Areco International Pte Ltd v Lam Cheng Yee (Wong Mau Lan Cindy and Another, Third Parties)
[2009] SGHC 9

Case Number	: Suit 101/2008, RA 245/2008, 246/2008
Decision Date	: 09 January 2009
Tribunal/Court	: High Court
Coram	: Kan Ting Chiu J
Counsel Name(s)	: Beh Eng Siew (Lee Bon Leong & Co) for the plaintiff; Lin Ming Khin (Donaldson & Burkinshaw) for the defendant
Parties	: Areco International Pte Ltd — Lam Cheng Yee — Wong Mau Lan Cindy; Chew Hua Seng

Agency – Misrepresentation

9 January 2009

Kan Ting Chiu J:

Background

1 The defendant, Lam Cheng Yee, the owner of a property at 32H Nassim Road, Singapore ("the property"), was sued by the plaintiff, Areco International Pte Ltd, her agent for the sale of the property for refusing to pay the agreed agent's commission. Although the sale of the property was completed, the defendant had revoked her irrevocable authority to her solicitors to pay the commission to the plaintiff out of the sale proceeds.

2 In response to the plaintiff's claim, the defendant filed a defence and counterclaim and issued two third party notices. The plaintiff applied for summary judgment on its claim and for the striking out of the two third party notices. The Assistant Registrar who heard the matter granted the plaintiff's applications. The defendant appealed against the order for summary judgment and the striking out of one of the third party notices.

3 The defendant's defence was that she was entitled to rescind the authority to pay the commission because of the wrongful conduct of Cindy Wong Mau Lan ("CW"), the housing agent from the plaintiff company who had worked to secure the sale of the property. She counterclaimed for the interest she paid to the purchaser for late completion of the sale, and the loss of opportunity to obtain a higher price for the property.

4 In her defence and counterclaim, the defendant alleged that CW had represented that the purchaser was interested in the property because of its "feng shui"[note: 1], that the purchaser's address was "c/o 9 Temasek Boulevard, #16-02A Suntec Tower 2, S(038989)"[note: 2], and that the selling price of $25,500,000 was a very good price[note: 3].

5 She made an issue of the address because the purchaser, Chew Hua Seng ("CHS"), is the owner of the property at 32K Nassim Road Singapore, which adjoins her property. Her husband, Thio Keng Thay ("TKT"), who had dealt with CW on her behalf, deposed in his affidavit filed in these proceedings that:

> [I]f the prospective purchaser wished to buy a property adjacent to his existing property such as this, he had only two he could buy. Therefore I believe, subject to expert advice, that an adjacent property would command a substantial premium over the market value. Certainly I would not have agreed to sell the property at $25.5 million if Cindy Wong had informed me when I enquired as to the prospective purchaser's interest in the property that he also had an interest in the adjacent property.

6 The defendant claimed that the representations were false and misleading in that:

> 32.1.1. the address of the Purchaser was at all material times 32K Nassim Road, Singapore, namely the plot adjoining the Property; and
>
> 32.1.2. the real reason for the Purchaser's interest in the property was his ownership of the adjoining land;
>
> 32.1.3. the Purchaser was not a market buyer but a special purchaser: the price was not a 'good price' for a special purchaser in the position of the Purchaser.

and that

> The above misrepresentations were made by Ms Wong deliberately and with knowledge of their falsity and with the expectation that they would be relied upon by the Defendant in considering whether and at what price to sell the Property to the Purchaser and whether and at what rate to pay commission to the Plaintiff. …

All these allegations were denied by the plaintiff and CW.

7 In addition to filing the defence and counterclaim, the defendant instituted third party proceedings against two persons. The first person was CW. She is a shareholder of the plaintiff and was the person from the plaintiff who liaised with TKT to secure the sale. In these third party proceedings, the defendant sought an indemnity from CW against the plaintiff's claim, and she also claimed against CW reliefs similar to those she claimed against the plaintiff in the counterclaim.

8 The second third party was CHS, the purchaser of the property. The defendant did appeal against the Assistant Registrar's order to strike out the third party notice against him.

9 A reference to parts of the parties' pleadings is helpful to understand the basis and merits of the third party notice against CW. In the defence and counterclaim, the defendant pleaded:

> 7. The Plaintiff at all times acted by its agent Ms Cindy Wong ("Ms Wong") for whose actions and defaults they are vicariously liable.
>
> 8. At all material times in her dealings with the Plaintiff the Defendant acted by her agent Mr Thio Keng Thay, the Defendant's husband ("Mr Thio"). The knowledge of Mr Thio is to be treated as the knowledge of the Defendant.

and the plaintiff responded in its reply and defence to counterclaim:

> 2. Paragraphs 7 and 8 of the Defence & Counterclaim and the agency alleged therein are admitted (in particular that at all material time, Thio Keng Thay, ("Thio"), the husband of the Defendant, acted as agent for the Defendant).

