Pender Development Pte Ltd and Another v Chesney Real Estate Group LLP and Another and Another Suit
[2009] SGHC 126

Case Number : Suit 479/2008, 501/2008

Decision Date : 26 May 2009

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Vinodh S Coomaraswamy SC, David Chan and Kenneth Choo (Shook Lin & Bok LLP) for the plaintiffs; Alvin Yeo SC, Chua Sui Tong, Smitha Rajan Menon (WongPartnership LLP) for the defendants in Suit No 479 of 2008 and the first defendant in Suit No 501 of 2008; Abdul Rashid Gani, Chia Ho Choon and Joycelyn Lin (KhattarWong) for the second defendant in Suit No 501 of 2008

Parties : Pender Development Pte Ltd; Bravo Building Construction Pte Ltd — Chesney Real Estate Group LLP; Vincent Chesney

Contract – Misrepresentation – Whether representation was material or mere puff

Contract – Mistake – Rectification – Whether insurance bond ought to be rectified on basis of common mistake

Contract – Whether sham transaction – Whether documents represented true relationship between parties – Whether there was intention to create legally binding arrangement with no covert arrangement intended

26 May 2009 Judgment reserved.

Andrew Ang J:

Introduction

1 These two proceedings before me arose from the same factual matrix involving the same or related parties. In Suit No 479 of 2008 ("Suit 479"), Chesney Real Estate Group LLP ("Chesney LLP") sought to recover $8.284m which it claimed to have loaned Bravo Building Construction Pte Ltd ("Bravo"). According to Chesney LLP, this loan was secured by an insurance bond issued by India International Insurance Pte Ltd ("India Insurance"). It thus sought, in Suit No 501 of 2008 ("Suit 501"), payment of the loan moneys from India Insurance pursuant to this bond. Bravo resisted Chesney LLP's claim on the ground that the loan was not really a loan but a deposit under a broader agreement between Chesney LLP and Pender Development Pte Ltd ("Pender"). According to Bravo, Chesney LLP was not entitled to a refund of this deposit. Pender, on the other hand, sought to claim damages from Chesney LLP on the basis of an alleged breach of that broader agreement as well as damages for a misrepresentation allegedly made by Chesney LLP's managing partner, Vincent Chesney ("Vincent").

The facts

2 Bravo and Pender are associated companies in the construction business. One Pang Sor Tin ("Jenny Pang") was consultant to both companies and it is undisputed that she had authority to act for them. In September 2007, through a professional acquaintance, Vincent learned that Pender was purchasing *en bloc* the development at 110 Wishart Road ("Pender Court"). Through the same acquaintance, he came to be introduced to Jenny Pang on 20 September 2007. Jenny Pang informed

him that Pender had entered into a sale and purchase agreement with the majority owners of the units at Pender Court for the sale of the development at a price of $80m with the completion date fixed for 25 February 2008.

3 Vincent indicated to Jenny Pang that should Pender be willing to construct a mixed development of townhouses and apartments in the form of cluster housing which foreigners could purchase, he was confident of Chesney LLP's ability to find sufficient buyers for units in the redeveloped property. Jenny Pang indicated that Pender would be keen to do so and instructed Pender's architects, aKTa-rchitects to look into changing the design plans accordingly. Through the course of numerous meetings, Pender appointed Chesney LLP as Pender's exclusive marketing agent to sell units in the redeveloped Pender Court. As a result, two written agreements were entered into between Chesney LLP and Pender:

(a) An Exclusive Marketing Agreement & Consultancy Services Agreement dated 4 October 2007 ("First Marketing Agreement"); and

(b) An Exclusive Marketing Agreement dated 22 October 2007 but signed on 23 October 2007 ("Second Marketing Agreement").

