Ma Ong Kee and another *v* Kaiyo Reptile Products Pte Ltd
[2011] SGHC 188

Case Number	: Suit No 642 of 2010
Decision Date	: 16 August 2011
Tribunal/Court	: High Court
Coram	: Woo Bih Li J
Counsel Name(s)	: Subramaniam s/o Ayasamy Pillai and Taryn Yap (Colin Ng & Partners LLP) for the Plaintiffs; Beh Eng Siew and Bernard Sahagar (Lee Bon Leong & Co) for the Defendant
Parties	: Ma Ong Kee and another — Kaiyo Reptile Products Pte Ltd

Land – Sale of Land – Conditions of Sale

16 August 2011

Woo Bih Li J:

Introduction

1 The plaintiffs Ma Ong Kee and Tan Soo Ling (collectively referred to as "The Purchasers") had entered into an agreement to purchase a non-residential property known as 15, Realty Centre #01-02, Enggor Street, Singapore 079716 ("the Property") from the defendant Kaiyo Reptile Products Private Limited ("the Vendor"). The sole dispute which arose between them was whether the Purchasers were liable to pay goods and services tax ("GST") on the purchase price which the Vendor was itself liable to pay to the relevant authority. Unfortunately, this issue was not resolved and the Vendor terminated the agreement in the circumstances elaborated below and forfeited the deposit paid by the Purchasers. The Purchasers then filed a Writ of Summons to claim specific performance of the agreement and liquidated damages or general damages in lieu of specific performance. The Vendor in turn counterclaimed declarations that it was entitled to rescind the agreement, that the Purchasers were to cancel any entry in the relevant land register relating to the agreement and that the Vendor was entitled to forfeit all moneys paid by the Purchasers. The Vendor also counterclaimed a declaration that it was entitled to damages under condition 29.9 of the Singapore Law Society's Conditions of Sale 1999 ("the 1999 Conditions of Sale") but did not pursue this claim before me. Instead, the Vendor claimed damages for being precluded from utilising a deposit as I shall elaborate below.

Background

2 By an option to purchase dated 31 March 2010, the Vendor granted the Purchasers an option to purchase the Property at a price of $3,800,000. The option fee was $38,000, *ie*, one per cent of the price.

3 On 14 April 2010, the Purchasers' solicitors Colin Ng & Partners LLP ("CNP") wrote to the Vendor's solicitors Lee Bon Leong & Co ("LBLC"), with various documents enclosed to exercise the option. One of the documents was a cheque for $152,000 in favour of LBLC, being the balance of 5% of the price, which was the amount payable on the exercise of the option. I will refer to the entire 5% amounting to $190,000 as "the Deposit".

4 On 15 April 2010, LBLC wrote to CNP to state, for the avoidance of doubt, that the Property was sold subject to an existing tenancy and that the Vendor was registered for GST. LBLC requested $13,300 being the 7% GST payable on the Deposit.

5 Notwithstanding the request for $13,300, there was no dispute that the option had been validly exercised. Accordingly when it was exercised, there was a binding sale and purchase agreement between the Vendor and the Purchasers.

6 Although the terms of the option did not clarify whether the Property was sold with vacant possession or subject to a tenancy, the Purchasers did not raise any issue about the tenancy and apparently accepted that the sale was subject to the tenancy mentioned by LBLC in its letter dated 15 April 2010.

7 On 11 May 2010, about four weeks after LBLC's letter of 15 April 2010, CNP wrote to LBLC to say that the Purchasers were surprised at the belated request for payment of GST and that the Purchasers were not obliged to pay it "as this is contrary to the contractual bargain between the parties. In any event, this is consistent with the position at law where if there is no provision in the Option for the purchaser to pay the vendor's GST liability or the GST attracted by the sale, then the price quoted by the vendor for the sale of the property shall be deemed to include any GST chargeable on the sale".

8 LBLC replied on 12 May 2010 to disagree with CNP's letter on the issue as to whether the Purchasers were liable to pay the Vendor's GST, pending formal instructions from the Vendor. LBLC drew CNP's attention to condition 7.3 of The 1999 Conditions of Sale which they said imposed the liability for GST on the Purchasers.

9 On 14 May 2010, LBLC wrote to confirm their client's stand as stated in LBLC's letter of 12 May 2010. I will refer to the issue as to whether the Purchasers were liable to pay the GST as "the GST issue".

