Privy Council Appeal No. 41 of 1989

Golden Bay Realty Private Limited *Appellants*

v.

Orchard Twelve Investments Pte. Ltd. *Respondents*

FROM

THE COURT OF APPEAL OF SINGAPORE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND JULY 1991

Present at the hearing:-

LORD TEMPLEMAN
LORD OLIVER OF AYLMERTON
LORD GOFF OF CHIEVELEY
SIR MICHAEL KERR
SIR CHRISTOPHER SLADE

*[Delivered by **Lord Oliver of Aylmerton**]*

The Sale of Commercial Properties Act 1979 of Singapore (as amended in 1980) (hereinafter referred to as the "Act") provides (in section 5) that every agreement for the sale and purchase of a commercial property shall contain such terms and conditions of sale as may be prescribed by rules made under the Act and that any term or condition in such an agreement which is inconsistent with the terms so prescribed shall, to the extent of the inconsistency, be null and void. The Act thus evinces a clear legislative intention to impose a uniform statutory code on all sales of commercial property. Indeed it goes further. Section 6 renders failure to comply with any of the provisions of the Act a criminal offence and imposes heavy penalties. By section 9(1) the Minister is empowered to make rules for (*inter alia*) the prescribing of any matter which is authorised or required under the Act and sub-section (2) of the same section provides expressly that the Minister may, by such rules, (*inter alia*) ...:-

> "(d) regulate the form or forms of an agreement for the sale and purchase of any commercial property; and
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> (e) prescribe the conditions which, if used in any agreement for the sale and purchase of any commercial property, shall be void."

The Sale of Commercial Properties Rules, 1979 (S.158/79) (hereinafter referred to as the "Rules") as subsequently amended in 1980 provide, so far as material, as follows:-

"6. The agreement for the sale of any commercial property to which the Act applies shall be in the Form B set out in the Schedule to these Rules.

7. No amendment, deletion or alteration to ... the agreement for sale referred to in [rule 6] shall be made except with the approval in writing of the Controller of Housing.

9. Any person who contravenes or fails to comply with any of the provisions of [rule 7] shall be guilty of an offence ..."

The present appeal (from an order of the Court of Appeal of Singapore made on 13th April 1989) concerns a multi-storey commercial and residential development known as Orchard Towers, in Orchard Road, Singapore, the construction of which was commenced in 1971. By the autumn of 1975 the fabric of the building was substantially complete and the Licence for Temporary Occupation, which is required under Singapore building regulations before a building can lawfully be occupied, had been issued for that part of the building which included the unit (number 13-05) to which this appeal relates. In November 1978 the unit was let to a tenant who entered into occupation. By an agreement dated 17th February 1981 and made between the appellants as vendors and the respondents as purchasers the appellants agreed to sell to the respondents the whole of unit 13-05 (then numbered 1205) at a price of $3,380,000.

The statutory form of agreement makes no provision for a commercial building which is completed at the date when the contract is entered into and clause 4 of the agreement had in fact been overtaken by events at the date of the contract. It provided for the purchase price to be paid by twelve progress payments of which eleven amounting to $2,535,000 had fallen due at the date of execution of the contract and fell to be paid on execution. The balance, amounting to 25% of the price, was payable on completion of the sale, as to 20% to the vendor and as to 5% to the purchasers' solicitors as stakeholders, to be paid to the vendor on production of the certificate of fitness for occupation issued by the Assistant Director (Building Control) in respect of the property sold. Completion of the sale was regulated by clause 14 of the agreement which, with such insertions as were necessary to adapt it to the agreed timetable, was in the form prescribed by Form B of the Rules. That clause provided as follows:-

" 14.-(1) The sale and purchase of the said unit shall be completed at the office of the Vendor's

solicitors, Messrs. Lee and Lee fourteen (14) days after the receipt by the Purchaser or his solicitors of the notice to complete from the Vendor or the Vendor's solicitors such notice to be accompanied by the certificate of the Vendor's architect that the Temporary Occupation Licence or Certificate of Fitness for Occupation has been obtained for the said unit, and subject to clause 2 hereof, after receipt by the Purchaser or his solicitors of the notice from the Vendor's solicitors that the Subsidiary Strata Certificate of Title has been issued for the said unit. On completion, the Vendor shall execute in favour of the purchaser a transfer or lease, as the case may be, of the said unit sold, such transfer or lease to be prepared by and at the expense of the Purchaser.

