IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2024] SGHC 231

Originating Application No 581 of 2024

In the matter of Section 18 of the Supreme Court of Judicature Act 1969

And

In the matter of [address redacted] ("Property")

Between

(1) Kow Kim Song
(2) Kow Meow Chuan (Gao Miaozhuang)

… *Applicants*

And

Kow Kim Siang (Gao Jingxiang)

… *Respondent*

GROUNDS OF DECISION

[Land — Sale of land — Sale under court order]

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v
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Goh Yihan J:

1 This was the applicants' application, pursuant to s 18(2) of the Supreme Court of Judicature Act 1969 (2020 Rev Ed) ("SCJA"), read with the First Schedule to the SCJA ("First Schedule"), for the primary order that the property at [address redacted] (the "Property") be sold in the open market and for the net sale proceeds to be divided between the applicants and the respondent. The applicants and the respondent, whom I shall refer to collectively as the "parties", are biological siblings.

2 At the end of the hearing on 8 August 2024, I dismissed the application with brief reasons. I provide my detailed reasons in these grounds to explain why I considered the application to be (a) insufficiently particularised, and (b) premature in so far as the parties were still engaged in good faith discussions. More broadly, this application shows that a party should not use the procedure

under s 18(2) of the SCJA read with the First Schedule of the same to cut short any discussion between the parties to bring about an amicable resolution to the prospective sale of a property.

The background facts and parties' contentions

3 I begin with the background facts. The Property was previously owned by the parties' late mother, Mdm Ng Siew Lim ("Mdm Ng"). Mdm Ng was the sole owner of the Property, which had been fully paid for. She passed away intestate on 31 October 2016.[1] The parties then inherited the Property as tenants-in-common in equal shares.[2]

4 The parties began serious discussions about the respondent's purchase of the applicants' two-third share in the Property on 21 December 2023.[3] After the parties engaged solicitors to conduct the negotiations, they agreed sometime in or around January 2024 to a consideration price of $400,000 for the applicants' share in the Property, and a completion period of four months from the date of exercise of the Option to Purchase ("OTP") (the "Agreement").[4]

5 Despite the Agreement, the applicants alleged that the respondent made several unreasonable requests between January and May 2024, which hampered the progress of the sale. The applicants did not particularise these allegedly unreasonable requests in their supporting affidavit. Instead, they merely exhibited two letters which their former solicitors had sent to the respondent at

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1 Affidavit of Kow Kim Song and Kow Meow Chuan (Gao Miaozhuang) dated 13 June 2024 ("Applicants' Affidavit") at para 5.

2 Applicants' Affidavit at para 7.

3 Applicants' Affidavit at para 10.

4 Affidavit of Kow Kim Siang (Gao Jingxiang) dated 8 July 2024 ("Respondent's Reply Affidavit") at para 13.

or around the time of the Agreement.[5] I pause to note that this was insufficient because the burden was on the applicants to make out their case, and they needed to explain how the letters made out their claim of the respondent's allegedly unreasonable requests. On examining their contents, I failed to see how these letters supported the applicants' claim as to the respondent's allegedly unreasonable requests.

6 In any case, the applicants then alleged that the respondent "withdrew" from the Agreement on 7 May 2024.[6] Yet again, the applicants did not exhibit any document in their supporting affidavit to substantiate this claim. In short, I found that the applicants' evidence in support of this application to be wholly insufficient to make out their case. I would reiterate that it is incumbent on an applicant to make out his or her case under s 18(2) of the SCJA read with the First Schedule (see ss 103(1) and 104 of the Evidence Act 1893 (2020 Rev Ed); see also the High Court decision of *HSBC Institutional Trust Services (Singapore) Ltd (trustee of Capitaland Mall Trust) v Chief Assessor* [2020] 3 SLR 510 at [25]), instead of making bare assertions about, for example, the state of the parties' relationship and how the counterparty may have conducted himself or herself.

7 The respondent's evidence is that the parties had corresponded via email about the conveyancing process following the Agreement. As can be gleaned from the various correspondence exhibited in the respondent's reply affidavit, the applicants had on 2 April 2024 forwarded a signed standard-form OTP to the respondent.[7] However, the OTP did not reflect the previously agreed-upon

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5 Applicants' Affidavit at pp 23 and 25-26.

