied on by the learned district judge comes under the rubric "Particulars of Sale" (at 157). It is obvious that all this particular passage stands for is that at the *pre-contract stage* of a sale, the vendor should notify the purchaser of the existence of a tenancy agreement. This is, needless to say, hornbook law. Obviously in the absence of a tenancy, a purchaser has a right, on completion, to insist on vacant possession. Disclosure of a tenancy varies this legal obligation of the vendor to hand over vacant possession of the property to the purchaser. It is *purely* in this context that *Barnsley* refers to the obligation to alert a purchaser to a notice to quit served by a tenant. It is abundantly clear that there can be no obligation to *consult* a purchaser on such an issue at this juncture.

30 Had the learned district judge's attention been properly drawn to *Barnsley*, he would have noted that the treatise does not equate "pre-sale contract" obligations with "pending completion" obligations. *Barnsley* deals with the parties' rights and obligations pending completion in a separate and distinct section altogether, namely in chapter 8. *Barnsley* summarises therein the vendor's rights and obligations, at 246:

> (i) [The vendor] can retain possession of the property until payment of the purchase money, though this right may be varied by the contract.
>
> (ii) He is entitled to a lien on the property for the security of the purchase price, or the balance. This lien arises, apparently, immediately there is a binding contract. As a general rule, it remains enforceable by the vendor so long as money is outstanding, notwithstanding that he has conveyed the property to the purchaser and let him into occupation. If the purchaser is in possession, the court will restrain him from any act, such as felling timber, by which the vendor's security might be lessened.
>
> (iii) Though the vendor still retains the legal estate, qua trustee, his powers as owner are suspended to some degree. *Where the property sold is subject to tenancies, he should not determine a tenancy without consulting the purchaser. Similarly, if a tenant quits prior to completion, the vendor should not create a new lease without the purchaser's consent. The vendor should not withdraw any application for planning permission and, if he does will be liable for any additional expense incurred by the purchaser in applying anew*. Again, if a business is being operated from the property, at a loss, the vendor should not continue to run the business

without consulting the purchaser. On the other hand, the vendor may create a mortgage for his own benefit provided, of course, he redeems it before completion.

(iv) The general rule that a trustee must not make any profit from his trust does not apply to the vendor. So he is entitled to retain the rents and profits until the time fixed for completion. Once that date has passed without actual completion, he must account for them to the purchaser, not only for what he actually receives, but for what he should have received had he not allowed the property to lie waste. The vendor is not entitled to retain rents received by him after the contractual date for completion, in satisfaction of rents accrued due before that date.

[emphasis added]

31 In my view, this passage accurately, but not exhaustively, sums up the vendor's rights and obligations pending completion. In fact, the highlighted extract is almost on point except that it does not expressly deal with the situation of a *tenant* attempting to determine the tenancy. It does however reiterate, in no uncertain terms, the existence of a duty upon the vendor not to determine a tenancy without consulting the purchaser. I do not therefore see any difficulty in extrapolating established principles to the obverse situation. If a vendor owes a duty not to determine a tenancy without consulting the purchaser, by the same token, he owes a similar duty to consult the purchaser on how he should deal with the situation should the tenant attempt to determine the tenancy. I also drew counsel's attention to an observation made by Romer J in *Raffety v Schofield* [1897] 1 Ch 937 at 944–945:

> As between vendor and purchaser of a property which at the date of the contract is in occupation of a tenant, the purchaser is generally speaking entitled to have the property preserved pending completion in its existing state, and the vendor would not only not be entitled as against the purchaser's desire to determine the tenancy, but if he did determine it he would be liable to the purchaser for any loss thereby accruing. This has always, I think, been the general view of the profession, and is certainly implied in the case of *Harford v Purrier*. *In fact, as between vendor and purchaser generally the powers of the vendor to act as owner of the property, and (inter alia) to change tenants or holdings, are suspended pending completion of the purchase.* [emphasis added]

The reference to the vendor's rights *qua* owner being "suspended" in my view accurately and succinctly sums up the applicable principle. In other words, the vendor no longer enjoys the unfettered freedom to deal with property related issues unilaterally. His status has been radically altered. To use a metaphor, this period could fairly be characterised as a "twilight period" for the vendor's rights in anticipation of a successful completion. The transitional change in ownership ends with completion. Should completion not take place and the contract for sale be rescinded, his rights are restored.

32 The risk for a vendor who fails to consult the purchaser is obvious. If the tenancy is wrongfully determined by the tenant, the purchaser who is not privy to this decision can rightfully initiate a cause of action for breach of the vendor's fiduciary duty *qua* trustee to preserve the value of the property for the purchaser. Alternatively he may insist on deducting as damages from the completion account losses that can be liquidated. If there is no mutual agreement on this, the prudent course of action would be for the purchaser to complete the transaction. It has been held that a vendor is, notwithstanding a breach of his fiduciary duty, entitled to serve on a purchaser a valid notice to complete the sale: *Prosper Homes Ltd v Hambros Bank Executor and Trustee Co Ltd* (1979) 39 P & CR 395. Equity will usually not view a breach of fiduciary duty as an event that permits a purchaser to rescind a land sale transaction; it does not affect title. Completion subject to a

preservation of rights (to avoid waiver) is the appropriate recourse.

