

17,1982

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL OF SINGAPORE

B E T W E E N :

PHOENIX HEIGHTS ESTATE (PTE) LIMITED Appellants

- and -

1. LEE KAY GUAN Respondents
2. ONG KIM LIONG

CASE FOR THE RESPONDENTS

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1. This is an appeal from the judgment of the Court of Appeal in Singapore (Wee Chong Jin, C.J., Chua and D'Cotta, JJ.) dated the 6th November, 1978, which allowed the Respondents' appeal from a judgment of the High Court in Singapore (Choor Singh, J.) dated the 23rd January, 1978, which dismissed the Respondents' claim to liquidated damages pursuant to clause 11 of a Sale and Purchase Agreement dated the 6th January, 1973, in respect of delay by the Appellants in serving a notice to complete upon the appointed date, the relevant period of delay being from the 28th November, 1974, to the 7th December, 1975, and the Appellants having admitted their liability to pay such liquidated damages from the 31st December, 1973 to the 28th November, 1974.

2. On the 6th January, 1973 the Appellants and the Respondents entered into an Agreement (hereinafter called "the said Agreement") for the sale and purchase of a building plot in a building estate then being developed by the Appellants together with a detached bungalow in the court of erection thereon as described in the First Schedule thereto at the price of \$180,000. The relevant clauses for the purposes of this appeal are clauses 3, 10 and 11. Clause 3 provides for the payment of the purchase price by instalments. Clause 10 provides for all instalments of the purchase price to be paid notwithstanding any delay in the Vendor obtaining the approval of the Competent Authority under S.9(3) of the Planning Act (Cap. 279) for the subdivision of the property. Clause 11 provides for completion of the sale and purchase to be at the Appellants' Solicitors' offices fourteen days after the receipt by the Respondents or their Solicitors of the

Record

PP 22-27

pp 13-15

pp 35-36

p.14 U.3-7

Exhibit 1

PP 30-47

Exhibit 1

P. 51

Exhibit 1

pp 30-32

35-36

See Annexure I

PP 35-36

Record

Notice to Complete which is required to be served by the Appellants on or before the 30th June, 1973 "or such other subsequent date or dates as may after the date hereof be appointed by the Controller of Housing". Clause 11 concludes with the following sentence:

Exhibit 1

P.35 L.47-

P.36 L.1

"If the Vendor shall fail to give the said Notice to Complete on the appointed date the Vendor shall pay to the Purchaser liquidated damages calculated from day to day in respect of the period commencing from the appointed date up to the date when the said Notice to Complete shall actually have been given at the rate of nine per centum (9%) per annum on the purchase price such interest to be paid and deducted from the balance of the purchase price payable on completion."

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pp. 30-47

See Annexure I
See Annexure I

3. The said Agreement was in the standard form of agreement as prescribed by the Housing Developers Rules, 1965 as amended by the Housing Developers (Amendment) Rules, 1967, made pursuant to S.21 of The Housing Developers (Control and Licensing) Act (Cap.250).

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pp. 30-32

p.13 L.33-38

Exhibit 2
p.48

4. In compliance with clause 3, the Respondents paid 95% of the purchase price amounting to \$171,000. There was considerable delay on the part of the Appellants in completing the building of the bungalow. It was finally completed in November, 1974. On the 28th November, 1974 the relevant authority issued a Temporary Occupation Licence pursuant to regulation 34(3) of the Local Government (Building) Regulations, 1966 which reads as follows:

"34.....

(3) No person shall occupy or permit to be occupied any building or any part thereof unless a Certificate of Fitness for occupation has been issued under this regulation for such building:

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See Annexure I

Provided always that the Chief Building Surveyor may in his discretion grant a licence for the temporary occupation of such building for a period not exceeding six months, in cases where only minor deviations from the approved building plans in respect thereof have been made and pending full compliance with the requirements of the Chief Building Surveyor before the issue of a Certificate of Fitness."

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p25 L.45-50

pp. 21-22

5. On the 1st December, 1974 the Appellants offered to hand over possession of the bungalow to the Respondents but the Respondents did not take possession asserting that they were entitled to refuse possession until completion of the sale. On the 11th December, 1974, the Respondents' Solicitors wrote to the Appellants' Solicitors asking for Notice of Completion in accordance with clause 11 of the said Agreement and informing the Appellants' Solicitors

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that the Respondents were claiming liquidated damages under that clause. The bungalow lay vacant until the 17th April, 1975 when the Respondents took possession of the same.

