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CHAN YEW MUN & ANOR v. FABER UNION SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
VAZEER ALAM MYDIN MEERA JC
[SUIT NO: 22NCVC-644-11-2013]
26 JANUARY 2015

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CONTRACT: *Sale and purchase agreement – Housing units – Breach – Delivery of housing units not in accordance with agreement – Claim to rescind contract – Whether defendant contractually bound to deliver property with car porch measuring at its promised length – Whether plaintiffs consented to shortening of car porch – Whether breach so fundamental as to entitle plaintiffs to rescind agreement – Plaintiffs did not elect to terminate contract upon discovery of shortage of car porch length – Whether plaintiffs only entitled to damages for breach of contract and not rescission of contract*

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CONTRACT: *Sale and purchase agreement – Rescission of – Claim for – Housing units – Breach – Delivery of housing units not in accordance with agreement – Whether defendant contractually bound to deliver property with car porch measuring at its promised length – Whether plaintiffs consented to shortening of car porch – Whether breach so fundamental as to entitle plaintiffs to rescind agreement – Plaintiffs did not elect to terminate contract upon discovery of shortage of car porch length – Whether plaintiffs only entitled to damages for breach of contract and not rescission of contract*

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The defendant was the developer of a housing development project known as Armada Villa ('the project'). By a sale and purchase agreement ('the SPA') the defendant sold the housing unit to be built on one of the lots in the project ('the property') to the plaintiffs, a husband and wife. On 16 January 2013, the plaintiffs took vacant possession of the property and discovered that the length of the car porch was shorter than that of reflected in the SPA. On 20 June 2013, the plaintiffs submitted a defect list form to the defendant to raise complaints about defects to the property, including the length of the car porch. At the same time, the plaintiffs proceeded to carry out renovation works on the property. In response to the plaintiffs' complaints, on 5 July 2013, the defendant wrote to the plaintiffs stating that the shortening of the length of the car porch had been agreed to by the plaintiffs and that this agreement to amend was evidenced by the plaintiffs having signed on the amended floor plan given to the plaintiffs during the course of construction of the property. On 25 October 2013, the plaintiffs wrote to the defendant alleging that the defendant had breached the SPA and gave notice terminating the SPA as well as seeking damages from the defendant. Subsequently, the plaintiffs brought this action against the defendant for fraudulent misrepresentation and breach of contract in relation to the length of the car porch. In this claim, the plaintiffs sought, *inter alia*, orders declaring that the

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defendant had breached the SPA, and that the SPA be rescinded and the purchase price refunded to the plaintiffs together with general, exemplary and aggravated damages to be assessed. The defendant denied any breach of the SPA and in the alternative stated that, even if the alleged breach was proved, such breach was not fundamental to entitle the plaintiffs to rescind the SPA. The defendant further stated that even if the defendant had breached the SPA as alleged, the plaintiffs had expressly or impliedly by conduct affirmed the alleged breach and therefore were estopped from seeking relief to rescind the SPA.

Held (entering judgment for plaintiffs):

(1) There was no merit or substance to the defendant's contention that the plaintiffs had subsequently agreed to the shortening of the car porch when the first plaintiff had signed on the amended floor plan. The first plaintiff in his evidence stated that sometime after the SPA had been executed, the defendant's employee, one Liew, had informed him that the defendant intended to carry out some improvements to the property and at no time did the said Liew inform him that the car porch length would be substantially reduced. The first plaintiff confirmed receiving a copy of the amended floor plan and had put down his initial in the amended layout plan as an acknowledgement of receipt of the aforesaid plan and not as giving his consent to any amendment to the floor plan; and not least of all to the shortening of the car porch length. (paras 16 & 17)

(2) Clause 13 of the SPA provides that the defendant shall construct and deliver the property in accordance to the plans accepted and approved by the plaintiffs as in the SPA and no changes shall be made without the prior consent of the plaintiffs in writing. In this regard, there was no agreement in writing by the plaintiffs to vary the SPA to shorten the car porch. The mere initial or signature of the first plaintiff on the amended floor plan, without anything more, could not be taken as signifying the plaintiffs' consent to amend the SPA and shorten the length of the car porch. In the premise, the defendant was contractually bound to deliver the property with a car porch measuring 9981mm in length. (paras 19 & 18)