33 Quite apart from the issue of observing a fiduciary duty, it must surely be in any enlightened vendor's self-interest to make any such decision in consultation with the purchaser. Such issues often bristle, like porcupines, with legal difficulties; to make a decision unilaterally would therefore often be tantamount to an open invitation to the aggrieved party to initiate litigation – as amply illustrated in this case. A vendor who causes economic loss to a purchaser in respect of a contractual incident pertaining to the property ought to be liable for this damage even after completion.

34 It is therefore axiomatic, given the concurrent interests of both vendor and purchaser in the property pending completion, that the vendor who has possession of the property and the right to enforce rights, must consult with a purchaser as to how their mutual interests can be adequately protected. Upon having his attention drawn to these authorities and hearing my views, counsel for the respondent conceded, without reservation, that both he and the learned district judge had in fact erred.

Extent of the duty

35 The authorities do not however appear to have progressed beyond articulating the existence of an obligation to consult, without explicating with any degree of precision or detail the extent or scope of that obligation. What if the consultation process is unfruitful? Clearly, there must be instances of unreasonable purchasers, unreasonable vendors or deadlock between purchasers and vendors in deciding on mutually acceptable course(s) of action. The duty of the vendor to consult does not amount to an obligation to take directions from the purchaser. When I pressed counsel for the appellant on this point, he conceded that this must be right. Therein lay the fundamental flaw in the appellant's contention. He could not unilaterally impose his views on the respondent, particularly if they were unreasonable. A vendor in such a situation ought to be able to reject any unreasonable course of action proposed by a purchaser. Arguably, if the purchaser offers to indemnify him pending completion, it may be difficult for him to decline the purchaser's proposal. In my view, however, where the purchaser's request or views are capricious, unreasonable or legally incorrect, equity will frown upon his conduct. In such instances, the purchaser will in all likelihood be unable to prove any damages in loss flowing from a putative breach of the fiduciary duty. Indeed this is precisely the position in this case. The vendor is entitled, in such instances, to act unilaterally even if an indemnity is offered. Should it, on the other hand, be the vendor who is behaving or conducting himself in an inappropriate manner, the purchaser will have to look for legal relief, pending or post-completion.

36 There would be two options open to vendors or purchasers faced with stalemate situations after consultation:

(a) First, the vendor could take the stance that the purchaser's position is unreasonable, and proceed unilaterally with what he considers to be the appropriate course of action. There is always the element of litigation risk if this approach is adopted.

(b) Secondly, either party could initiate a vendor and/or purchaser summons pursuant to s 4 of the Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed); this is a summary procedure, where the court at short notice determines *inter alia* the parties' rights pending completion. This procedure should however not be resorted to for *de minimis* issues lest the court should take the view that unnecessary litigation costs are being incurred, implying and entailing in turn cost consequences for counsel.

37 The court's main criterion in reviewing issues of this nature when they surface is, apart from

principle and case law, fairness laced perhaps with commercial morality. Both the vendor and purchaser should approach such issues that arise with a realisation that the law will always lean towards a resolution that ensures their mutual interests are adequately protected, pending completion, and that the purchaser's post-completion interests are not unfairly prejudiced or diminished.

38 I turn now to the facts at hand. The respondent inexplicably failed to consult the appellant on an issue that the appellant had a legitimate interest in. The appellant had a legitimate expectation to be consulted. The termination of a tenancy is an important contractual incident attaching to the property. It is incontrovertibly *ex facie* a valuable right. The respondent behaved unreasonably in not just failing to consult the appellant but in also keeping the appellant in the dark with regard to its acceptance of the tenant's termination notice. *Prima facie*, the respondent was in breach of its fiduciary duty *qua* trustee to consult the purchaser on this important issue. This does not, however, end the matter. The appellant had to show the court that, in the circumstances of this case, the right to be consulted was indeed a valuable right; that as a result of not being consulted he had indeed suffered consequential economic loss of some sort that was directly attributable to the loss of this right. Put another way, the appellant had to show that he would, had he been consulted, have taken a position that would be regarded in law as being reasonable or proper in the circumstances and that he had suffered actual prejudice.

39 It can be seen from the correspondence adverted to earlier that the appellant had adopted an unduly obdurate and uncompromising stance: the diplomatic clause, he asserted, could only be complied with if the employee had his employment pass cancelled. He had clearly taken an "all or nothing" approach. He did not resile, in any appreciable manner, from this stance during the trial proceedings.

