Yuen Chow Hin and Another v ERA Realty Network Pte Ltd
[2009] SGHC 28

Case Number : Suit 137/2008

Decision Date : 05 February 2009

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Gan Kam Yuin (Bih Li & Lee) for the plaintiffs; Leonard Loo Peng Chee (Leonard Loo & Co) for the defendant

Parties : Yuen Chow Hin; Wong Wai Fan — ERA Realty Network Pte Ltd

Agency – Agency by estoppel – Defendant had held out associate as agent – Option form had defendant's logo printed on it – Commission agreement had defendant's letterhead and addressor was identified as defendant

Agency – Duties of agent – Agency relationship between housing agent and principal – Breach – Agent had assisted his boss's wife to make profit – Whether or not agent's conduct was breach of duties of agent

5 February 2009 Judgment reserved

Choo Han Teck J:

1 The first plaintiff, a businessman, is the husband of the second plaintiff. They owned a flat in a condominium known as Riverside Piazza at Keng Cheow Street. They decided to sell the flat and by recommendation from the first plaintiff's mother, sister, and brother, they asked one Ang Teik Soon, known to them as "Jeremy" to help them find a buyer. Jeremy was a "Senior Marketing Director" of the defendant company although the latter asserted in its defence that none of the agents or directors named or involved in this suit were its servant or employee. It claimed that they were independent contractors known as "associates". I shall return to this point shortly.

2 Jeremy was regarded as an agent of "ERA" (as the defendant is more famously known). The plaintiffs understood ERA to be a company that provided the services of a housing agency; and that a person carried an ERA calling card or who advertised himself as a housing agent under the banner of ERA was an ERA agent.

3 Jeremy had just prior to his engagement by the plaintiffs, found a buyer for a flat owned by the mother of the first plaintiff and was recommended to the plaintiffs as a competent agent. Jeremy worked as a subordinate to one Mitul Ratilal Parikh, known as "Mike". Mike had at all material times, about 200 agents working under him, all of whom used the defendant's ERA name and logo. The arrangement in place was that whenever an agent under Mike has successfully helped a client to complete a sale and purchase transaction he would share his commission with Mike and the defendant. There was some discrepancy in the evidence as to what the applicable ratio was, and it seemed that a flexible formula was used. In this respect, the evidence of the defendant's former Legal Manager Tan Keng Yong's account differed from that given by Mike. The exact ratio, however, was not important but the fact that the defendant and Mike shared in an agent's commission was relevant in establishing the nature of the relationship between Jeremy, and Mike, and the defendant. It was a relationship in which the defendant could not be heard to say that it had nothing to do with the conduct of Jeremy or Mike.

4 The first plaintiff was frequently away on business and he therefore left it to the second plaintiff to manage the sale of their Riverside Piazza flat. The second plaintiff was the one who appointed Jeremy as the agent for that purpose in June 2007. Jeremy reported to her sometime in mid-June that the OCBC Bank had valued the flat between $650,000 and $700,000. He told her that he would soon place an advertisement for the sale of the flat. Jeremy telephoned the second plaintiff about 4 July 2007 and told her that he had a Chinese client who wanted to buy the flat for $650,000. According to the second plaintiff, Jeremy described this client as a "regular" client of his. This "client" turned out to be one Natassha Sadiq ("Natassha"), who was (and still is) Mike's wife. The second plaintiff asked Jeremy why she was not offered the valuation price of $700,000. Jeremy told her in reply that it was because she had recently renewed the tenancy for the flat, implying that a tenancy encumbered flat had a lower value. The second plaintiff then asked Jeremy to make a counter-offer of $688,000. Natassha, who later testified for the defendant, said in her evidence that she had offered to buy the flat at $650,000 after a discussion with her husband, and that they decided on this sum because it was the serial number of her identity card (which was in fact "6500003"). This was not a crucial piece of evidence in itself; it was useful only in my assessment of the witness's credibility. Jeremy then told the second plaintiff that the seller had accepted her offer. The second plaintiff's evidence was that she then granted an option dated 12 July 2007 addressed to "Natassha Sadiq or nominee(s)" for her to buy the flat at $688,000, and also signed a commission agreement also dated 12 July 2007 agreeing to pay a commission of $6,880 (1%). The commission agreement was on the defendant's letterhead, and the addressor was identified in the phrase "Yours sincerely, ERA REALTY NETWORK PTE LTD" and signed by Jeremy in his proper name "Ang Teik Soon". Between 5 July 2007 and 12 July 2007 there were some negotiation concerning the price and the completion period but this was not relevant to the issues before me.