Record

p.13 U.41-end

6. The Appellants did not give Notice to Complete pursuant to clause 11 until the 7th December, 1975, almost two years after the appointed date fixed in clause 11 which fell on the 31st December, 1973 following an extension of six months by the Controller of Housing.

p.25 L.53-
p.26 L.3

p.7 U.20-28

10 7. The Appellants admitted that they were liable to pay liquidated damages pursuant to clause 11 for the period of 327 days from the 31st December, 1973 up to the 28th November, 1974 when the Temporary Occupation Licence was issued. Before the hearing in the High Court the Appellants paid the appropriate sum of \$14,512.26 to the Respondents (being 9% of the purchase price of \$180,000 over 327 days). The issue before the High Court and Court of Appeal was whether the Appellants were liable under clause 11 to pay liquidated damages for the period
20 from the 28th November, 1974 to the 7th December, 1975 when the Notice to Complete was eventually given.

p.13 U.3-7

p.26 U.4-9

p.14 U.8-12
p.26 U.10-13

8. The Respondents, by their Writ dated the 31st December, 1975 and Amended Statement of Claim dated the 5th May, 1977 claimed inter alia liquidated damages under clause 11. By their Amended Defence dated the 13th May, 1977 the Appellants denied liability and contended, inter alia, as follows:

pp.1-3
pp4-6

pp.7-9

(i) That clause 11 amounted in law to a penalty and not a provision for liquidated damages;

p.7 L.37-
p.8 L.3

30 (ii) Even if clause 11 did not amount to a penalty, the obligation to pay liquidated damages ceased when the Temporary Occupation Licence was issued on the 28th November, 1974;

p.7 U.29-36

(iii) That they took all reasonable steps to complete construction of the bungalow and the failure to give Notice to Complete at the appointed time was not caused by their default.

p.8 U.36-46

By their Reply, dated the 20th March, 1976 the Respondents joined issue with the Appellants and contended:

pp.9-10

40 (i) That the Appellants admitted liability in writing for liquidated damages from 1st January, 1974 to the 28th November, 1974;

p.9 U.33-end

(ii) That the Amended Defence if sustained on the facts did not disclose any cause of defence in law.

p.10 U.11-13

9. On the 30th September, 1977 the action came on for trial before Choor Singh, J. No evidence was called by

pp.10-11

Record

pp. 13-15

pp. 13-14

p. 14 ll. 3-7

p. 14 ll. 8-12

pp. 14 ll. 13-20

p. 14 ll. 21-23

p. 14 ll. 36-38

p. 14 ll. 44-47

~~pp.~~

p. 14 ll. 47 -

p. 15 ll. 3

p. 15 ll. 4-8

pp. 15-16

pp. 17-19

p. 18 ll. 3-16

p. 18 ll. 26-34

pp. 19-21

p. 20 ll. 7-13

either party, both parties informing the Court that the question was one of construction of documents. On the 23rd January, 1978 Choor Singh, J. delivered judgment. After summarizing the facts, Choor Singh, J. said that the Appellants had admitted that they were liable for damages up to the date of the issue of the Temporary Occupation Licence on the 28th November, 1974 which had been paid to the Respondents. The learned Judge said that the dispute was whether damages thereafter up to the 8th December, 1975 were payable by the Appellants. After setting out the Appellants' contentions as to their alleged inability for reasons beyond their control to serve a Notice to Complete earlier than the 7th December 1975, but making no finding thereon in the absence of any evidence to support such contentions, Choor Singh, J. said that the Appellants were not liable to pay damages for the period after the 28th November, 1974. He said that the Respondents' claim was in essence a claim for compensation for financial loss. As to the period when the Respondents were in occupation from 17th April to 8th December, 1975, Choor Singh, J. said that the Respondents had suffered no financial loss at all. As to the period from the 28th November, 1974 when they were offered possession until the 16th April, 1975, the learned Judge said that the Respondents gave no valid reason for not taking possession and were not entitled to any damages. Choor Singh, J. concluded by holding that the Respondents were entitled to damages only up to the 28th November, 1974 when the Temporary Occupation Licence was issued.