4 The express terms of the First Marketing Agreement provided for Chesney LLP to be appointed by Pender either as exclusive marketing agent or consultant for the redeveloped Pender Court which would comprise 48 units. It also provided for Chesney LLP to pay Pender, by 22 October 2007, an exclusive marketing fee of $168,000 per unit taken up by Chesney LLP. Chesney LLP, as marketing agent, was also to be paid a commission of 3% of the selling price of all units sold by Chesney LLP. The First Marketing Agreement also gave Pender the option to reject the exclusive marketing fee submitted by Chesney LLP if the latter failed to take up a minimum of 40 units. This First Marketing Agreement was unusual in that it was the marketing agent who had to pay the developer a marketing fee and not the other way round as one would have expected. This marketing fee was tied to the number of units taken up by Chesney LLP which suggested that the latter had a choice in the number of units it wished to take up. Oddly, however, it was also provided that in the event Pender accepted Chesney LLP's marketing fee (regardless of how many units were taken up), Chesney LLP would have to use its best efforts to secure buyers for *all* 48 units at a total selling price of $175m. No such marketing fee was paid by 22 October 2007. Instead, the Second Marketing Agreement dated 22 October 2007 was executed by the parties on 23 October 2007.

5 The Second Marketing Agreement differed from the first in several ways. It provided for Chesney LLP to be appointed as exclusive marketing agent without an option for appointment as a consultant. The Second Marketing Agreement also did not refer to any exclusive marketing fee to be paid by Chesney LLP. Further, the Second Marketing Agreement stipulated that there would be 52 units in the development (which would comprise 48 townhouses and 4 duplexes) as opposed to the 48 units specified in the First Marketing Agreement. It also expressly stated that the development would be eligible for purchase by foreigners. Both agreements provided that the exclusive marketing period would only commence when Pender had obtained a sales licence from the Controller of Housing.

6 On 23 October 2007, the same day the Second Marketing Agreement was signed, Chesney LLP entered into a loan agreement with Bravo ("the Loan Agreement") pursuant to which Chesney LLP issued a cheque dated the same day for the sum of $8.284m in favour of the latter. Clause 2 of the Loan Agreement stipulated two "conditions precedant [*sic*]" to the issuance of the loan: first, Bravo had to execute a corporate guarantee and indemnity in favour of Chesney LLP for the loan; and second, Bravo had to procure an insurance bond with Chesney LLP as beneficiary to secure Bravo's repayment of the loan. Bravo executed a corporate guarantee and indemnity dated 30 October 2007

and procured an Insurance Bond No A035806 dated 6 December 2007 issued by India Insurance for Chesney LLP's benefit ("the Insurance Bond").

7 On or about early April 2008, pursuant to cl 5.1 of the Loan Agreement which provided for repayment of the loan within 30 days of written demand, Chesney LLP called for the loan to be repaid. It issued a notice of demand of repayment dated 3 April 2008 to Bravo. Bravo did not respond to this letter.

Bravo and Pender's case

8 Bravo and Pender's case was that the documents did not contain the entire agreement between the parties. According to Jenny Pang, Pender and Chesney LLP reached an oral agreement on 15 October 2007 with the following terms:

(a) Chesney LLP was to market and secure buyers for all 52 units in the redeveloped Pender Court;

(b) Chesney LLP was to sell all 52 units in the redeveloped Pender Court at an aggregate price of not less than a guaranteed sum of $175m ("the Guaranteed Sum");

(c) Chesney LLP would pay Pender an $8m deposit ("the Deposit") against its obligations on the following terms:

(i) The Deposit was part-payment of the Guaranteed Sum;

(ii) Pender was entitled to retain the Deposit in the event that Chesney LLP breached its partly oral and party written agreement with Pender ("the Agreement");

(iii) Pender was obliged to return the Deposit, without interest, in the event the sale and purchase of Pender Court was not completed for reasons that did not arise from Chesney LLP's breach of the Agreement or if Pender failed to complete or failed to procure the completion of the redevelopment otherwise than as a result of Chesney LLP's breach of the Agreement;

(d) Pender was to work with Chesney LLP in finalising the redevelopment plans for Pender Court with the latter having the final say on the plans for the redevelopment;

(e) Pender would appoint Bravo as main contractor for the redevelopment; and

(f) In consideration of Chesney LLP helping Pender to market and sell the units in the redeveloped Pender Court, Chesney LLP would earn a commission equivalent to 3% of the higher of the two values – the Guaranteed Sum or the total of the sale prices.

9 Further, Jenny Pang alleged that she had met Vincent again on 18 October 2007 and that it was agreed that the Agreement between Chesney LLP and Pender would be varied so that Bravo instead of Pender would receive the Deposit. In that same meeting, Bravo and Chesney LLP agreed that the receipt of the moneys by Bravo would be recorded in terms of a written agreement whereby Chesney LLP would ostensibly lend the amount of the Deposit to Bravo but that the Loan Agreement would nevertheless be subject to the terms applicable to the Deposit as agreed between Pender and Chesney LLP.