10 The parties could not agree on the GST issue. Apparently, the Purchasers offered to complete the sale but to pay the 7% GST amounting to $266,000 to CNP or to a neutral third party to be held a s stakeholders pending determination of the GST issue. However, these suggestions were not acceptable to the Vendor. Accordingly, the sale and purchase was not completed on 28 July 2010 which was the scheduled date of completion as calculated under the terms of the option.

11 On 30 July 2010, LBLC sent CNP a 21-day notice to complete the sale and purchase. In turn, CNP sent LBLC a 21-day notice to complete also dated 30 July 2010. Both the 21-day notices expired on 20 August 2010.

12 While each set of solicitors maintained that their respective clients were ready, able and willing to complete the transaction, there was no completion because of the GST issue.

13 In the circumstances, if the notice to complete from LBLC was valid, the Vendor was entitled to forfeit and keep the deposit paid by the Purchasers and resell the Property (see condition 29.8 of the 1999 Conditions of Sale). Although there is no express provision that a sale and purchase agreement would be terminated for failure by a purchaser to comply with a valid notice to complete, both sides assumed that that must be the effect of condition 29.8.

14 The Purchasers filed the writ of summons on 24 August 2010, a few days after the expiry of the notices to complete. The reliefs they sought and the reliefs sought by the Vendor in its counterclaim

are summarised in [1] above.

15 The action was fixed for hearing for three days from 4 July 2011. Counsel for the parties eventually agreed that the material facts were not in dispute. The issue was the correct interpretation of condition 7.3.1 of the 1999 Conditions of Sale, *ie*, whether it imposed liability for GST on the Purchasers. Counsel summarised the facts in an Agreed Statement of Facts which is attached hereto as a schedule. I have elaborated above on the summary.

Condition 7.3

16 Condition 7.3 of the 1999 Conditions of Sale states:

> 7.3.1 The Purchaser (whether of freehold or leasehold property) shall pay all Goods and Services Tax, if any, which may be payable in respect of the sale price of the property under the Goods and Services Tax Act (Cap. 117A) on completion or earlier as required by the Comptroller.
>
> 7.3.2 These provisions are not to merge in the Conveyance of the property.

The court's decision

17 The predecessor to the 1999 Conditions of Sale is the Singapore Law Society's Conditions of Sale 1994 ("the 1994 Conditions of Sale"). It was common ground that condition 7.3.1 of the 1999 Conditions of Sale is a new provision dealing with GST and that there was no such provision in the 1994 Conditions of Sale on GST.

18 GST was introduced in Singapore from 1 April 1994 under the Goods and Services Tax Act (Cap 117A, 1994 Rev Ed) ("the Act").

19 Section 8(3) of the Act stipulates that tax on any supply of goods or services is a liability of the person making the supply. However, this only made the supplier liable to the relevant authority for GST. It did not preclude the supplier from recovering the GST (for which it was liable) from the consumer.

20 Regulation 77(1) of the Goods and Services Tax (General) Regulations states:

> 77.–(1) Where any taxable person displays, advertises, publishes or quotes in any manner the price of any supply of goods or services he makes or intends to make, such price shall include the tax that is chargeable on the supply under the Act unless the Comptroller approves otherwise under regulation 78.

21 Counsel for the Purchasers submitted that since the price quoted by the Vendor was $3.8 million, that was inclusive of GST and they should not be liable for GST on the $3.8 million.

22 I was uncertain whether Reg 77(1) was confined to a quotation to the public at large or it also applied to the facts in the present case. Admittedly, the words "quotes in any manner" were wide enough to cover the present case. However, even if they did apply, it seemed to me that Reg 77(1) did not preclude a supplier from claiming GST on the purchase price from the consumer. For example, if the terms of the option stipulated the purchase price to be $3.8m and if there was a specific provision in the option clearly stating that the Purchasers were to pay the GST on the purchase price, then the Purchasers would be liable to pay the GST on the $3.8 million, even if the Vendor had simply orally quoted the $3.8 million figure, without more, before the option was issued. Counsel for the

Purchasers accepted this as much. Therefore, the question still remained whether condition 7.3.1 imposed the liability for GST on the Purchasers.

23 True, condition 7.3.1 was not well drafted. It did not impose liability for GST on the Purchasers as clearly as the contractual provision in *Woon Wee Hao v Coastland Realty Pte Ltd* [1998] 3 SLR(R) 463 ("*Woon Wee Hao*"). In that case, cl 17 of the sale and purchase agreement stated:

> The Purchaser shall be liable and shall pay for the Goods and Services Tax and the stamp fees in respect of or in connection with the sale and purchase of the Vendor's share in the Property or the said sale price.