6 Applicants' Affidavit at para 15.

7 Respondent's Reply Affidavit at pp 48-57.

terms in the OTP. For instance, the applicants had unilaterally inserted an option fee of $1,000 and an option exercise fee of $4,000.[8] The respondent asserted that the parties never agreed to these terms.[9]

8 More importantly, the applicants allegedly did not reflect the parties' agreed completion period of four months in the OTP.[10] The respondent therefore instructed his solicitors to reply to the applicants by way of a letter dated 9 April 2024.[11] In the letter, the respondent counter-proposed an option fee of $1, and an option exercise fee of $500. The respondent also alerted the applicants to the fact that the OTP did not reflect the parties' agreement to complete the transaction within four months from the date of exercise of the OTP. The respondent therefore requested for the amended OTP to reflect this.

9 The applicants' solicitors replied on 24 April 2024. The applicants were agreeable for the option fee to be $1 and the option exercise fee to be $500.[12] However, the applicants did not reply to the respondent's assertion about the completion date. The respondent's solicitors pointed this out on 2 May 2024.[13] The applicants' solicitors replied on 3 May 2024 to propose that the respondent make the necessary amendments to the OTP.[14] The respondent's solicitors then replied on the same day to point out that the onus was on the applicants to ensure

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8 Respondent's Reply Affidavit at pp 49-50.

9 Respondent's Reply Affidavit at para 30.

10 Respondent's Reply Affidavit at para 31.

11 Respondent's Reply Affidavit at pp 58-59.

12 Respondent's Reply Affidavit at p 64.

13 Respondent's Reply Affidavit at p 65.

14 Respondent's Reply Affidavit at para 37.

that the OTP reflected the parties' agreed terms. In particular, the respondent pointed out that the applicants' solicitors should write to the Housing and Development Board ("HDB") in their capacity as the sellers' solicitors to seek HDB's consent to amend the standard-form OTP.[15] The applicants' solicitors replied on 7 May 2024 to insist, among other things, that they could not make the amendments to the OTP.[16] The respondent's solicitors replied on the same day to maintain that the onus was on the applicants, as sellers, to obtain HDB's consent to modify the OTP to reflect the parties' agreement.[17]

10 Based on the documents appended in the respondent's affidavit (which is not contradicted by any document in the applicants' affidavit), the applicants apparently did not respond to the respondent's letter of 7 May 2024. Instead, on 30 May 2024, the applicants' solicitors informed the respondent by letter that they were commencing this application.[18]

The applicable law

11 I turn now to the applicable law. To begin with, the present application is based on s 18(2) of the SCJA read with the First Schedule. Section 18(2) of the SCJA provides that the General Division of the High Court shall have the powers set out in the First Schedule. Relevantly, para 2 of the First Schedule provides as follows ("Paragraph 2"):

> **Partition and sale in lieu of partition**
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> 2. Power to partition land and to direct a sale instead of partition in any action for partition of land; and in any cause or

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15 Respondent's Reply Affidavit at para 39 and pp 66-67.

16 Respondent's Reply Affidavit at para 45 and pp 68-69.

17 Respondent's Reply Affidavit at para 50 and p 70.

18 Respondent's Reply Affidavit at p 71.

> matter relating to land, where it appears necessary or expedient, to order the land or any part of it to be sold, and to give all necessary and consequential directions.

12 In deciding whether it is "necessary or expedient" for a sale to be ordered, the Court of Appeal in *Su Emmanuel v Emmanuel Priya Ethel Anne and another* [2016] 3 SLR 1222 ("*Su Emmanuel*") held that this had to be done through a balancing exercise of various factors as follows (at [57]):

> In our judgment, the following points may be distilled from the foregoing discussion of the authorities:
>
> > (a) In deciding whether it is necessary or expedient for a sale to be ordered in lieu of partition, the court conducts a balancing exercise of various factors, including (i) the state of the relationship between the parties (which would be indicative of whether they are likely to be able to co-operate in the future); (ii) the state of the property; and (iii) the prospect of the relationship between the parties deteriorating if a sale was not granted such that a "clean-break" would be preferable.
> >
> > (b) Regard should be had to the potential prejudice that the various co-owners might face in each of the possible scenarios, namely, if a sale is granted and if it is not granted.
> >
> > (c) A sale would not generally be ordered if to do so would violate a prior agreement between the co-owners concerning the manner in which the land may be disposed of.