(2) The said notice to complete shall be given by the Vendor on or before the 31st day of December 1981. If the Vendor shall fail to give the said notice to complete on the date fixed for completion the Vendor shall pay to the Purchaser liquidated damages calculated from day to day commencing from the date when such notice to complete should have been given at the rate of nine (9) per cent per annum on a sum equal to eighty-five (85) per cent of the purchase price, such interest may be deducted from any instalment due and payable to the Vendor."

In fact what occurred was that the respondents paid to the appellants a sum equal to 10% of the contract price on the execution of the contract. The balance of the progress payments due up to that date (a further 65%, amounting to $2,197,000) was demanded in February 1981 but was not in fact paid until 19th May 1981, when it was paid to the appellants together with interest due for late payment. The balance of $845,000 remained outstanding and was payable on completion in the manner prescribed by clause 4. As from 19th May 1981 the respondents were let into possession and received the rent of the property.

In fact the appellants did not give notice to complete by the date specified in clause 14. A notice was not in fact served until 17th June 1983, so that (subject to clause 15 of the agreement) the provisions of clause 14(2) as to damages became operative. Clause 15 is in the following terms:-

" 15. Notwithstanding anything herein contained if by reason of any strike, riot, civil commotion, earthquake, flood, or natural disaster or any other cause or causes over which the Vendor has no control there shall be any delay on the part of the Vendor in completing the Building or completing the sale of the said unit to the Purchaser, the Vendor shall not in any way be liable to the Purchaser in damages or otherwise."

Prior to completion, on 12th January 1983 a Certificate of Fitness was issued and the 5% of the purchase price provided for in clause 4 was paid to the Vendor. The respondents were ready to complete but claimed to set off against the remaining 20% of the price then due a sum by way of liquidated damages for delay equal to interest at the rate of 9% per annum on 85% of the purchase price from 31st December 1981 until 16th June 1983, thus leaving a balance due of only $267,039.02. The appellants having refused to complete on these terms, the respondents issued an originating summons on 26th August 1983 in the Supreme Court of Singapore claiming a declaration of their entitlement to a sum of $409,460.98 as liquidated damages pursuant to clause 14(2) and an order upon the appellants to complete upon payment of the sum of $267,039.02. In fact the latter order did not become necessary because the parties managed to agree terms upon which the sale could be completed and it was in fact completed on 9th January 1984, the question of the respondents' entitlement to damages being left outstanding and to be determined by the court.

On 27th May 1986 Thean J. gave judgment for the respondents and on 23rd March 1989 his decision was upheld by the Court of Appeal of Singapore (Sinnathuray and Chua JJ. and Chao Hick Tin J.C.). From that decision the appellants now appeal to their Lordships' Board.

The appellants' primary contention is that it is evident that the respondents had not in fact suffered any damage. They had, it is contended, been in possession of the property by receipt of the rent since 19th May 1981 and had, between the date when the contract should have been completed and the date of actual completion, had the benefit of retaining the balance of the purchase price which they would otherwise have been bound to pay. Thus, it is argued, although clause 14(2) describes the damages calculated by reference to a percentage of 85% of the purchase price as "liquidated damages", it was not in any sense a genuine pre-estimate of the damage likely to be suffered but constituted a penalty and was therefore unenforceable.