10 On those pleadings, it was common ground that CW was an agent of the plaintiff and the plaintiff was vicariously liable for her actions and omissions. Against this background, the defendant was by her counterclaim against the principal and her third party notice against the agent, seeking the same reliefs.

11 This raises a question whether the third party proceedings against CW were an abuse of process of court. As this issue was not fully dealt with before me, I will not come to any concluded position and will leave it to be examined by the Court of Appeal, if it is thought appropriate.

The events leading to the sale

12 The events as recounted in the affidavits of CW and TKT are:

(i) in November/December 2006, CW called TKT and enquired if the property was for sale. Initially, TKT had no interest in selling, but after a time, he informed CW that he would sell at $18m, and they agreed on a commission of 1.5%;

(ii) on 11 December 2006, CW informed TKT that there was a buyer for the property at $18m, and she forwarded an option and a commission agreement;

(iii) on 16 December 2006 TKT withdrew his offer to sell at $18m because he felt that the property may be under-priced;

(iv) on 1 February 2007, TKT informed CW that he was prepared to sell the property at $25m, and received counter-offers of $20m and $22m (CW and TKT's accounts varied over whether TKT accepted the $22m offer, but no option to purchase was issued);

(v) on 15 May 2007, TKT again informed CW that the price was $25m and an option prepared by his solicitors was forwarded to her;

(vi) in June 2007, TKT asked CW for prices of properties transacted in Districts 10 and 11, and on 7 June, a list of the prices was forwarded to him;

(vii) on 12 September 2007, TKT sent to CW a new option prepared by his solicitors at the price of $25.5m;

(viii) on 18 September 2007, TKT's price was accepted, and an option for that price was issued with the name and address of the buyer left blank.

Feng shui

13 TKT deposed in his affidavit that when he asked CW for the purchaser's reason for buying the property, she said that the reason was "feng shui". [note: 4] CW's account was that she told TKT that "one of the reasons could be "feng shui". [note: 5]

The purchaser's address

14 TKT did not know that CHS was the purchaser up to the time the option was issued on 18 September 2007. CW's evidence was that CHS did not want his identity revealed during the negotiations and this was confirmed by CHS. CW stated that she informed TKT of that, but TKT maintained that he was not aware that the purchaser wanted to remain anonymous.

15 The situation was that TKT did not ask for and was not informed of the identity of the purchaser till 18 September 2007. On that day when CW tendered the option money and received the option, it did not bear the purchaser's name. CW wanted CHS's name to be inserted with the words "and/or nominee". As TKT was not agreeable to those words, CHS's name and NRIC number were inserted together with his address which was stated as c/o 9 Temasek Boulevard, #16-02A, Suntec Tower 2 Singapore (038989).

The price of $25.5m

16 By his evidence, the price was set by TKT.[note: 6] CW would have said that it was a very good price after TKT informed her of it.

The alleged misrepresentations

(i) Feng shui

17 The first misrepresentation pleaded is the 'feng shui' reason for the purchaser. There is an uncertainty over whether CW had stated that to be the reason, or that it could be a reason for the purchase. Even if it was the former, it could not assist the defendant.

18 Nothing turned on this because this representation did not induce TKT to agree to sell the property for $25.5m on 18 September 2007. He did not, and could not, without appearing irrational, say that he would not have agreed to sell but for that representation.

(ii) The purchaser's address

19 CHS's address was stated in the option as "c/o 9 Temasek Boulevard, #16-02A, Suntec Tower 2, S(038989)". It was not disclosed who had decided to use that address. It could have been CHS himself, his solicitors, or CW. The defendant had no basis to attribute that to CW.

20 It was plain on its face that the address stated was not CHS's residential address. TKT did not object to it, and it was not a false or misleading address as it was the address of the solicitors acting for CHS in the purchase.

21 It is noteworthy that TKT did not say that he had required, as a condition to issuing the option that the purchaser's residential address be inserted or disclosed, or that he was told or believed that the address given was CHS's residential address.

(iii) That $25.5m was a very good price

22 In the course of the drawn-out negotiations, each of the increasing asking prices for the property, i.e. $18m, $25m and $25.5m, was set by TKT without consultation with CW. The negotiations were conducted in a seller's market. TKT must have considered $25.5m to be a good selling price when he fixed it and issued the option on 18 September 2007.