10 Bravo therefore sought to resist Chesney LLP's claim for repayment of the loan on the ground

that Chesney LLP breached the Agreement. Chesney LLP's alleged anticipatory breach stemmed from (1) a meeting in late March 2008 where Vincent allegedly informed Jenny Pang that Chesney LLP was unable to proceed with the Agreement; and (2) the issuance of a notice of repayment dated 3 April 2008 pursuant to the Loan Agreement shortly after this meeting. Pender also sought to recover damages for this breach of contract.

11 Additionally, Pender alleged that Vincent had orally represented to Jenny Pang in late September 2007 that the new development at Pender Court would "definitely attain" foreigner eligibility status with his assistance. This did not materialise and Pender sought damages for this misrepresentation from Vincent.

Chesney LLP and Vincent's case

12 Chesney LLP's case was relatively simple. It argued that the loan was simply a loan and that it was thus entitled to seek repayment. The Loan Agreement was wholly separate from Chesney LLP's involvement in the marketing of the redeveloped Pender Court. According to Vincent, Jenny Pang informed him at their meetings in September and October 2007 that Bravo required an injection of cash in order to fund some of its projects. She told him that the money was needed by Bravo for these other projects and not for the redevelopment of Pender Court. She had assured him that the moneys were not going to be used to enable Pender to purchase Pender Court from its existing owners. Vincent felt that assisting Bravo with a loan with sufficient security would help Chesney LLP secure an opportunity to work with Bravo on some of the latter's other projects that had traditionally been marketed by another real estate agency. Bravo did, in fact, proceed to appoint Chesney LLP as the exclusive marketing agent for one of its other projects in or about February 2008.

13 Jenny Pang assured Vincent that Chesney LLP's loan would be repaid and sufficient security would be provided such that any risk of default would be negligible. She also suggested procuring an insurance bond for the benefit of Chesney LLP as security for Bravo's repayment of the loan. She added that Bravo would provide a corporate indemnity that would enable Chesney LLP to be repaid as and when it demanded repayment. In reliance on these assurances, Chesney LLP and Bravo entered into the Loan Agreement and the moneys were extended to Bravo.

14 Chesney LLP thus sought repayment of the loan from Bravo and when Bravo failed to pay, it sought to claim the loan amount from India Insurance under the Insurance Bond.

Issues raised

15 I shall address the issues raised in this order:

(a) Whether Chesney LLP was entitled to claim the loan amount from India Insurance pursuant to the Insurance Bond;

(b) Whether the moneys extended under the Loan Agreement were truly a loan or whether they were meant to be a deposit subject to the terms and conditions of the Agreement;

(c) If the moneys were meant to be a deposit, whether Chesney LLP breached the Agreement so that Bravo was entitled to retain the deposit;

(d) Whether Pender ought to succeed in its claim against Chesney LLP for breach of the Agreement; and

(e) Whether Pender ought to succeed in its claim against Vincent for damages for an alleged misrepresentation.

Whether Chesney LLP is entitled to claim the $8.284m from India Insurance

16 The relevant parts of the Insurance Bond read as follows: 6th December 2007

To: Chesney Real Estate Group LLP and his successors in office

OUR INSURANCE BOND NO. **A035806** FOR S$8,284,000.00

Whereas on the 23rd of October 2007 it was agreed between **Bravo Building Construction Pte Ltd** of **71 Lor 23 Geylang #04-01 Singapore 388386** (hereinafter called "the Turnkey Main Contractor") of the one part and **Chesney Real Estate Group LLP of 176 Ocean Drive Sentosa 098458** (hereinafter called "the Lender") of the other part whereby the Turnkey Main Contractor and Lender has entered into an Agreement Dated **3rd July 2007** (hereinafter called "the Agreement") on terms and conditions conveyed.

