

Sinnathamby Rajespathy and Another v Lim Chong Seng and Another (Lim Raymond and Another, Third Parties)
[2002] SGHC 163

Case Number : DA 6/2002
Decision Date : 29 July 2002
Tribunal/Court : High Court
Coram : Choo Han Teck JC
Counsel Name(s) : K Rajendran and Prasanna (Raj Prasanna & Partners) for the appellants/plaintiffs; Teo Eng Thye (KK Yap & Partners) for the respondents/defendants; Third parties absent
Parties : Sinnathamby Rajespathy; Another — Lim Chong Seng; Another — Lim Raymond; Another

Civil Procedure – Amendments – Appellants seeking to amend claim to that of money had and received and/or mistake of law – Appellants seeking to amend writ to join third party as defendant – Whether to allow amendments

Evidence – Documentary evidence – Receipt – Respondents signing receipt acknowledging receipt of money – Effect of such receipt

Landlord and Tenant – Agreements for leases – Housing and Development Board flat – Lease agreement with option to purchase – Parties entering into lease with option to purchase flat before minimum occupation period met – Nature of such agreement – Whether agreement illegal and void – s 49A Housing and Development Act (Cap 129, 1997 Ed)

counsel asked for judgment against Raymond Lim or alternatively for leave to amend the writ so as to join Raymond Lim (who was already named as the first third party) as a defendant. The trial judge also dismissed these applications.

Held,

dismissing the appeal:

(1) The meeting at the solicitor's office was held for the purpose of sealing the deal and paying over the deposit. In the absence of any other party, the money would go directly from purchaser to vendor. In this case, the money was handed by the purchasers to their solicitor. The obvious implication must be that the lawyer is to hand over the money to the vendor if he is satisfied that it is safe to do so. If he handed the money to the wrong party and that party absconded with the money, the lawyer would have to explain why he did not hand the money to the vendor. Hence, while the trial judge's finding that the respondents had not received the \$33,000 should not be disturbed, it was not on the strength of the argument that Raymond Lim held the money as stakeholder. On the facts, the money was handed to the solicitor. If there was any stakeholder, it was the solicitor. The question was whether the solicitor was entitled to hand the money to Raymond Lim, who had no reason to receive the money. (See 7.)

(2) As a general rule, a person must be held to his signed receipt. However, an acknowledgement of receipt cannot have the effect of treating what has not been paid as having been paid. A signed receipt must naturally be given great weight when the issue concerns whether or not the signor had received the money. However, he is entitled to persuade the court that he did not in fact receive the money. The court has to weigh other evidence against the signed receipt in determining the fact of receipt. In this case, the incontrovertible evidence was that the money was taken by Raymond Lim. The crucial issue was whether Raymond Lim had handed over the money to

the respondents. In this regard, the judge disbelieved Raymond Lim. Further, not only was the receipt prepared and issued by Raymond Lim, it was signed by the respondents before Raymond Lim purportedly handed the money over to the respondents. In these circumstances, the trial judge was entitled give little weight to the receipt. (See 8.)

(3) The written agreement offered the appellants an option to purchase, with a condition that their deposit of \$38,000 would be forfeited if they did not exercise the option. Notwithstanding that the agreement mentioned that the option might only be exercised after the respondents became legally entitled to sell, the agreement itself was an agreement to sell within the express wording of s 49A(1) Housing and Development Act. Further, the parties regarded the transaction as an agreement for the sale and purchase of the flat and not a tenancy agreement. The spirit and intention of the parties went against the spirit and purpose of s 49A in as much as their agreement went contrary to the letter of that provision. (See 9.)

(4) The alternative submissions on the basis of money had and received and mistake of law were rightly rejected on the ground that these claims were not pleaded. In any event, these claims had to be made, not against the respondents, but against either the solicitor or Raymond Lim. (See 10.)

(5) The trial judge was not wrong in refusing to exercise her discretion to allow the writ to be amended by adding Raymond Lim as a defendant. It was far too late for such a major amendment. The appellants ought to have made that application at the start of the trial. (See 10.)