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10. By their Notice of Appeal, dated the 11th October, 1977 the Respondents appealed to the Court of Appeal on grounds set out in their Petition of Appeal, dated the 31st January, 1978. The Respondents' therein contended, inter alia, that:

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(i) Choor Singh, J. erred in law in not giving effect to clause 11 of the said Agreement and/or to the Housing Developers (Control and Licensing) Act (Chapter 250): and the Housing Developers (Amendment) Rules 1967 which prescribed the statutory form of agreement;

(ii) the learned Judge erred in law in holding that the Respondents were required to take possession as from the date of the issue of the Temporary Occupation Licence, or in holding that possession was relevant to the calculation of liquidated damages under clause 11.

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11. By their Respondents' Notice dated the 14th February, 1978 the Appellants contended, inter alia, that:

(i) the said Agreement was partly a building contract and partly a sale of land and that in law no damages were due for delay to completion in respect of the latter;

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- (ii) public policy coupled with the Respondents' failure to mitigate prevented the Respondents from recovering damages after the issue of the Temporary Occupation Licence; Record
p.20 U.31-43
- (iii) the form of agreement prescribed by the Housing Developers (Amendment) Rules, 1967 had not been affirmed by Parliament and was therefore subject to judicial control as being unreasonable and repugnant to the common law; p.20 L.44 -
p.21 L.5
- 10 (iv) the provision for "liquidated damages" in clause 11 was in law a penalty. p.21 U.3-5
12. The appeal was heard by Wee Chong Jin, C.J., Chua and D'Cotta, JJ. and judgment was given on the 24th November, 1978 unanimously allowing the Respondents' appeal. pp.22-27
13. Wee Chong Jin, C.J. delivering the judgment of the Court, summarized the facts and set out clauses 3,10 and 11 of the said Agreement. The learned Chief Justice then summarized the reasoning in the judgment of Choor Singh, J. and stated that the Respondents claimed payment pursuant to clause 11 which they contended was not in the nature of a penalty but was in truth liquidated damages. In the opinion of the Court, Wee Chong Jin, C.J. said that the said Agreement was similar to a building contract. The said Agreement contained a definite date from which liquidated damages for delay in giving a notice to complete were to run. The learned Chief Justice found that the relevant provision, having regard to all the terms of the said Agreement, was clearly a genuine pre-estimate of the loss likely to flow from a breach thereof and was accordingly recoverable without proof of the actual loss suffered. The fact that it was difficult to ascertain the loss caused to the purchaser by delay in giving a notice to complete indicated that the provision to pay a sum as specified in clause 11 was in the nature of liquidated damages, so long as the sum specified was not excessive. It was clear to the Court that the sum specified was not excessive having regard to all the terms of the said Agreement. The learned Chief Justice was unable to see how the Appellants' contention that they were unable to make title to the land and premises for reasons beyond their control could affect the bargain agreed upon by the parties. pp.23-26
p.26 U.15-34
p.26 U.35-41
p.26 U.41-43
p.26 U.43-46
p.26 U.47-51
p.26 L.51 -
p.27 L.3
p.27 U.4-8
p.27 U.16-18
14. Accordingly, the Respondents' appeal was allowed, the Respondents being held entitled to judgment calculated in accordance with the provisions of clause 11 for the period 29th November, 1974 to 7th December, 1975 together with costs of the appeal and in the High Court. p.27 U.19-25
15. The Respondents respectfully submit that this appeal should be dismissed and that the judgment of the Court of p.27 U.19-25
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Record

Appeal is correct. It is respectfully submitted that clause 11 does not amount to a penalty but is a genuine liquidated damages clause as found by the Court of Appeal, a conclusion supported by the Appellants' payment of liquidated damages pursuant to clause 11 for delay up to the 28th November, 1974 and by Choor Singh, J.'s decision that such liquidated damages were payable. It is respectfully submitted that clause 11 plainly consists of a genuine and moderate pre-estimate of the loss likely to be suffered by a purchaser in the event of completion being delayed in the context of the whole of the said Agreement. The Purchaser under clauses 3 and 10 of the said Agreement had paid 95% of the purchase price. The Purchaser would or might in the event of a delay in completion suffer (1) loss of interest on the amount of the purchase price paid (2) loss in the form of interest paid on mortgage money out of which part of the purchase price was paid (3) the loss of use of the property or the income therefrom and (4) loss of the opportunity of re-sale. In all those circumstances, it would not be, and was not, unreasonable to provide under clause 11 for the payment by the Vendor to the Purchaser of liquidated damages, in the event of a delay in completion beyond the appointed time which could be extended by the Controller of Housing, of no more than 9% per annum of the purchase price.