24 It was useful to bear in mind that there were a few cases on the liability for GST before condition 7.3.1 was introduced by the 1999 Conditions of Sale.

25 In *Kuo Ching Yun and another v H & L Investments Holding Pte Ltd* [1995] 3 SLR(R) 276 ("*Kuo Ching Yun*"), a question arose whether the purchaser of a non-residential property was obliged to pay the GST on the purchase price of the property. The 1994 Conditions of Sale were incorporated as part of the terms of the sale. One of the points was whether condition 12 of the 1994 Conditions of Sale imposed an obligation on the purchaser to pay the GST. Condition 12 is a different provision from condition 7.3.1 which I was considering and I need not set out condition 12 here. It suffices for me to say that the High Court in that case decided that condition 12 did not impose an obligation on the purchaser to pay the GST.

26 In *Challenger Technologies Pte Ltd v Sheares Edwin Charles Hingwee and others* [1998] 2 SLR(R) 292 ("*Challenger Technologies*"), a vendor who had already completed the sale and purchase of a property then sought to claim the GST from the purchaser. The High Court in that case concluded that it was not a term of the agreement for the sale and purchase that the purchaser was to bear the GST.

27 I come back to the case of *Woon Wee Hao* which I referred to at [23] above. As I mentioned, cl 17 of the sale and purchase agreement there clearly provided that the purchaser was to pay for the GST. In that case, the vendor was advised that the sale of his undivided share in a property could attract GST. He then claimed the GST from the purchaser who refused to pay it. To avoid jeopardising the sale, the vendor completed the sale and reserved his right to claim the GST from the purchaser. Thereafter, the vendor filed an action to seek a declaration that the clear liability of the purchaser to pay the GST under the sale and purchase agreement had not merged in the transfer upon the completion, *ie*, that the contractual obligation was not extinguished by the transfer of title. Apparently, the purchaser argued that as the vendor was not registered for the purpose of GST at the time of completion, no GST was payable.

28 The Court of Appeal concluded that there was nothing in the sale and purchase agreement which suggested that the cl 17 obligation was predicated on the payment of GST being exigible upon completion of the sale and purchase. Referring with approval to an earlier High Court decision in *ACS Computer Pte Ltd v Rubina Watch Co (Pte) Ltd* [1997] 1 SLR(R) 1006, the Court of Appeal decided that the contractual obligation did not merge into the transfer.

29 I mentioned *Woon Wee Hao* again because counsel for the Purchasers suggested that it was because of that case that condition 7.3.1 was introduced. That is not correct. As I have mentioned, the contractual provision in that case clearly imposed the liability to pay GST on the purchaser. The issue there was whether the contractual obligation had merged into the transfer. It is condition 7.3.2 of the 1999 Conditions of Sale, not condition 7.3.1, which addresses the issue in *Woon Wee Hao*.

30 It seemed to me that condition 7.3.1 was introduced because of *Kuo Ching Yun* and *Challenger Technologies*.

31 Prior to condition 7.3.1, the default position in the absence of a contractual provision to the contrary was that the vendor was to bear the GST. Incorporating the 1994 Conditions of Sale did not affect this position. The question then was whether condition 7.3.1 of the 1999 Conditions of Sale effected a change and imposed the liability for GST on the purchaser.

32 Counsel for the Vendor submitted that the terms of condition 7.3.1 clearly stipulated for a purchaser to pay GST. However, the provision does not simply say that the purchaser is to pay GST. It states that the purchaser is to pay GST "on completion or earlier as required by the Comptroller". There is no definition of "the Comptroller" in the 1999 Conditions of Sale. Presumably it refers to the Comptroller of GST.

33 In other words, as drafted, the literal interpretation of condition 7.3.1 focuses on the time of payment of GST. It assumes that a purchaser is liable for GST. In that sense, one may argue that it does not impose the liability to pay GST on a purchaser and any such imposition must be found somewhere else, if at all imposed.

34 Counsel for the Vendor also relied on some materials issued in 2010 by the Board of Legal Education for the Preparatory Course leading to Part B of the Singapore Bar Examinations. In Volume 4 on Conveyancing, there is a passage at p 81 which states:

> Under the **Goods and Services Tax Act (Cap 117A)** the vendor is liable to the Comptroller of GST for the payment of any GST payable. However, in the case where a contract is governed by the Singapore Law Society's Conditions of Sale 1999, the vendor is entitled to claim such GST from the purchaser.
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> [emphasis in original]

35 I did not give any weight to this text as its provenance was not properly established.

36 As mentioned above at [23], condition 7.3.1 was not well drafted. Nevertheless, I was of the view that its purpose was to incorporate two points, *ie*, firstly, to stipulate that the purchaser is to pay GST and, secondly, to pay it on completion or earlier. I did not think that the introduction of condition 7.3.1 was to deal only with the timing of payment of GST by a purchaser when there was no other provision in the 1999 Conditions of Sale to impose liability on a purchaser in the first place.