(3) When the defendant delivered vacant possession of the property on 16 January 2013, the plaintiffs discovered that the car porch was only 6100mm in length, which was very much shorter than that reflected in the SPA. This was a clear breach of a fundamental term of the SPA as well as a breach of the pre-contractual representations of the defendant. The plaintiffs, being the innocent parties to the breach, had the right of election, then and there, to either terminate the contract or affirm the contract. (para 20)

(4) However, the plaintiffs did not elect to terminate the contract upon discovery of the shortage of the car porch length when vacant possession was delivered on 16 January 2013. To the contrary, the plaintiffs engaged the services of an architect to carry out renovation works to the property and had in fact carried out renovation works to the property with the intention of using it as their family home. This amounted to affirmation of the contract by conduct and the plaintiffs had by conduct elected not to rescind the contract. Having made this election, the plaintiffs would no longer be entitled to rescind the contract on the basis of breach of contract or misrepresentation. The plaintiffs would have to live with that election and would only be entitled to damages for breach of contract and not rescission of the contract. (paras 22 & 23)

Case(s) referred to:
Capping Corp Ltd & Ors v. Aquawalk Sdn Bhd & Ors [2013] 1 LNS 574 CA ***(refd)***
Kwan Chew Holdings Sdn Bhd v. Kwong Yik Bank Bhd [2007] 2 CLJ 127 CA ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 40

For the plaintiffs - Justin Voon Tiam Yu (Ng Li Kian with him); M/s Justin Voon Chooi & Wing
For the defendant - Vendee Chai (Kelvin Seet Wan Nam with him); M/s Cheang & Ariff

Reported by Suhainah Wahiduddin

JUDGMENT

Vazeer Alam Mydin Meera JC:

[1] The defendant is the developer of a housing development project known as Armada Villa @ Taman Danau Desa, Kuala Lumpur ("the project").

[2] The uncontroverted facts of the case are as follows. By a sale and purchase agreement dated 18 May 2010 ("the SPA") the defendant sold the housing unit to be built on Lot 37 in the project ("the property") to the plaintiffs at the price of RM2,730,800. The plaintiffs, who are husband and wife, obtained a loan facility from United Overseas Bank Bhd to part finance the purchase.

[3] On 16 January 2013, the plaintiffs took vacant possession of the property and discovered that the length of the car porch was shorter than that reflected in the SPA. The plaintiffs then verbally complained about this shortage to the defendant's staff.

[4] Subsequently, on 20 June 2013, the plaintiffs submitted a defect list form to the defendant to raise complaints about defects to the property,

including the length of the car porch. The plaintiffs engaged an architect to advise whether the car porch could be extended. At the same time the plaintiffs proceed to carry out renovation works on the property.

[5] In response to the plaintiffs' complaints, on 5 July 2013, the defendant wrote to the plaintiffs stating that the shortening of the length of the car porch had been agreed to by the plaintiffs and that this agreement to amend is evidenced by the plaintiffs having signed on the amended floor plan given to the plaintiffs on 24 March 2011, during the course of construction of the property.

[6] On 25 October 2013, the plaintiffs wrote to the defendant alleging that the defendant had breached the SPA and gave notice terminating the SPA as well as seeking damages from the defendant.

[7] Subsequently, the plaintiffs brought this action against the defendant for fraudulent misrepresentation and breach of contract in relation to the length of the car porch. In this claim, the plaintiffs are seeking *inter alia* orders declaring that the defendant has breached the SPA, and that the SPA be rescinded and that the purchase price of RM2,730,800 be refunded to the plaintiffs together with general, exemplary and aggravated damages be assessed.

[8] The defendant denies any breach of the SPA and in the alternative states that even if the alleged breach is proved, such breach is not fundamental to entitle the plaintiffs to rescind the SPA. The defendant further states that even if the defendant had breached the SPA as alleged, the plaintiffs had expressly or impliedly by conduct had affirmed the alleged breach and therefore are estopped from seeking relief to rescind the SPA.

[9] The defendant states that on or about 24 March 2011 the first plaintiff on behalf of himself and the second plaintiff, had accepted and agreed to changes to be made to the floor plan by signing on the amended floor plan ("amended floor plan"). The defendant avers that the changes to the floor plan as reflected in the amended floor plan include shortening of the car porch.

[10] The defendant further avers that on or about 16 January 2013, the plaintiffs took vacant possession of the property and only some six months later, ie, on or about 20 June 2013, did they submit the defect list form to the defendant. By way of the notification in the defects list form, the plaintiffs requested the defendant to rectify three defects, including the length of the front car porch.