Cases referred to

Archbolds (Freightage) Ltd v S Spanglett Ltd

[1961] 1 QB 374 (refd)

Burt v Claude Cousins & Co Ltd

[1971] 2 QB 426 (refd)

Fook Gee Finance Co Ltd v Liu Cho Chit & Anor

[1998] 2 SLR 121 (refd)

MFH Marine Pte Ltd v Asmonah Bin Mohamad

[2000] 4 SLR 368 (refd)

Sorrell v Finch

[1977] AC 728 (refd)

Legislation referred to

Housing and Development Act (Cap 129, 1997 Ed) s 49A

JUDGMENT

GROUND OF DECISION

The Main Parties

1. This was an appeal arising from a district court judgment dismissing the appellants' claim for

restitution of \$33,000 paid as part of a sum of \$38,000 purported to be the deposit for the rental of two rooms of a Housing And Development Board ("HDB") flat belonging to the respondents. The appellants are two sisters who wanted to purchase a flat in the Hougang area near the homes of their other siblings. The respondents are a husband and wife who worked as hawkers and were, at the material time, in urgent need of money. The respondents decided to place their flat on sale in order to raise funds. To that end, in September 1999, they engaged the services of a housing agent by the name of Raymond Lim, who, at that time, was employed by the firm of R. Paiman & Associates. The appellants responded to an advertisement of the sale placed by Raymond Lim on behalf of the respondents.

The Problem

2. Raymond Lim was told by Lim Chong Seng (the first respondent and husband of the second respondent) that he needed cash of \$30,000 but the respondents had not occupied the flat for the minimum period of occupation required under the Housing And Development Board Act, Ch 129. This fact meant that the respondents were precluded from selling or entering into an agreement to sell the flat by reason of s 49A of the Act. This important statutory provision says:

"(1) Except with the prior written consent of the Board, no owner of any flat, house, or other building which has been sold by the Board under the provisions of this Part shall, within the prescribed minimum occupation period, by contract agreement or otherwise, **sell or agree to sell** his flat, house or other building or any estate or interest therein to any person. (*my emphasis*)

(2) Unless otherwise authorised by the Board, every contract, agreement, or other document relating to the sale of any such flat, house or other building which is made between the owner of the flat, house or other building and a purchaser other than the Board shall be in the prescribed form.

(3) **Any contract, agreement** or other document which is made on or after the commencement of the Housing And Development (Amendment) Act 1998 **in contravention of subsection (1) or (2) shall be null and void.** (*my emphasis*)

The Plan

3. An ostensibly ingenious plan was proposed to help the respondents get around the prohibition under s 49A. It is not clear who hatched the plan because Raymond Lim and the first respondent each said it was the other who came up with the idea. From the evidence, including the affidavit of evidence-in-chief of the first appellant, it appears more likely that the plan was the brainchild of Raymond Lim. The plan was palpably simple. The respondents were to enter into an agreement to lease two rooms of their flat to the appellants for a monthly rent of \$1,000. The agreement would be titled "Lease With Option To Purchase". Such an agreement was signed on 29 September 1999 in the office of a solicitor, ("the solicitor", of whom, more later). The agreement provided for the rental of two rooms for a period of two years at a monthly rent of \$1,000.00. The agreement also contained an option to purchase the flat, at the price of \$245,000, to be exercised two months after 1 August 2000 "when the Landlord is legally capable of executing Sale and Purchase agreement according to by-law". Under the agreement, the appellants were to commence the tenancy of the two rooms on 1 March 2000. It is useful to note the undisputed fact that the lease was only for two rooms because a tenancy over the entire flat would have required an approval from the HDB, and the tenancy

agreement would have to be in an HDB approved form.

The Cash Involved

4. Before we move to what took place in the office of the solicitor, it is necessary to mention two other monetary items. First, Raymond Lim obtained a signed authorization from the respondents to appoint him as their exclusive agent. Under the terms of that agreement he was to receive \$17,000 by way of commission. It was obvious from the evidence at trial that Raymond Lim was unable to give a convincing answer as to how he justified being paid such a large sum for what was to be a tenancy agreement. He made alternative statements such as, "the owner willingly paid this sum", and "the tenancy also included an option to purchase" (hence, the commission in respect of the \$245,000 purchase price was not exorbitant). Secondly, under the lease agreement, the appellants had to pay a deposit of \$38,000. It was not disputed that \$5,000 had been paid earlier, but also in September. This was meant to be paid to the respondents but Raymond stated in his evidence-in-chief that he took the money and gave only \$3,500 to the respondents. This part was not disputed. The balance of \$33,000 due as deposit was agreed to be paid at the solicitor's office on 29 October 1999. This date was scheduled to enable the appellants to collect the money from the sale of their own flat, the completion of which was on 28 October 1999.