13 Subsequently, in *Ooi Chhooi Ngoh Bibiana v Chee Yoh Chuang (care of RSM Corporate Advisory Pte Ltd, as joint and several private trustees in bankruptcy of the bankruptcy estate of Freddie Koh Sin Chong, a bankrupt) and another* [2020] 2 SLR 1030 ("*Bibiana*"), the Court of Appeal described the correct approach in the following terms (at [25]):

> … the court must consider *all the facts and circumstances of the case* and conduct a ***balancing exercise*** of the various considerations and interests at play in determining whether a sale should be ordered. Indeed, this balancing approach may be said to be the ***raison d'etre*** in deciding any application

> under s 18(2) read with para 2 of the First Schedule of the SCJA. Each case, however, would ultimately give rise to *different interests* and the *weight* to be given to the relevant factors would ultimately depend on the *precise facts and circumstances of each case*. Once it is appreciated that the test is a question of ***balance***, it cannot possibly be said that the test is inherently poised in favour of any single party. Indeed, it bears reiterating that, consistently with this test, the list of factors set out by the Judge (see [24] above) is (correctly, in our view) *non*-exhaustive in nature.
>
> [emphasis in original]

14 It is therefore incumbent on an applicant to provide sufficient evidence to make out his or her case under s 18(2) of the SCJA, with particular emphasis on the various factors articulated in *Su Emmanuel* (at [57]), bearing in mind that those factors are non-exhaustive and the weight to be attributed to each factor will depend upon the factual matrix of a particular case and will differ between cases. There is no presumptive starting point in favour of or against ordering a sale depending on the type of case at hand. Instead, Paragraph 2 contemplates a "broad directive possessed by the court" based on the "general principle that the court is to conduct a ***balancing exercise*** of various factors, having regard to all the relevant facts and circumstances of the case" [emphasis in original] (see *Bibiana* at [31]). The court must therefore be provided with a full account of those factors, particularly from the applicant (who bears the burden of proof), to enable it to carry out that balancing exercise properly (see also, in a different context, the General Division of the High Court decision of *Re CK Tan Law Corp* [2024] SGHC 204 at [14]). Accordingly, it is to those facts and circumstances of the present application that I now turn.

My decision: it was not "necessary or expedient" to order a sale of the Property pursuant to Paragraph 2

15 I decided that it was not necessary or expedient to order a sale of the Property. To begin with, as I have already alluded to (see at [6] above), the

applicants failed to adduce sufficient evidence to make out their case. In particular, the evidence did not make out a sufficient case for a grant of relief under Paragraph 2 for the following four reasons.

16 First, the evidence did not show the state of relationship between the parties. Beyond a bare assertion that the applicants have had difficulty in dealing with the respondent (at para 19 of the applicants' affidavit), there was no evidence adduced to support the point (see at [5] above). Instead, all that the applicants substantiated with documentary evidence was that the parties only started to negotiate for the sale of the property in or around December 2023 and January 2024, whereas Mdm Ng, from whom they had inherited the property, passed away several years before in 2016. However, given the relatively short span of time that has passed, there was no evidence that the parties' relationship had broken down since those negotiations.

17 Second, the evidence did not show, contrary to the applicants' assertion, that the respondent had on 7 May 2024 withdrawn from the agreement to purchase.[19] The applicants adduced no documentary evidence nor explained the circumstances of this supposed withdrawal. Instead, the relevant correspondence exhibited by the respondent in his reply affidavit showed otherwise.[20] The evidence showed that the respondent was clearly making good faith attempts in May 2024 to convince the applicants that they had the onus to inform HDB of the necessary amendments to be made to the OTP. There was simply no record of the respondent ever reneging on the Agreement.

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19 Applicants' Affidavit at para 15.

20 Respondent's Reply Affidavit at pp 65-70.

18 Third, in so far as the applicants alleged during the hearing before me that the parties had never entered into an Agreement, I disagreed. Contrary to Mr Umar Abdullah bin Mazeli's submission that the parties did not agree to particular terms of the sale and purchase of the Property, it is trite law that parties can agree to the material terms of a contract, while leaving the non-material terms to be agreed later. Even where parties are unable to agree on the remaining terms thereafter, a valid contract can be formed based on the material terms which *were* agreed to, provided that there was an intention to form legal relations thereon (see the Court of Appeal decision of *R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521 ("*R1 International*") at [52]). Whether the parties intended to make such a binding agreement prior to their agreeing on the non-material terms of the contract still being negotiated will depend upon their objective intentions, which is to be gleaned from the factual matrix of parties' negotiations up to that point.

19 This is also the position in English law. The UK Supreme Court in *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] 1 WLR 753 ("*RTS Flexible*"), relying on *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601 at 619 (and cited with approval in *R1 International* at [52]), held (at [48]) that it is entirely possible that "[t]he parties agreed to bind themselves to agreed terms, leaving certain subsidiary and legally inessential terms to be decided later". As with *R1 International*, whether parties intended to be so bound will depend on the precise facts and circumstances (see *RTS Flexible* at [49]–[56]).