NOW in consideration of the Agreement granted by the Lender to the Turnkey Main Contractor under the said Agreement, We (AT THE REQUEST OF THE Turnkey Main Contractor) HEREBY AGREE as follows:-

1.In the event of the Turnkey Main Contractor fails to fulfill any of the terms and conditions of the Agreement in connection with the Turnkey Main Contract Works for the **Design & Build for New Erection of Condominium Development Consisting of 4-Storey Apartment Block and 3-Storey Strata Terrace Houses with Basement and Attic (Total 52 Units) and Provision of Carpark and Swimming Pool On Lot 01904X MK1 at Wishart Road / Morse Road / Pender Court (Bukit Merah Planning Area)**, we shall indemnify the Lender against all losses, damages, expenses, or otherwise sustained by the Lender up to the sum of Not Exceeding Singapore Dollars **Eight Million Two Hundred and Eighty-Four Thousand Only (S$8,284,000.00)** ("the Guaranteed Sum") upon receiving your written notice of claim for payment made pursuant to Clause 4 hereof.

2....

3.Our liability under this Guarantee shall continue and this Guarantee shall remain in full force and effect from **23 October 2007** until **22 October 2009** (both dates inclusive).

17 Counsel for Chesney LLP submitted that "[o]n plain reading, the Insurance Bond is shown to be in respect of the Loan Agreement". With respect to learned counsel, I am unable to agree. It is important in bear in mind that, save in exceptional circumstances, it is necessary to observe strict compliance with the conditions stipulated in a performance bond which trigger the financial institution's obligation to pay. This is so as to ensure a high degree of certainty necessary for the functioning of such institutions (see Poh Chu Chai, *Law of Pledges, Guarantees and Letters of Credit* (LexisNexis, 5th Ed, 2003) at p 867). In this instance, on a plain reading of the wording of the Insurance Bond, it is clear that there is no direct reference to the Loan Agreement. Instead, in the recital, reference is made to an agreement entered into between Bravo and Chesney LLP on 3 July 2007. This could not have been the Loan Agreement (for it was not even in existence on that date) or any other agreement for that matter (for it was common ground that there was no agreement between Chesney LLP and Bravo dated 3 July 2007). Second, the agreement referred to in the

Insurance Bond was not described as a loan agreement. Instead, it was described in cl 1 as an agreement for the "Design & Build for New Erection of Condominium Development ... On Lot 01904X MK1 [Pender Court]". For these reasons, *ex facie*, there was no reference to the Loan Agreement. When these points were raised in cross-examination, Vincent was compelled to agree that the true purpose of the Insurance Bond was encapsulated in the words set out in cl 1 of the Insurance Bond. He conceded that India Insurance's liability was engaged only if there was a failure to fulfil any of the terms and conditions of the Agreement and not the Loan Agreement.

18 Nevertheless, I note that there are *indirect* references to the Loan Agreement in the Insurance Bond. It was stated in the subject of the Insurance Bond that the bond was for the sum of $8.284m. This was also the monetary limit set for the indemnity stated in cl 1 of the same document. This amount is exactly the same as that loaned to Bravo. This could not be dismissed as a mere coincidence. Second, Chesney LLP was referred to in the Insurance Bond as "the Lender". On the strength of these points, Chesney LLP argued that the wording of the Insurance Bond was ambiguous. It thus sought to adduce extrinsic evidence which it hoped would show that the Insurance Bond was made in reference to the Loan Agreement. In putting forth this argument, Chesney LLP relied on the case of *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029 ("*Zurich Insurance*").

19 It has been clarified in *Zurich Insurance* (at [114] to [120]) that even in the absence of ambiguity, extrinsic evidence may be admissible under proviso (f) to s 94 of the Evidence Act (Cap 97, 1990 Rev Ed) to aid in the interpretation of the written words of a contract by providing context. However, a line is still drawn between interpreting a contact and varying it (see *Zurich Insurance* at [123]). In this case, it is difficult to see how providing evidence as to the context in which the Insurance Bond was concluded could allow the court to ignore the express wording of cl 1 which refers to an agreement entirely different from the Loan Agreement. There were no tools of contractual interpretation which would have allowed me to accept Chesney LLP's assertion for, in the final analysis, acceptance of that assertion would require me to find that the wrong words were used in the Insurance Bond, and, as a consequence, to reject those words. It would not have been right for me to do this in the exercise of contractual interpretation (see *Zurich Insurance* at [123)]). If the wrong words were used, rectification might be a more appropriate remedy. In anticipation of this conclusion, perhaps, Chesney LLP sought, in the alternative, rectification of the Insurance Bond.