5 Jeremy claimed that the option and the commission agreement were signed on 5 July 2007 and not on 12 July 2007. I have no hesitation in preferring the second plaintiff's version. In any event, in my view, it was not a major issue although Jeremy's point was that the second plaintiff knew as at 5 July 2007 that Natassha was likely to sub-sell the property because of the words "or nominee(s)" appearing in the option form. What was significant was that the defendant filed a claim against the plaintiffs for the commission due from the sale of the flat. That claim was made in the Small Claims Tribunal in the Subordinate Courts by the defendant; not by Jeremy.

6 Natassha exercised her right of option on 26 July 2007, thus contracting to buy the plaintiffs' flat for $688,000. The plaintiffs did not know at that time that Natassha was Mike's wife; and they also did not know that Mike was Jeremy's superior in the defendant organisation. Neither did they know that Jeremy had known Mike for a very long time and was employed by Mike personally when he (Jeremy) was retrenched in 1999 by his previous employer. Mike subsequently suggested that Jeremy join the defendant and that was how Jeremy became an "associate" of the defendant. More importantly, unknown to the plaintiffs, Mike had placed newspaper advertisements for the sale of the flat; and conversely, Jeremy did not place any advertisement. The second plaintiff thought he did because he told her that "no one had responded to the advertisement". When cross-examined Jeremy told the court that he believed that telling his regular clients (which was in fact Mike, who used his wife as nominee) constituted advertisement. That clever answer did not explain why he had said to the second plaintiff that no one answered the advertisement. Perhaps Jeremy did not think that counsel knew the difference between a tip-off and an advertisement. I think that it is fair to say that most people know the huge difference between those two words. The plaintiffs subsequently discovered that Mike had placed at least two advertisements in the Straits Times; one on 7 July and the other on 14 July. It also transpired that Natassha granted an option to purchase the flat to one Teo Su Kee on 18 July 2007 for the price of $945,000. Teo Su Kee exercised his right of option on 25 July 2007, the day before Natassha exercised her right of option granted by the second plaintiff. Teo Su Kee testified that he bought the flat through Mike in response to a newspaper advertisement.

7 The plaintiffs were puzzled when they received a query from the Central Provident Fund Board ("the Board") asking them why they had sold their flat below valuation. They asked Jeremy whether that was so. Jeremy told them that it was not true and helped them draft a reply to the Board. The reply was not entirely truthful but that was not a major issue and adds only to the court's assessment of Jeremy. The plaintiffs received no further communication from the Board after that but they sensed that something was not right. They then searched the newspapers and found the advertisements placed in the Straits Times by Mike. They also discovered through a search made at the Registry of Marriages that Natassha was Mike's wife. On these facts the plaintiffs sued the defendant for breach of contract and specifically, for the breach of the implied terms that the defendant would use its best endeavours to obtain the best price for the plaintiffs and not act in conflict of interest, or obtain any secret profit.

8 The defendant denied the claim and its counsel, Mr Leonard Loo, made the following two arguments on its behalf. First, he argued that there was no wrongdoing on the part of Mike or Jeremy. Secondly, even if there were any wrongdoing it did not amount to a breach of contract between the defendant and the plaintiffs because neither Mike nor Jeremy was a servant or agent of the defendant. Counsel argued that even though Jeremy (and Mike) had used the defendant's name, they were independent contractors whose actions did not bind the defendant. It was not disputed that Mike and Jeremy had signed what was titled an "Associate Agreement" with the defendant in which the defendant was known as "the Broker". Under that agreement, the associate was appointed as the defendant's agent in terms stipulated as follows:

> APPOINTMENT
>
> Subject to the provisions of this Agreement, the Broker hereby appoints the Associate as the Broker's real estate agent to sell, lease and provide other real estate brokerage services, to solicit additional property listings and customers for the Broker and to otherwise promote the business of servicing the public in real estate transactions, and the Associate hereby accepts this appointment. The Associate agrees to work diligently and to perform his services to the best of his ability. The Associate shall at all times conform to and abide by all rules, regulations and policies of the Broker for the performance of the Associate's obligations hereunder, as the same may be amended from time to time at the Broker's sole discretion. The Associate agrees to conduct his business and regulate his habits, so as to maintain and to increase, and not to diminish, the goodwill and reputation of the Broker. For the avoidance of doubt, nothing in this Agreement shall constitute or create a partnership or employment between the Broker and the Associate.

This agreement also provided for the commission to be charged to clients or customers for services rendered by the associate. Although it declared that it was not a document creating a partnership or an employer-employee relationship between the associate and the defendant, I am of the view that the defendant had held out the associate as its agent. In the circumstances, unless the associate's client was expressly told otherwise, the client was entitled to regard the associate as a servant or agent of the defendant. I am satisfied that such disclosure was not made to either the first plaintiff or the second plaintiff.