20 Applied to the present case, the salient point is that there is no principle which precluded the parties from having concluded the Agreement based on certain essential terms having been agreed between them, such as the consideration price and the completion period, whilst reserving other matters to

be negotiated between them thereafter. This is because "[e]ven if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement" (see *RTS Flexible* at [45]). Indeed, it bears repeating that the applicants, who bear the burden of proof (see at [6] above), have put nothing on affidavit to support their position taken in oral submissions that the parties only reached a non-binding agreement on material terms which was intended to be subject to the issuance of the OTP.

21 Further, apart from the applicants not having made out their case, the evidence showed that there were factors against granting the application here. Primarily, as the applicants admitted on affidavit, there is an Agreement of sale between the parties. Indeed, it was they who accused the respondent of having "suddenly" reneged on that Agreement.[21] However, based on the correspondence adduced in his affidavit, the respondent has raised legitimate concerns about aspects of the execution of the sale. These concern the length of the completion period on the OTP and the party that bears the onus of writing to the HDB to ensure that the amendments are reflected in the OTP. It cannot be that the respondent's reasonable requests are construed as him being difficult and then used against him in an application such as the present.

22 In sum, the applicants cannot use this application to short-circuit the process of carrying out the conveyancing process just because they think it is tedious. There is a line between the respondent being difficult and the negotiations being difficult, and I did not think that the respondent has been difficult. Based on the letters in May 2024 appended to the respondent's

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[21] Applicants' Affidavit at para 15.

affidavit (at pp 66–70), I found that he remained willing to proceed with the transaction over the Property and made good faith efforts to resolve the differences between parties in order for the sale to be effected. The applicants have put nothing on affidavit to show that they have engaged with the respondent's proposals of May 2024, made counter-proposals that the respondent rejected or failed to consider, or otherwise shown that they were unable to reach an amicable solution with the respondent to allow the sale to move forward in the absence of a court order. Instead, the applicants have only made a bare assertion that "the respondent on 7th May [*sic*] 2024 withdrew from the agreement to purchase",[22] which, as I have found, was not congruent with the contents of the respondent's letters of May 2024.

23 More broadly, the court's exercise of discretion under a Paragraph 2 application is a nuanced and fact-sensitive one. The facts and circumstances which the court is to consider, and the relative weight to be attributed to each of them, will depend on the factual matrix at hand and cannot be reduced to rigid rules or sweeping presumptions (see *Bibiana* at [24]–[27] and [29]). Here, where all parties wish to effect a sale of the Property, and are in the midst of good faith negotiations respecting specific operational aspects of effecting that sale, a counterparty cannot use Paragraph 2 as a mechanism to abort discussions midway and exert pressure on the counterparty to effect the sale on *his or her* desired terms. This is especially so when it has not been shown that the counterparty is unwilling to effect a sale of the Property, is being unreasonable in his or her position, or that negotiations would be fruitless between them or have run their course to a deadlock or stalemate. It is only in those situations that an order of court may be needed for the Property to be sold.

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22 Applicant's Affidavit at para 15.

24 Thus, bearing in mind the Court of Appeal's warning in *Bibiana* (at [31]) that the court should avoid adopting a presumptive starting point in favour of or against granting the sale order based on a rigid, rule-based approach to the factual matrix at hand, and instead "conduct a ***balancing exercise*** of various factors, having regard to all the relevant facts and circumstances of the case" [emphasis in original], I found that it was neither necessary nor expedient to order a sale of the Property under the circumstances before me. The respondent has not behaved unreasonably and remains willing to effect a sale of the Property and engage in good faith negotiations on the specific terms therefor. The applicants have not shown that such negotiations would be impractical or useless. They therefore cannot turn to Paragraph 2 to prematurely terminate such negotiations and to apply pressure on the respondent to effect a sale on their preferred terms. Thus, in such a case, the relative prejudice which would be occasioned to either party from the sale order being granted or refused (see *Su Emmanuel* at [57(b)] and *Bibiana* at [24(c)] and [25]) militates in favour of refusing the order of sale so that the negotiations may continue between parties to effect a sale of the Property on the terms agreed between them.

Conclusion

25 For all these reasons, the application was dismissed with costs to the respondent. I would encourage all parties to resolve their differences amicably.

Goh Yihan
Judge of the High Court

Mohammed Shakirin bin Abdul Rashid, Umar Abdullah bin Mazeli and Nur Amalina binte Saparin (Adel Law LLC) for the applicants;
Lim Kim Hong and Maximilian Tay Zhan Hui (Kim & Co) for the respondent.