20 In order to allow rectification of a contract, it must be shown that there was an intention common to the parties at the time of the formation of the contract to include in their bargain a term which by mutual mistake was omitted or that the terms were wrongly recorded (see *Kok Lee Kuen v Choon Fook Realty Pte Ltd* [1997] 1 SLR 182 at [45]). The degree of probability to be established in rectification proceedings was a high one, similar to that of "convincing proof" (*Syed Yacob Alkaff v Syed Alwee Alkaff* [1993] 1 SLR 34 at [23]).

21 Counsel for the Chesney LLP devoted a substantial part of his submissions to making the point that as between Bravo and Chesney LLP, there was a common intention for the Insurance Bond to secure the moneys loaned under the Loan Agreement. I accept that as between Bravo and Chesney LLP, this was the intended purpose of the Insurance Bond. This would explain the indirect references to the Loan Agreement in the Insurance Bond (see [18] above). However, this did not take Chesney LLP very far in its claim for rectification. There was insufficient evidence to show that what transpired between Bravo and Chesney LLP was made known to India Insurance. Quite the contrary, I was convinced that India Insurance had not intended for the Insurance Bond to secure the moneys extended under the Loan Agreement.

22 India Insurance's manager in charge of issuing the Insurance Bond, Goh Suan Kim ("Amy Goh"),

gave evidence that she was first approached on the subject of the Insurance Bond in the last week of November 2007 by one Douglas Ong of OCW Insurance Brokers Pte Ltd ("OCW"). Douglas Ong informed her that OCW was Bravo's insurance broker, that Bravo was the design and build contractor for the redevelopment of Pender Court and that Bravo required a performance bond for the construction of the new development in addition to the Contractor's All Risk Insurance and Workman's Compensation Insurance. He asked her whether India Insurance would be able to provide the performance bond of about $8m to secure Bravo's design and build obligations. Amy Goh agreed to consider this.

23 On 3 December 2007, one Augustine Ong of OCW showed Amy Goh the draft wording of the performance bond which was substantially the same as the final draft of the Insurance Bond except that the date of the agreement in the recital was left blank. Amy Goh noted that the description of the agreement in cl 1 was indeed for the design and building of a new development at Pender Court. In the course of preparing the Insurance Bond, Amy Goh asked a member of her staff, Ng Siaw Ling ("Ng"), to check with OCW on the date to be filled in for the recital. Augustine Ong informed her that the date to be inserted was "3rd July 2007". Ng's evidence was unchallenged for Chesney LLP chose not to cross-examine her. I found there to be some truth in the Amy Goh and Ng's testimony. At no point did India Insurance intend to guarantee an outright loan extended by Chesney LLP to Bravo. In fact, it was company policy not to secure outright loans. It may be that this was the reason why, although Bravo and Chesney LLP intended for the Insurance Bond to secure the performance of the Loan Agreement, they saw the need to craft the wording of cl 1 of the Insurance Bond such that it referred to something other than an outright loan. If so, this was foolish because the consequence was that the Insurance Bond would not have the effect Bravo and Chesney LLP intended. It did not secure performance of the Loan Agreement. In any event, regardless of Bravo and Chesney LLP's intentions, I was convinced that, at least on the part of India Insurance, it did not intend to agree to something other than that spelt out in the plain wording of the Insurance Bond. To India Insurance, this was simply a performance bond in respect of an agreement for the design and build of the new development at Pender Court.

24 There is, accordingly, no basis to order rectification of the Insurance Bond. For the foregoing reasons, there was also no need for me to address Chesney LLP's arguments on unilateral mistake since even if there was such a mistake, India Insurance would not have been aware of it. Consequently, Chesney LLP fails in its claim against India Insurance for the latter owes no obligation under the Insurance Bond to guarantee performance of the Loan Agreement.