Both Thean J. and the Court of Appeal found two very short answers to this. In the first place, neither court was convinced that the provision was not a genuine pre-estimate of damage. 9% of 85% of the purchase price, they considered, could not be considered extravagant or unconscionable and the size of the amount which, in the event, was claimed was due simply to the length of the delay in completing. Until the legal title is vested in the purchaser he has an equitable interest only and is thus subject to the risk of being overreached by other interests and has a more restricted ability to deal with the property by way of

mortgage or resale. Such disadvantages are not easy to quantify. But secondly, and perhaps more cogently, the condition is a statutory condition of every sale of commercial property which the parties, whether they like it or not, are obliged by law to include in their contract under pain of criminal sanction. It is not easily conceivable that the legislature - represented in this case by the Minister acting *intra vires* under statutory powers in providing what is contemplated as a universal code for commercial properties - could have deliberately enacted an unequivocal mandatory provision for damages which was liable to be struck down as a penalty. Thean J. expressed the matter thus:-

> "Clause 14(2) of the statutory form, Mr. Lowe submits, is intra vires the Act; it has statutory force and takes effect in precisely the same way as if the provision were contained in a form set out in a schedule to the Act. In consequence, a contract in a statutory form will not have all the incidents of an ordinary contract (in a non-statutory form) and in particular will not be subject to the ordinary rules relating to penalty. If such a statutory form of contract when entered into is subject to the ordinary rule in relation to penalty, then different contracts will operate differently depending on individual circumstances; this would be inconsistent with the Act and the Rules. It is therefore not open to a vendor who has entered into a contract in a statutory form (and who is obliged to enter into such a form) to say that in the circumstances of the particular case the provision therein for payment of liquidated damages is penal in nature. It can only be successfully attacked on the ground that the provision is ultra vires the Act; but such is not seriously the argument advanced.
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> I think Mr. Lowe's argument is well founded and I agree with him entirely. I have only this to add. It cannot be said that the legislature intended by the Rules to enact or prescribe a form of agreement which contains, inter alia, provisions which may be penal in nature. It must be taken that the legislature in providing for liquidated damages has considered various factors and adopted a formula as set out in clause 14(2) as a genuine pre-estimate of damages."

If it is once assumed that the ordinary incidents of a non-statutory contract apply, their Lordships see more scope than did the courts below for the argument convincingly advanced by Mr. Price on behalf of the appellants that the calculation by reference to interest on 85% of the total purchase price is difficult to support as a genuine pre-estimate of the damage likely to be suffered from delay in completion in any case. Particularly this would be so in a case in which the building is complete at the date of the contract and the purchaser is let into possession under the terms of the

contract, although it is fair to say that the purchaser will still, pending completion, have paid in advance for a title that he has not yet received. In their Lordships' opinion, however, the argument based on the statutory nature of the condition and encapsulated in the passage from the judgment of Thean J. quoted above is unanswerable. There simply is no room for an argument that the form which, acting *intra vires*, the Minister has prescribed is unconscionable and void. Not only does the statutory form of contract itself contemplate the possibility (in clause 13) that the purchaser may be put in possession prior to completion, but it has to be borne in mind that, having regard to the terms of section 5(2) of the Act, if the parties themselves had sought to provide any other formula for the calculation of damages for delay in these or any other circumstances, that provision would itself have been void so far as it was inconsistent with the terms of clause 14(2) unless inserted with the consent of the Controller of Housing. It has not been and could not easily be argued that the Rules are *ultra vires* the Act, and the possibility that parties become liable to severe criminal penalties for failure to include in their contract a provision which, if included, would be liable to be immediately struck down by the court is too absurd to contemplate.

This point has not, so far as their Lordships are aware, been previously made the subject of direct decision in any case prior to the instant case but there are two obiter opinions of the Board which strongly militate against the appellants' argument (see *Phoenix Heights Estate (Pte) Limited v. Lee Kay Guan* and Another [1982] 2 M.L.J. 86; *Loh Wai Lian v. S.E.A. Housing Corporation Sdn. Bhd.* [1987] 2 M.L.J. 1). In the *Phoenix Heights* case a very similar question arose on the statutory form of contract prescribed by rules made under the Singapore Housing Developers (Control and Licensing) Ordinance 1965. In that case the vendor against whom damages for delay were claimed admitted liability for part of the amount but disputed it in relation to the period elapsing prior to completion but after he had made an offer to allow the purchaser to take possession on the ground that thereafter no damage had been suffered. That argument was rejected, their Lordships' Board holding that the offer of possession was irrelevant. In rejecting it, however, Lord Brightman, delivering the judgment of the Board, adverted to an argument that the agreement for payment of liquidated damages was in fact a penalty. He observed in the *Phoenix Heights* case at page 88:-