At The Lawyer's Office

5. On 29 September 1999 the appellants went to the solicitor's office, accompanied by two male relatives. The respondents were already there with Raymond Lim. The solicitor then explained the "Lease With Option To Purchase" to the parties. He advised the appellants that they may compel the respondents to sell the flat by an order of court order the respondents refuse to carry out the sale. The documents were signed with the lawyer as witness. He then told the appellants that they had to pay \$33,000. The appellants handed the money to him in cash which he counted and then handed over to Raymond Lim. Raymond Lim then issued a receipt from his own receipt book which he dated 29 November (not October) 1999. The respondents were asked to sign the receipt which they did. Raymond then told the parties to pay the solicitor's fees of \$250.75 each. This was done and the solicitor issued a receipt for that. The solicitor was asked under cross-examination as to which party he was acting for and he replied that he acted for neither. He continued by repeating his evidence-in-chief where he said that he was only there to read and explain the lease to the parties. He said that they wanted to sign the lease before a solicitor and so he was there to do just that. He concluded by saying that thereafter he "had no part, nor was aware of what was going on among the [appellants], [respondents], and [Raymond Lim] who was in overall charge of the whole matter." He had also conceded that the lease was drafted by Raymond Lim. Having taken that stance, he nonetheless rendered a bill (under the file reference of "CNT/jt/RAYMOND 6") addressed to the appellants as well as the respondents as tenant and landlord respectively charging them professional fees based on the scale fees in respect of work for landlord and tenant. The bill was paid.

Where Did The \$33,000 go?

6. There is conflicting evidence as to what happened to the cash. Raymond Lim's evidence was that he took \$10,000 and handed the remaining \$23,000 to the first respondent. The respondents say that Raymond Lim did not hand any money to them. The first respondent said that when they were out of the solicitor's office Raymond Lim told him that he would have the "documents endorsed by the court and he'll give everything to [the first respondent] when it's done"(NE page 155). The respondents testified that after 29 October 1999 Raymond Lim vanished after that and did not respond when paged. Raymond Lim's explanation at trial was that he was in the library, reading up to 9 or 10 o'clock at night. I am always heartened to find people with strong reading habits, but unfortunately, the trial

judge here did not appear to believe Raymond Lim, and I have no cause to disagree with her. In fact, from the record, the trial judge was clearly entitled to regard Raymond Lim as the villain of the piece. Whether there was more than one villain is a matter for inquiry elsewhere, and is not relevant for the purposes of this appeal. I continue. After failing to contact Raymond Lim, the first respondent reported him to the police. Raymond Lim re-emerged only two days before the first respondent was scheduled to be interviewed by the officers from the Criminal Investigation Department. He went to see the first respondent late one evening and engaged him in conversation. The trial judge noted that his purpose was to manoeuvre the first respondent into admitting that he (the first respondent) was in trouble and needed his (Raymond Lim's) help. The conversation carried on with a mixture of tricks and threats, but the ploy did not work. Not surprisingly, the trial judge formed a dim view of the exercise by Raymond Lim.

Receipt And Receipt Of Money

7. The trial judge relied on *Sorrell v Finch* [1977] AC 728 for the proposition that an estate agent receives deposits as an agent of the vendor only when he is authorised to do so; otherwise, he holds it as stakeholder pending the outcome of a future event. In this regard, Lord Edmund-Davies adopted the dissenting judgment of Lord Denning in *Burt v Claude Cousins & Co Ltd* [1971] 2 QB 426 which was directly on point. However, I would caution against reliance on these authorities for the factual situation in this case. In *Sorrell*, for example, the estate agent went about collecting deposits, without authority but before any agreement had been concluded. It was a straightforward case of whether there was actual authority or implied authority; and the court took the view that there was neither. I am in full agreement with that view. The facts here are different. The meeting was held precisely for the purpose of sealing the deal and pay over the deposit. In the absence of any other party, the money would go directly from purchaser to vendor. In this case, the money was handed by the purchaser to their solicitor. The obvious implication must be that the lawyer has to hand over the money to the vendor if he is satisfied that it was safe to do so. If he handed the money to the wrong party and that party absconded with the money, the lawyer would have to explain why he did not hand the money to the vendor. Hence, on the facts, while I would not disturb the judge's finding that the respondents had not received the \$33,000, it is not on the strength of the *Sorrell v Finch* argument, namely that Raymond Lim held the money as stakeholder. On the facts, the money was handed to the solicitor. If there was any stakeholder, it was the solicitor. The question, which was not raised at trial, is whether the solicitor was entitled to hand the money to Raymond Lim (a person who had no reason to receive the money)?