[11] In addition thereto, the defendant states that after having taken vacant possession of the property, the plaintiffs carried out substantial renovation work on the property including soft furnishings, thus evincing the intention to affirm the contract.

[12] The plaintiffs called two witnesses, whilst the defendant called one. From the evidence adduced I find that the defendant had:

(i) made pre-contractual representations to the plaintiffs as to the length of the car porch, which was stated to be about 32 feet in length and that the car porch would accommodate four cars; and

(ii) that the aforesaid representation is also a term of the contract between the parties as can be seen from the building floor plans in the first schedule to the SPA, which by virtue of cl. 34 of the SPA are to be construed as part of the agreement.

[13] From a perusal and analysis of the pleadings and evidence, I find that the defendant had indeed made pre-contractual representation to the effect that the car porch would be about ten meters in length (9981mm to be exact), which is approximately 32 feet. This representation was made by one Ms Hanizah Mohd Ramli a sales staff of the defendant before the SPA was entered into. The first plaintiff testified that the length of the car porch was one of the important features that induced the plaintiffs into purchasing the property as the plaintiffs wanted a car porch that was long enough to accommodate four cars. This evidence of the plaintiffs stands uncontroverted.

[14] The fact that the aforesaid representation was made to the plaintiffs is fortified by the terms of the SPA. The first schedule to the SPA among others contains the floor plan for the property (p. 38 of bundle A). By virtue of the provisions of cl. 34 of the SPA, the first schedule is to be read, taken and construed as an essential part of the agreement. The floor plan clearly states that the length of the car porch is 9981mm. Therefore, it a contractual term of the SPA that the length of the car porch is 9981mm and accordingly the defendant is contractually bound to deliver a car porch of such length.

[15] The defendant states that though the floor plan in the SPA shows the car porch to be 9981mm in length, by agreement of parties, the length of the car porch was subsequently reduced to about 6100mm (about 20 feet) in length. The defendant states that the plaintiffs' agreement to the shortening of the car porch is evidenced by the initial of the first plaintiff found on the amended floor plan (p. 56 of bundle A). The plaintiffs however deny that they had consented to the shortening of the car porch as contended by the defendant.

[16] Having considered the evidence in its totality, I find that there is no merit or substance to the defendant's contention that the plaintiffs had subsequently agreed to the shortening of the car porch when the first plaintiff had signed on the amended floor plan. A careful perusal of the amended floor plan shows the initial of the first plaintiff at the bottom right corner of the document. The first plaintiff in his evidence states that sometime after the SPA had been executed, the defendant's employee, one Mr Liew, informed

him that the defendant intends to carry out some improvements to the property including enlarging the size of the window frames, adding a 'rainforest pond' at the underground level and removal of a partition wall in the master bedroom to make it more spacious. The first plaintiff states that at no time did Mr Liew inform him that the car porch length would be substantially reduced.

[17] The first plaintiff confirms receiving a copy of the amended floor plan and had put down his initial in the amended layout plan as an acknowledgement of receipt of the aforesaid plan and not as giving his consent to any amendment to the floor plan; and not least of all to the shortening of the car porch length. The first plaintiff reiterates that when he was given a copy of the amended floor plan, the said Mr Liew did not inform him that the defendant intends to shorten the car porch. The plaintiffs submit that in fact the length of the car porch is not indicated at all on the amended floor plan for the first plaintiff to have agreed to any shortening of the car porch as alleged by the defendant.

[18] I find that the evidence adduced by the defendant does not show that the plaintiffs had consented to or agreed to the shortened car porch. Clause 13 of the SPA provides that the defendant shall construct and deliver the property in accordance to the plans accepted and approved by the plaintiffs as in the SPA and no changes shall be made without the prior consent of the plaintiffs in writing. The Court of Appeal in *Capping Corporation Limited & Ors v. Aquawalk Sdn Bhd & Ors* [2013] 1 LNS 574; [2013] 6 MLJ 579 had reaffirmed the principle that when:

> ... there is a written agreement, any variation or termination of the same should be also in written form and in very clear language.