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16. The Respondents respectfully submit that the issue of the Temporary Occupation Licence on the 28th November, 1974 and/or the Appellants' offer to give possession to the Respondents and/or the Respondents' taking up of occupation on the 17th April, 1975, did not in any way affect the Respondents' entitlement to liquidated damages under clause 11. There was no obligation upon the Respondents to take up occupation at any material time before completion whether under the said Agreement or under the principle of mitigation of damage or otherwise, assuming (which the Respondents do not accept) that the taking up of occupation could or did reduce the Respondents' loss. It is respectfully submitted that if clause 11 is not a penalty, then the liquidated damages from their very nature are payable for delay in giving the notice to complete whether or not the Respondents have in fact suffered any loss or taken any steps to mitigate any loss.

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17. The Respondents respectfully submit that clause 11 makes provision for the payment of liquidated damages for delay in giving the notice to complete irrespective of the causes of such delay. It is no answer for the Appellants to say that the delay was caused without fault on their part. It is respectfully submitted that there is no rule or principle in the law of Singapore which would prevent parties from entering into an effective and valid agreement in the terms of clause 11. Further or in the alternative, if and in so far as it may be necessary to do so, the Respondents will rely upon the provision in clause 11 whereby the Controller of Housing may appoint the date

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or dates upon which notice to complete shall be given by the Vendor and thus effectively give an extension of time. The Vendor is thereby given an opportunity in the case of delay caused without fault on his part to obtain further time within which to give notice to complete.

10 18. The Respondents respectfully submit that the provision for the standard form of agreement as set out in the Housing Developers (Amendment) Rules, 1967 of which clause 11 forms part was validly made by the Minister for Law and National Development in the exercise of powers conferred by S.21 of the Housing Developers (Control and Licensing) Act (Cap.250). Accordingly, such standard form of agreement has statutory force. It is respectfully submitted that in those circumstances it is not lightly to be presumed or found that clause 11 amounts in law to a penalty or is unreasonable. It is further submitted that there is no rule or principle of law in Singapore to which clause 11 is repugnant or against which the same offends. To the extent that the Appellants may rely upon any relevant part of the law of England imported into Singapore whether by virtue of S.5(1) of the Civil Law Act (Cap.30) or otherwise, the Respondents will submit that other provision has been made by law having force in Singapore, namely in the Housing Developers (Amendment) Rules, 1967, providing for a prescribed form of agreement of which the said Agreement is an example.

20 19. The Respondents respectfully submit that the judgment of the Court of Appeal in Singapore is right and ought to be affirmed, and this appeal ought to be dismissed with costs for the following (among other)

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R E A S O N S

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- (1) BECAUSE the Respondents are entitled in all the circumstances to recover liquidated damages under Clause 11 in respect of the period from the 28th November, 1974 to the 7th December, 1975:
- (2) BECAUSE clause 11 did not amount to a penalty but was a genuine provision for liquidated damages:
- (3) BECAUSE the availability of possession and/or the taking up of occupation before completion did not in any way affect the Respondents' entitlement to liquidated damages under clause 11:
- (4) BECAUSE the causes of delay in completion do not under clause 11 affect the Respondents' entitlement to liquidated damages:
- (5) BECAUSE there is no rule or principle of law in Singapore against which clause 11 offends:
- (6) BECAUSE clause 11 appears in a statutory form of agreement as prescribed in the Housing Developers

Record

(Amendment) Rules 1967:

- (7) BECAUSE of the other reason given in the judgment of the Court of Appeal delivered by the learned Chief Justice.

STUART N. MCKINNON

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(PTE) LIMITED

Appellants

- and -

1. LEE KAY GUAN
2. ONG KIM LIONG

Respondents

CASE FOR THE RESPONDENTS

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