9 Mr Loo attempted to show that the second plaintiff was an experienced businesswoman with a real estate agency company called Katz Realty Pte Ltd. Counsel thus wished to persuade the court that she must have not only known what was going on, but also knew that the defendant was not bound by Jeremy's conduct. The evidence did not support Mr Loo's argument. I accept the evidence of the first and second plaintiffs and find that they were not professionally familiar with the real

estate business of Katz Realty Pte Ltd; and, further, that they had unreservedly relied on the services and expertise of Jeremy. I accept the second plaintiff's evidence that her business was that of a personnel agency.

10 I accept the evidence of the second plaintiff that had she known the full facts, that is, that Natassha was Mike's wife; and Mike was not only an ERA agent, but also a Divisional Director and Jeremy's boss, she would not have agreed to sell her flat to Natassha; and that she would have asked an agent from a different housing agency to act for her. She voiced what I think would be the sentiment of any reasonable vendor, namely, that she would not have trusted an agent who did not disclose that the purchaser he procured was actually the agent's boss. I also reject Mr Loo's argument that the plaintiffs sold at the price they wanted therefore they should not be unhappy that the purchaser made a larger profit. That argument missed the point. Jeremy was not entitled to act as he did, namely, placing himself in a position where he might have to act in conflict between his principal's interests and his own. In any event, the second plaintiff had stated that she would not have granted the option had she known the concealed facts.

11 Chua Khee Hak (better known as "Jack Chua") was (and still is) the president of the defendant as well as the president of the defendant's holding company. He was not called as a witness for the defendant and was thus subpoenaed to appear by the plaintiffs as a witness for the plaintiffs. He testified that understanding the facts as disclosed he did not think that Jeremy or Mike had acted unethically. He also testified that by reason of the Associate Agreement, Jeremy and Mike were independent agents whose actions do not bind the defendant. He stated that the defendant's agents need not disclose the identity of the buyer unless the agent himself has a pecuniary interest, or the defendant would have obtained a financial benefit for itself. He confirmed that no disciplinary action had been taken against either Mike or Jeremy. When Mike and Jeremy gave their evidence they likewise declared that their conduct was not unethical. Their evidence were consistent with that of Jack Chua. Ms Gan Kam Yuin, counsel for the plaintiffs, drew Mike's attention to the Code of Ethics of the Institute of Estate Agents ("the Code of Conduct") and showed him that they had provisions that would have required Jeremy to make the appropriate disclosure to the plaintiffs. Mike expressed the view that since Jeremy was not a member of the Institute of Estate Agents he (Jeremy) was not bound by the Code of Conduct. Mike admitted that although he (Mike) was a member of the Institute, he was not in breach of the code of ethics because he was not the plaintiff's agent. That was the thrust of the defendant's case – Mike and Jeremy did no wrong for the reasons given by Mike, and in any event, they were independent contractors whose conduct did not bind the defendant.

12 It transpired in the trial that this was not the only instance in which Jeremy, Mike, and Natassha had been involved in a sale and purchase of property on behalf of clients without disclosing to them the identity, connection, and the interests of each of them. I think that the facts as I found above indicated that Jeremy was utterly wrong not to have made full disclosure to the plaintiffs. I find that Natassha was only a nominee, and the person who had wanted to buy the plaintiffs' flat was Mike because he was the one who was acutely aware of the true state of what Jeremy described as the "crazy" market at the time. I am of the opinion that he was the one who wanted to make a profit from a quick subsidiary sale as he had done. However, had he done so himself, he would have been in breach of the ethics set out in the Code of Conduct. He thus created a little more distance between himself and the plaintiffs by using his wife Natassha as the purchaser, and Jeremy as the vendor's agent. I think that any reasonable person would hold such conduct to be wrong, and I was surprised that Jack Chua, the president of the defendant, as well as Marcus Chu, the defendant's Senior Vice President, both thought that there had been no misconduct on the part of Mike, Jeremy, and the defendant. It was only during the cross-examination of Marcus Chu that it became clear to me why they thought so – Marcus Chu admitted that he and others in the company as well as agents from other companies in the housing agency business had been doing what Mike and Jeremy had done in

the transaction of the plaintiffs' flat.