40 In my view, this interpretation of the diplomatic clause is wholly incorrect. It appears to me that the appellant and his previous solicitors had unreasonably interpreted the diplomatic clause. The diplomatic clause required the tenant to furnish the vendor with "sufficient documentary or other evidence to the landlord's satisfaction" that the employee had been "transferred or relocated to another country". Clauses of this nature, while worded subjectively, are usually construed objectively; the law will not countenance capricious behaviour unless the contractual provision is explicit. Given that the appellant had a concurrent legitimate interest in the property, I am also prepared to accept that pending completion, equity would impose an obligation that the evidence should also be satisfactory, to the appellant *qua* purchaser, again in an *objective* sense.

41 The tenant had confirmed in writing that the employee was to be transferred to another country. The respondent had no reason to doubt the veracity of the tenant's notice of termination. While the respondent could have taken further steps to verify the tenant's assertion, it adopted a view based on its past dealings with the tenant, that the notice was given in good faith. In failing to consult the purchaser, the vendor took a risk. I do not agree with the learned district judge's tacit suggestion that the appellant is required to show that the notice was a "scam". The appellant could have adequately maintained an action against the vendor if he could have shown, for instance, that the terms of the notice or the procedure for giving the notice was not in accordance with the terms of the tenancy. This would amount to a breach of the tenancy terms. This, the appellant did not and could not do; to all intents and purposes, the tenant *had* indeed given a proper notice in accordance with the terms of the tenancy.

42 It is indeed here that the appellant's case fatally falters despite the fact that the respondent was in breach of its fiduciary duty to consult the purchaser and had to that extent acted unreasonably. To put it quite simply, the appellant had not an iota of evidence to indicate that the

notice to determine had been improperly given and/or incorrectly accepted. Indeed, the unchallenged evidence of the respondent is that the employee had moved out of the subject property well ahead of the expiry of the termination notice. This, as the learned district judge correctly pointed out, went a long way towards confirming that the notice had been given *bona fide*. The appellant's complaint that he had been deprived of an opportunity to litigate the matter with the tenant is without substance. He lost nothing. He adopted an unreasonable position and misinterpreted the contract. I should mention in passing, that when I reviewed the appeal record, I came across a copy of the tenancy agreement ("new tenancy") that the appellant subsequently entered into, post-completion. I noted with interest that the new tenancy contained the following diplomatic clause:

> Notwithstanding the tenancy is for a term of Two (02) years from the 15 November 2002 it may be determined after a period of 12 months from the commencement of the tenancy hereby granted by the Tenant giving to the Landlord two (2) calendar months notice in writing of the Tenant's intention to end the tenancy (however, the Tenant can only serve the 2 months' notice after the expiration of the 12 months from the day of the commencement of the tenancy) if … the Employee of the Tenant occupying the premises for the time being shall be required by the Tenant or by the Immigration or other Governmental authority or by any law or regulation to leave Singapore or if the said employee's employment with the Tenant becomes terminated for any reason whatsoever or the said employee is transferred or relocated from Singapore to another country. *Proof of such transfer or cessation (evidence must be by way of cancellation of the employment pass) must be shown to the Landlord.* In the event of the termination of this agreement as aforesaid the tenant shall refund to the Landlord the commission equal to one month's rental ($5,000.00) paid by the Landlord to the Agent … on a pro-rata basis for the remaining duration of this agreement. [emphasis added]

43 It is to be noted that the appellant here *expressly* and very precisely requires that proof of the employee's transfer be evidenced by a cancellation of the employment pass. One might speculate that he had perhaps learnt a lesson and was wary of history repeating itself. Be that as it may, I do not see how he could conceivably *read* such a requirement into the diplomatic clause in the tenancy between the respondent and its tenant. Such a requirement could not have been implied in the subject diplomatic clause. He was unreasonably attempting to force his case into a Procrustean bed.

Summary

44 In the circumstances, I held that while the respondent *qua* vendor had behaved unreasonably and was in breach of its fiduciary duty, it did not cause any actual loss to the appellant *qua* purchaser. Given that the appellant had made a serious *faux pas* by adopting an unreasonable position, it would have made no difference if the respondent had consulted him. Ultimately, the appellant had no factual basis to complain about the respondent's conduct; nor could he prove any loss given that the tenancy was properly determined. I note with some relief that despite the unreasonable positions taken by both parties, they managed nevertheless to take one step in the right direction: they completed the transaction, leaving only this issue to be litigated.

45 The appellant succeeded in this appeal only on the issue of the existence of a fiduciary duty to consult. This is however a Pyrrhic victory for the appellant, given that the appeal failed in substance. I have varied the order of costs made by the district judge to take into account the costs unnecessarily incurred by the respondent in disputing this point of law. Much unnecessary time and effort were expended by both parties and the learned district judge in ruminating about a point that was neither novel nor critical to the decision, in the final analysis. This case should serve as a stark reminder that when extracts from a legal treatise are cited and invoked, a proper, thorough evaluation and understanding of their context is vital.

Appeal dismissed. District court's order on costs varied.

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