Whether the moneys extended under the Loan Agreement were subject to the terms and conditions of the Agreement

25 Bravo argued that the Loan Agreement was not in fact an independent agreement. According to Bravo, the moneys extended under the Loan Agreement were in truth the Deposit and that the terms and conditions of the Agreement thus applied. Although counsel for Bravo did not say this explicitly, he was effectively arguing that the Loan Agreement was a sham agreement, that is to say, that the parties did not intend for it to have legal effect. Bravo's argument thus goes towards *proof of the contract*. In this regard, extrinsic evidence may be adduced to prove the true nature of the agreement or the legal relationship of the parties even though this may vary or add to the written instrument (see *Chitty on Contracts* (Sweet & Maxwell, 30th Ed, 2009) at [12-113]). This point must distinguished from that made earlier (in [19]) which was concerned with the parol evidence rule. The parol evidence rule operates in an altogether different paradigm, that of *interpretation* of the contractual terms, and thus does not operate to prevent the adduction of extrinsic evidence to determine the true nature of an agreement and thus the legal force it has. In this connection, it is necessary to mention that the "whole agreement" clause in the Loan Agreement does not preclude

extrinsic evidence pertaining to the *validity* and *nature* of the agreement in the first place. Such a clause would have legal force only if the agreement was valid. It thus could not work to exclude extrinsic evidence which would go towards showing that the true nature of the agreement was something other than that evinced from the plain wording of the document.

26 After consideration of the wording of the Loan Agreement as well as extrinsic evidence on the circumstances surrounding the conclusion of that agreement, I found that Bravo had failed to prove that the Loan Agreement was meant to have no legal effect. Bravo argued that the Loan Agreement was merely a "receptacle" for payment of the Deposit. In support, Bravo pointed to the fact that Vincent had admitted, on cross-examination, that the Loan Agreement was furnished in consideration for the right to market what would have been the new development at Pender Court. (Vincent also conceded that the sum of the loan correlated with that of the Deposit: at $168,000 for each of 48 townhouse units and $55,000 for each of the 4 duplex units, the total sum of the Deposit worked out to be exactly $8.284m.)

27 Having considered these points and the fact that the Loan Agreement was concluded on the same day as that on which the Second Marketing Agreement was signed, I accepted that the Loan Agreement was related to the Agreement. However, it did not necessarily follow that the Loan Agreement was meant to have no legal effect. This conclusion would have been the result of a leap of logic and I could not agree for the following reasons: first, given that this was an arm's length commercial transaction, the parties would not have entered into agreements lightly, what more an agreement which appeared to have been carefully drafted. It would have been most unusual for the parties to go to the extent of preparing and executing an agreement which was not intended to have legal effect and which was in fact contrary to the parties' true intentions. Commercial parties do not, in the normal course of events, prepare and execute detailed written contracts that are not what they purport to be.

28 Second, it must be noted that the Loan Agreement was prepared by Bravo's director, one Lisa Poh. Assuming that the moneys extended under the Loan Agreement were the Deposit which Bravo was entitled to retain in certain circumstances (see [31] below), it defied common sense and logic for Lisa Poh to have characterised the moneys as a loan in the Loan Agreement and to grant Chesney LLP the right to call for repayment as and when it so desired. This would have been completely against Bravo's interest. It was inexplicable for Lisa Poh to characterise the moneys extended as a loan if it were really the Deposit, unless that was what it truly was.

29 Third, Bravo's position becomes even more untenable when one considers the fact that Bravo actually took steps to comply with the terms of the Loan Agreement. It executed the corporate guarantee required under cll 2.1 and 7.1 of the Loan Agreement. It also procured the Insurance Bond from India Insurance with the intention to secure performance of the Loan Agreement at a cost of $327,963.56 pursuant to its obligation to do so under cll 2.2 and 7.2 of the Loan Agreement. It is unbelievable that Bravo would have incurred such costs for the sake of an agreement which was not intended to be effective. Last, Bravo's failure to respond upon receipt of the demand for repayment was also telling. If indeed the moneys extended under the Loan Agreement were the Deposit, Bravo would have refuted Chesney LLP's claim, and one would think, rigorously. Instead, Bravo chose not to respond.

30 For the aforementioned reasons, I was not convinced that the loan was the Deposit the repayment of which was subject to the conditions stated in the Agreement.

Whether Bravo is entitled to retain the moneys extended under the Loan Agreement if the moneys were in truth the Deposit

31 Even if I were to accept that the loan was the Deposit, Bravo was still not entitled to retain the moneys. It was Bravo and Pender's case that it was a condition of the Agreement that Chesney LLP was entitled to repayment of the Deposit upon the occurrence of one of two events: first, if the sale and purchase of Pender Court was not completed for reasons that did not arise from Chesney LLP's breach of the Agreement; or second, if Pender failed to complete or failed to procure the completion of the redevelopment of Pender Court otherwise than as a result of Chesney LLP's breach of the Agreement. In this case, we are concerned with the first event.