13 I am of the opinion that the Mike and Jeremy were ethically wrong and in breach of contract by reason of creating a conflict of interest between their client and themselves. Jeremy was the contractual link between the plaintiffs and the defendant, but Mike was person behind the scheme, and his position in the defendant rendered Jeremy's breach even more reprehensible. The misconduct of Jeremy, Mike and the defendant in question is a matter of such importance that I feel bound to explain as simply and as briefly as I can the reasons as to why I think that the agents' conduct was wrong so that no property agent can claim ignorance after this. When a property agent is engaged to sell or buy real property, he (the agent) is the agent of the person who engaged him. That other person is his principal. The property agent has professional as well as specialised expertise and knowledge of the market that the property owner or buyer may not have. When he is so engaged, the agent has a responsibility to act in his principal's interests – not his own, or his friends', or his relatives' or his boss's. When a person has been appointed an agent of another, he becomes an extension of that other and so far as his endeavours are for the benefit of his principal he cannot create benefits for himself or his friends without due disclosure. That is the law of agency. This responsibility that the agent bears is the foundation of the ethical rules and contractual principles that prohibit an agent from acting in conflict of interests, and reaping secret profits for himself or his friends. The relationship that an agent has with his principal is fiduciary in nature; that is to say, it is one founded in trust. When a farmer negotiates with the fox on behalf of the chicken for its safe passage the farmer cannot have a personal interest in the deal or the chicken might be doomed for it has given its trust to the farmer and placed its safety in his hands.

14 The evidence showed that the option form had the defendant's logo printed on it. The agent's commission agreement was in fact executed between the second plaintiff and the defendant. All the advertisements were made with the object of persuading the public that if they engaged an ERA housing agent they would have the backing of ERA Realty Pte Ltd, *ie*, the defendant, and its network of clients and agents. This was exactly what the plaintiffs' believed. I do not accept that Jeremy and Mike had acted as independent contractors. They were agents of the defendant and their conduct binds the defendant. The result of the concerted efforts of Jeremy, Mike, and Natassha resulted in the plaintiffs' selling their flat for less than what they might have had they been properly and honestly advised. The profit Natassha made from the subsidiary sale is what the court regards as a secret profit even though Natassha herself was not a housing agent. She was a party to the plan made and carried out by two agents of the defendant.

15 In his written submissions Mr Loo referred me to the Privy Council case of *Horace Brenton Kelly v Margot Cooper and Another* [1993] 1 AC 205. The principle against acting in conflict of interests is a principle of law. Whether the circumstances of a given case amount to a conflict of interests is a question of fact. In *Horace Brenton Kelly v Margot Cooper and Another*, the agent was acting for two independent home owners. He owed duties of confidentiality to both and there was therefore an implied term not to divulge information regarding one principal to the other. In the present case the Jeremy acted in the interests of his friend – assisting Mike in making a profit from the plaintiffs' property when both of them were directors of the defendant. That was the conflict in this case. Furthermore, in *Horace Brenton Kelly v Margot Cooper and Another*, the court found that there was no element of dishonesty or bad faith on the part of the agent. I cannot say the same in this case. I find that the evidence established that the conduct of Mike and Jeremy amounted to a breach of duty and fraud. This case differs also on the facts from *ERA Realty Pte Ltd v Pushpha Rajaram Lakhiani and Anor* [1999] 1 SLR 190. I agree with the court there that where a housing agent acts for more than one potential purchaser he may not owe the duty of fidelity in the same way to all of them the way he would if he were acting for only one. A buyer is entitled to use a nominee when buying a property, but when the buyer is closely connected to the agent as to give rise to a situation of

conflict, the true facts must be disclosed. The conflict of interest before me was a conflict between the agent Jeremy and the vendor. In addition, Jeremy's duty to act honestly required him to disclose his boss's interests in the sale and purchase. The arrangements made and carried out by him in collaboration with Mike and his wife Natassha in the transaction depended on deception. The fact that there was no exclusivity of right of marketing was not relevant. The duties in contract express and implied depend on the facts.

16 For the above reasons, I give judgment in favour of the plaintiffs and order that the defendant pay them the sum of $257,000 being the profit made by Natassha, as well as all disbursements and expenses incurred by the plaintiffs in uncovering Natassha's relationship with Mike and Mike's relationship with Jeremy; all judgment sums will carry interests at the rate of 5.33% from the date of the filing of the writ to final payment. I am also ordering the defendant to pay costs to the plaintiffs on an indemnity basis to emphasize the gravity of the misconduct and breach of duty in this case. Mike has 200 agents working for him and we do not know how many agents the defendant has, nor how many housing agents there are in all. This kind of misconduct is never easy to discover because it is carried out in stealth and in breach of trust; and far too many homeowners and potential purchasers are at risk. The defendant and its two agents had done a grave disservice to the honourable and honest members in their rank.

Copyright © Government of Singapore.