[19] In this regard, I find that there is no agreement in writing by the plaintiffs to vary the SPA to shorten the car porch. The mere initial or signature of the first plaintiff on the amended floor plan, without anything more, cannot be taken as signifying the plaintiffs' consent to amend the SPA and shorten the length of the car porch. I accept the plaintiffs' explanation that the first plaintiff had merely penned his initial on the amended floor plan as an acknowledgement of having received a copy of that document from the defendant. In the premise the defendant is contractually bound to deliver the property with a car porch measuring 9981mm in length.

[20] When the defendant delivered vacant possession of the property on 16 January 2013 the plaintiffs discovered that the car porch was only 6100mm in length, which was very much shorter than that reflected in the SPA, ie, 9981mm. This was a clear breach of a fundamental term of the SPA as well as a breach of the pre-contractual representations of the defendant. The plaintiffs, being the innocent parties to the breach, had the right of election, then and there, to either terminate the contract or affirm the contract.

[21] This common law right is embodied in s. 40 of the Contracts Act 1950. This principle was very well explained by Gopal Sri Ram JCA (later FCJ) in *Kwan Chew Holdings Sdn Bhd v. Kwong Yik Bank Bhd* [2007] 2 CLJ 127 CA in the following terms:

> But let me assume for a moment that the plaintiff had in fact acted in breach of contract. What then is the consequence of the defendant in not terminating the contract then and there? The answer lies in those fundamental principles that underlie the law of contract. You must begin with s. 40 of the Contracts Act 1950 which says this:
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> > 40. When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.
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> So, when the plaintiff broke the contract, the choice was with the defendant to put an end to the contract or to affirm in its continuance. In the words of Seah FJ in *Ganam Rajamany v. Somoo Sinnah* [1984] 1 CLJ 123 (Rep); [1984] 2 CLJ 268; [1984] 2 MLJ 290:
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> > A wrongful repudiation by one party cannot, except by the election of the other party, so to treat it, put an end to an obligation; if the other party still insists on performance of the contract the repudiation is what is called "*brutum fulman*" that is, the parties are left with their rights and liabilities as before. A wrongful repudiation of a contract by one party does not of itself absolve the other party if he sues on the contract from establishing his right to recover by proving performance by him of conditions precedent (per Lord Wright in *Edridge v. Sathna* [1933] 60 IA 363).
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> [33] It follows that a party to a contract who affirms in its continued performance must himself perform his obligations. I have looked in vain for a clearer statement of the law on this point than that made by Ma JA in the Court of Appeal of Hong Kong in *Bill Keh Lung v. Don Xia* [2003] 679 HKCU 1 where he said:
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> > All I would add in relation to the aspect of acceptance of breach is that the facts of the present case starkly demonstrate the application of the principle that where a repudiatory breach takes place, in order to terminate the contract, the so-called innocent party must clearly and unequivocally accept the repudiation. If he does not do so, **he will run the risk of being in breach himself were he not to perform his side of the bargain and thereby allow the original wrongdoer to 'turn the tables' on him**: see *Frost v. Knight* [1872] LR 7 Exch. 111; *Avery v. Bowden* [1855] 5 E & B 714, [1856] 6 E & B 953. The basis for this conclusion (often ignored in the business world) is that **unless a contract is terminated, it remains in existence for the benefit of the wrongdoer as well as the innocent party.** (emphasis added.)

[22] However, the plaintiffs did not elect to terminate the contract upon discovery of the shortage of the car porch length when vacant possession was delivered on 16 January 2013. To the contrary, the plaintiffs engaged the services of an architect to carry out renovation works to the property and had in fact carried out renovation works to the property with the intention of using it as their family home. This to my mind amounts to affirmation of the contract by conduct and the plaintiffs have by conduct - elected not to rescind the contract. There is no clear and unequivocal acceptance of the defendant's breach or repudiation of the contract. The plaintiffs only complained in writing about the shortened driveway some five months after taking delivery of vacant possession and after having carried out renovation works to the property. This is evidenced by the defects list form submitted by the plaintiffs to the defendant on or about 20 June 2013 (p. 65 of bundle A) and the uncontroverted evidence of renovation works having been carried out to the property.

[23] Having made this election, the plaintiffs will no longer be entitled to rescind the contract on the basis of breach of contract or misrepresentation. The plaintiffs would have to live with that election and would only be entitled to damages for breach of contract and not rescission of the contract.

[24] In this regard, judgment is entered for the plaintiffs for breach of contract and I order that the Senior Assistant Registrar assess general damages. I further order that cost of RM25,000 is to be borne and paid by the defendant.