8. Counsel for the appellants submitted, as was done at trial, that the respondents had acknowledge receipt of the \$33,000 and therefore cannot resile from the documented admission. I think that as a general rule, a person must be held to his signed receipt; but as was pointed out by the LP Thean JA in the Court of Appeal case of *Fook Gee Finance Co Ltd v Liu Cho Chit & Anor* [1998] 2 SLR 121, at 24, an acknowledgement of receipt cannot have the effect of "treating what has not been paid as having been paid". I need only emphasize that a signed receipt must naturally be given great weight when the issue concerns whether or not the signor had received the money. But he is entitled to persuade the court that he did not in fact receive the money. The court has to weigh other evidence against the signed receipt in determining the fact of receipt. In this case, the trial judge accepted the evidence of the respondents that they did not receive the money. I need not repeat the evidence here save to observe that the receipt signed by the respondents was a receipt prepared by Raymond Lim. What was Raymond Lim's business in issuing a receipt in these circumstances? It appears that the solicitor may have assumed that Raymond Lim was acting as the agent for the respondents, but was that a reasonable assumption given that the principals themselves were present before him? The incontrovertible evidence was that the money was taken by Raymond Lim. The crucial issue was whether Raymond Lim had handed over the money to the respondents. In this regard, the judge

disbelieved Raymond Lim. Furthermore, it appears that not only was the receipt prepared and issued by Raymond Lim, it was signed before Raymond Lim purportedly handed the money over to the respondents. In these circumstances, the trial judge was entitled give little weight to the receipt.

Null And Void Contract

9. The trial judge, relying on *Archbolds (Freightage) Ltd v S Spanglett Ltd* [1961] 1 QB 374, held that in order to recover their money, the appellants were obliged to rely on their contractual rights under the lease with option to purchase agreement, and that being an illegal agreement, rendered null and void under the HDB Act, the appellants' reliance was worthless. The judge dismissed the argument that the agreement was only a tenancy agreement and therefore not invalidated by s 49A of the HDB Act. I agree that many of the important terms were inconsistent with a two-year tenancy of two rooms in a flat where the rental was only \$1,000 a month. It is at once obvious that the deposit of \$38,00 far exceeded the total rental for the entire period of tenancy. Furthermore, the commission of \$17,000 extracted by the housing agent was far in excess of a commission for finding a rented premises in the circumstances. But the inescapable fact is that the written agreement offered the appellants an option to purchase, with a condition that their deposit of \$38,000 would be forfeited if they do not exercise the option. So, notwithstanding that the agreement mentioned that the option may only be exercised after the respondents become legally entitled to sell, the agreement itself is **an agreement to sell** within the express wording of s 49A(1). Furthermore, throughout the evidence recorded in the Notes Of Evidence, it appears that all the parties concerned regarded the transaction as an agreement for the sale and purchase of the flat and not a tenancy agreement. At page 48, the notes of evidence of the second appellant reads:

"Q: Did you sign a contract with the [respondents] Mr. Lim and Mdm Chua?"

A: Yes, the agreement pertaining to the purchase of the house."

And in his evidence-in-chief the first respondent said at 5 - "My house was sold within three days at \$245,000". The spirit and intention of the parties, therefore, went clearly against the spirit and purpose of s 49A in as much as their agreement went contrary to the letter of that provision.

Amending The Claim After Trial

10. The appellants' counsel made an alternative submission on the basis of money had and received, and a further alternative of mistake of law. These submissions were rejected by the trial judge on the ground that these claims were not pleaded. See *MFH Marine Pte Ltd v Asmonah Bin Mohamad* [2000] 4 SLR 368. I agree with her. In any event, on the facts as the judge had found, these claims had to be made, not against the respondents, but against either the solicitor or Raymond Lim. That brings me to the final point. When the trial judge dismissed the appellants' claim, their counsel asked for judgment against Raymond Lim; alternatively, for leave to amend the writ so as to join Raymond Lim (who was already named as the first Third Party) as a defendant. The application was dismissed by the trial judge. Against this dismissal the appellants also appealed and ask that Raymond Lim be made a defendant should their appeal against the substantive judgment be dismissed. Raymond Lim did not appear at the hearing of this appeal and it appears that he had also discharged his counsel. In any event, I am of the view that the trial judge was not wrong in refusing to exercise her discretion to allow the writ to be amended by adding Raymond Lim as a defendant. It was far too late for such a major amendment. The appellants ought to have made that application at the start of the trial.

Verdict

11. For the reasons above, I dismiss the appeal. The appellants are legally-aided so there will be no order in respect of costs.

Sgd:

Choo Han Teck

Judicial Commissioner

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