Deceit

23 The defendant's assertion of deceit was founded on the three alleged misrepresentations and the non-disclosure of CHS's residential address. For the reasons I have given, these complaints did not give the defendant a basis to allege deceit.

24 As for the non-disclosure of CHS's residential address, the defendant had to show that CW or the plaintiff was under a duty as an estate agent to inform her or TKT of that address. There was no evidence or authority produced to support the existence of such a duty.

25 The situation may have been different if TKT had asked CW if the asking price of $25.5m was appropriate, or if he had asked her if there were particular factors that he should have taken into consideration in fixing the price at $25.5m.

26 Even if he had asked the first question, CW would have honestly replied in the affirmative, on the basis that $25.5m was a good price even when the purchaser was the owner of an adjoining property.

27 If he had asked the second question, he may have a stronger case for complaint, but that would depend on whether an estate agent in Singapore is expected to know that a property can command a higher price from the owner of an adjoining property. An estate agent is not a valuer. He may hold himself out to be knowledgeable in property valuation. If he does, then he probably would be under a duty to advise his vendor-client that an intending purchaser is the owner of an adjoining property. If the agent does not hold himself out to be knowledgeable in property valuation, then it becomes a question of fact whether he is under a duty to advise his vendor-client of that phenomenon. CW was not a valuer and was not engaged as a valuer, and she did not hold herself out to be knowledgeable in property valuation. Was she under a duty to inform the defendant or TKT that CHS owned the adjoining property? To establish such a duty, the defendant would have to show that a competent estate agent practicing the profession in Singapore is expected to know that a property can fetch a higher price from the owner of an adjoining property. The defendant did not lead any evidence on this effect.

28 In any event, it must be remembered that both questions were not asked. In the circumstances, CW and the plaintiff cannot be liable to the defendant for not disclosing CHS's ownership of the adjoining property.

29 For the foregoing reasons, I found that the Assistant Registrar was right to grant the plaintiff's application for summary judgment, and to set aside the third party notice against CW.

Revocation of the irrevocable instructions to pay the commission

30 While this issue has no direct bearing on the matters before the Assistant Registrar and me, the defendant's revocation of the authority to pay the commission and her solicitors' response invited consideration and comment.

31 In the option granted to CHS, there was a specific provision that:

> The Vendor agrees to pay Areco International Pte Ltd (hereinafter called "the Agent") a commission of Dollars Three Hundred Eighty-Two Thousand and Five Hundred ($382,500.00) which is inclusive of the Goods and Services Tax Act upon the completion of the sale and purchase of the Property and the Vendor's solicitors are hereby irrevocably authorised to deduct and retain the said commission from the sale proceeds and to pay the same to the Agent upon completion. It is hereby expressly provided that the Vendor shall only be obliged to pay the Agent the said commission upon the successful completion of the sale and purchase of the Property but not otherwise.

32 The 'Vendor' referred to the defendant, and the 'Vendor's solicitors' were Donaldson &

Burkinshaw. When the defendant discovered that CHS was the owner of 32 K Nassim Road at the scheduled time of completion, she initially refused to complete the sale (but did so later, on payment of interest for late completion) and revoked the solicitors' authority to pay the commission to the plaintiff,[note: 7] and Donaldson & Burkinshaw accepted the revocation without demurral.

33 What should the solicitors acting for a vendor have done in such a situation? They were aware that their client, the vendor, had represented to the agent that the solicitors will pay the agent its commission out of the proceeds of the sale and had issued an irrevocable authorisation for that to be done. When the authorisation was accepted to be revoked, there was no basis for the solicitors to deduct and retain the commission and the full sale proceeds would be released to the vendor. In such an event, the agent may be placed in jeopardy. The vendor may be outside the jurisdiction of the Singapore courts, or may be unable to pay the commission by the time a court ruled that the commission was payable. Prudent solicitors in such a situation have taken out interpleader proceedings and retained the commission pending the determination of the proceedings. Banks often do that when there are competing claims to funds held by them. That appears to me to be a better course of action for Donaldson & Burkinshaw to take rather than to accept the defendant's instructions without notice to the plaintiff.

[note: 1]Defence and Counterclaim para 17

[note: 2]Defence and Counterclaim para 21

[note: 3]Defence and Counterclaim para 25

[note: 4]Affidavit of evidence-in-chief of Thio Keng Thay 21 May 2008 para 14

[note: 5]Affidavit of evidence-in-chief of Cindy Wong 6 June 2008 para 7

[note: 6]Affidavit of evidence-in-chief of Thio Keng Thay para 21

[note: 7]Affidavit of evidence-in-chief of Thio Keng Thay 21 May 2008 page 126

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