> "An argument that the agreement for payment of liquidated damages is a penalty faces a formidable problem at the outset. The sale agreement takes a statutory form, in the sense that it was bound to follow the precedent laid down in 1967 by the Minister of Law and National Development, acting under his statutory power to make rules to provide

> for the form of contract to be used by a licensed housing developer. The vendor's argument is therefore an invitation to the Board to find that the official form of contract from which *prima facie* the vendor and the purchasers could not lawfully depart, and which must have been used in countless transactions over the last fifteen years, is nevertheless unconscionable and void.
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> Even if that problem is surmounted, and if it is also assumed that the principle of *Rowe v. School Board for London* [1887] 36 Ch.D. 619 forms part of the law of Singapore, and that the delay was not the fault of the vendor, their Lordships see a fundamental objection to the vendor's argument. The argument for liquidated damages was not directed to different categories of breach of contract, but to a single sort of breach, namely, a delay in serving notice to complete. As their Lordships have already indicated, the purchasers were not bound to pay the least attention to an offer of vacant possession unless and until notice to complete was served. The offer in the present case of vacant possession before completion was never a part of the sale agreement, but was an event altogether outside the contract. It cannot therefore be taken into account in assessing the validity of the agreement for compensation for delay in serving a notice to complete."

The point was thus not directly decided. Again, in the case of *Loh Wai Lian* the Board, without hearing argument on the point (which was not directly in issue in the case) expressed a view obiter that "there could not sensibly be any prospect of a sum calculated according to mandatory statutory provisions being held to be irrecoverable as a penalty".

The appellants in any event seek to distinguish the *Phoenix Heights* case on the ground that there, at the date of the contract, the building was still in a state of construction whereas in the instant case it had to all intents and purposes been completed and that the purchasers were not in possession at the date when completion should have taken place. Their Lordships do not find these to be persuasive grounds of distinction. The fact is that in both cases the purchaser paid in advance for something that he did not get at the date when the contract ought to have been completed and, as already mentioned, clause 13 of the statutory conditions expressly contemplates the possibility of the purchaser being let into possession prior to completion. None of the distinguishing features suggested by Mr. Price gets over the difficulty that the condition in question is one which is statutorily inserted and is clearly prescribed as part of the uniform code intended to have a uniform effect, except to the extent that the Controller of Housing may permit variations to be made.

This really is sufficient to dispose of the appeal but there are three subsidiary arguments which were addressed in the courts below and which ought perhaps to be mentioned even though not pressed with any enthusiasm before their Lordships' Board. First, it was argued that clause 14(2) in speaking of a failure to give notice to complete "on the date fixed for completion" is void for uncertainty having regard to the fact that clause 14(1) has already provided for the date for completion to be fourteen days after the receipt of the notice to complete. Their Lordships entirely agree with Thean J. and the Court of Appeal that there is nothing in this point. The clause is perhaps inelegant, but the intention quite clearly was to refer to 31st December 1981, the date fixed in the immediately preceding sentence for the giving of notice. Secondly, it was submitted that the word "fail" signifies some misconduct or want of diligence on the part of the vendor and that, in the absence of proof of such want of diligence, the clause never came into operation at all. Their Lordships have no hesitation in accepting Thean J.'s and the Court of Appeal's view that there is nothing whatever in this point and that "if the vendor shall fail to give" means no more than "if the vendor shall not give". All other considerations apart, clause 15 would, if the construction contended for by the appellants were correct, be quite unnecessary.

Finally, the appellants sought to rely on a contention that the delay which occurred was due to circumstances beyond their control and that they were accordingly exonerated from any liability by clause 15 of the agreement. This is a pure question of fact which was carefully investigated both by Thean J. and by the Court of Appeal. It is not their Lordships' practice to entertain appeals on matters of fact as to which there are concurrent findings in the courts below and Mr. Price has very properly not sought to urge that there are any grounds upon which he could successfully persuade their Lordships to depart from their practice in the instant case.

Their Lordships accordingly dismiss the appeal with costs.