37 In the circumstances, I made the declarations sought by the Vendor.

38 As for the Vendor's claim for damages for being precluded from utilising the Deposit, it appeared that CNP had in its letter dated 27 August 2010, informed LBLC that the Purchasers had commenced legal proceedings to claim specific performance of the sale and purchase agreement. CNP also demanded that the Vendor refrain from forfeiting the Deposit and from reselling the Property pending the outcome of the proceedings failing which they would apply for an injunction to restrain the Vendor from doing either of the above.

39 LBLC replied on 30 August 2010 to state, *inter alia*, that they would hold the Deposit pending the outcome of the legal proceedings on the Purchasers' undertaking to pay damages and/or loss of interest. It was unclear whether the Purchasers gave that undertaking.

40 I did not allow the Vendor's claim for damages for not utilising the Deposit as the facts in support of that claim were not pleaded. There was also no elaboration as to whether LBLC had earned any interest on the Deposit (or part thereof) and whether it would pass the benefit of the interest to the Vendor. In any event, the Vendor has benefitted from the forfeiture of the Deposit and from the rise in value of the Property since the date of the expiry of the 21-day notices. The latter point was confirmed by the Vendor's counsel.

41 There are some other points which I would like to elaborate on which I hope will be of assistance to parties and their solicitors.

42 When a dispute arises on the interpretation of a contractual or statutory provision, it is only natural that every means should be made to resolve it amicably or on an interim basis, for example, by making payment of any disputed sum under protest or to a stakeholder.

43 However, if there is no amicable settlement or interim solution, then the parties should file an action as soon as possible to seek a court ruling before it is too late and not wait till the contractual date of completion or when a notice to complete is given or has expired. Time is critical.

44 In addition, the appropriate mode of commencing such an action is the originating summons and not the writ of summons. The advantage of an originating summons procedure, if properly used, is that there is no need for pleadings and discovery and its hearing date is much earlier than for a writ.

45 Moreover, as a matter of caution, one should consider applying for interim relief in respect of the completion of the sale and purchase agreement in case the originating summons is not heard in time. Thus, for example, where a purchaser declines to make payment of the disputed sum to a vendor because of a genuine fear of dissipation of that sum and the vendor in turn declines to agree that the disputed sum be held by a stakeholder, the purchaser should apply for an interim order to complete the sale with provision being made for the disputed sum. If the court considers it unreasonable for the vendor to decline a stakeholdership arrangement, it can nevertheless order completion to be effected and the disputed sum to be paid to a stakeholder or into court which is effectively the same thing. If the court does not consider it reasonable to withhold the disputed sum from the vendor for the time being, it can order that sum to be paid to the vendor on completion pending the outcome of the action. Whichever interim order is made, the sale and purchase transaction is preserved and the scope of the dispute is restricted to the disputed sum as should be the case. The disputed sum should not be allowed to jeopardise the entire transaction.

Schedule

AGREED STATEMENT OF FACTS

1. On 31st of March 2010, the parties met and agreed to purchase the property at a price of S$3.8 million.
2. The property was a non-residential property.
3. The purchase price quoted by the Defendant was S$3.8 million.
4. The Plaintiffs were not informed on 31st March 2010 that the Defendant was GST registered.
5. There was no discussion on the payment of GST on the purchase price.

6. The Option to Purchase incorporates by reference the Law Society's Conditions of Sale 1999.

7. The Option was valid for 14 days from 31st March 2010 and it was exercised by the Plaintiffs on 14th April 2010.

8. There was no communication between the parties on GST or any other matter during the said 14 days period.

9. The very first time the Plaintiffs were informed by the Defendant that the Plaintiffs will have to pay GST on the purchase price was by way of the Defendant's solicitors' letter dated 15th April 2010.

10. On 30th July 2010, the Defendant gave the Plaintiffs notice to complete pursuant to the Law Society's Conditions of Sale 1999.

11. On 30th July 2010, the Plaintiffs gave notice to complete pursuant to the Law Society's Conditions of Sale 1999.

12. Both notices expired on 21st August 2010.

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