32 The sale and purchase of Pender Court was not completed for reasons that did not arise from Chesney LLP's breach of the Agreement. Pender argued that Chesney LLP had breached the Agreement and that the alleged anticipatory breach stemmed from (1) a meeting in late March 2008 where Vincent allegedly informed Jenny Pang that Chesney LLP was unable to proceed with the Agreement; and (2) the issuance of a notice of repayment dated 3 April 2008 pursuant to the Loan Agreement shortly after this meeting.

33 I did not agree with Pender that this constituted an anticipatory breach of the Agreement by Chesney LLP. The Agreement (as reflected in part in the Second Marketing Agreement) was for Chesney LLP to market a project consisting of 48 townhouses and 4 duplexes which had to be eligible for purchase by foreigners. Such a status was not granted. The Urban Redevelopment Authority ("URA") informed Pender by way of a letter dated 6 December 2007 that the redeveloped Pender Court could not be accorded condominium status which meant that it was not eligible for purchase by foreigners. This meant that Chesney LLP's obligation to market the project could not even have been triggered for the project was no longer that envisaged by the Agreement. Under the Second Marketing Agreement, Chesney LLP was to market a development which had to be eligible for purchase by foreigners. There was no such development. In these circumstances, even if Vincent had told Jenny Pang at the meeting in late March 2008 that Chesney LLP was unable to proceed with the Agreement, there would have been no breach. It was not that Chesney LLP had chosen to withdraw from its venture with Pender; the truth was that the venture had already fallen through as a result of URA's refusal to grant the redeveloped Pender Court condominium status.

34 I note that the parties spent some time quibbling over the reasons for which Pender chose not to complete the purchase of Pender Court. Pender argued that it had failed to complete the purchase because it no longer had Chesney LLP's co-operation in marketing the development. Chesney LLP argued that Pender had faced financial difficulties and had trouble paying the rest of the purchase moneys after it had earlier sought and obtained an extension of the completion deadline to 24 April upon payment of a $4m penalty to the Pender Court owners. I make no conclusions as to this for it did not matter. Since I have concluded (in the foregoing paragraph) that Chesney LLP was not in breach of the Agreement, it follows that the sale and purchase agreement was not completed for reasons other than a breach of contract by Chesney LLP. Therefore, even if I accept that the loan was actually the Deposit, Chesney LLP would still be entitled to be repaid the moneys. It goes without saying that Pender also failed in its claim against Chesney LLP for damages for breach of contract.

Whether Pender ought to succeed in its claim for misrepresentation

35 Pender also sought damages from Vincent for an alleged misrepresentation made by the latter to Jenny Pang. Pender's case was that Vincent had told Jenny Pang in late September 2007 that the development at Pender Court would *definitely attain* foreigner eligibility status with his assistance. This oral representation was allegedly made so as to induce Pender to enter into the Agreement with Chesney LLP. For the misrepresentation to be actionable, it is a requirement at law that it must have played a real and substantial part in operating on the mind of the innocent party in inducing the latter to enter into an agreement although it need not be the sole inducement (see *Jurong Town Corp v*

Wishing Star Ltd (No 2) [2005] 3 SLR 283 at [72]; and *Panatron Pte Ltd v Lee Cheow Lee* [2001] 3 SLR 405 at [23]).

36 Even if Vincent had made such a statement to Jenny Pang, I found it difficult to accept that the latter was induced by this statement to enter into the agreement. The statement was obviously nothing more than mere puff. After all, no one could guarantee that the development would *definitely attain* foreigner eligibility status save for the URA itself. Jenny Pang acknowledged this and admitted in cross-examination that even architects would not be able to guarantee that the URA would grant such status. Given Jenny Pang's experience in the property development industry and the fact that she had a team of architects to advise her, it is inconceivable that she would have been induced by Vincent's statement to enter into the Agreement. Vincent's statement was no more than mere puff and Jenny Pang must have known this.

Conclusion

37 For the foregoing reasons, I allowed Chesney LLP's claim against Bravo for the $8.284m but dismissed Chesney LLP's claim against India Insurance for payment of the sum. I dismissed Pender's claim against Vincent, for damages for his alleged misrepresentation, and its other claim against Chesney LLP for breach of contract.

38 I will hear the parties on costs.

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