

Hemlata Pathela (trading as Coco Properties) v Suresh Partabrai and Another
[2000] SGHC 126

Case Number : MC Suit 14038/1999

Decision Date : 05 July 2000

Tribunal/Court : High Court

Coram : Choo Han Teck JC

Counsel Name(s) : Eric Low (Khattar Wong & Partners) for the appellant/plaintiff; Madan Assomull (Assomull & Partners) for the respondents/defendants

Parties : Hemlata Pathela (trading as Coco Properties) — Suresh Partabrai; Another

Civil Procedure – Originating processes – Defendants applying to strike out claim – Whether proper procedure was to apply for trial of preliminary issue

Contract – Illegality and public policy – Statutory illegality – Contract for brokerage commission – Unlicensed agent brokering sale of property – Whether agent able to enforce agreement and recover commission through process of court – s 9(2) Auctioneer's Licences Act (Cap 16)

: The plaintiff is the sole proprietor of a business registered as Coco Properties. She averred that she carried on the business of a real estate agent. She brokered a sale of the defendants' property at 1 Amber Road for \$2.7m. The contract for sale was concluded between the defendants and the purchaser on 20 August 1998 and the sale was completed on 21 October 1998.

The plaintiff by this action sued the defendants for her commission of \$27,000 (being one per cent (1%) of the purchase price) agreed between the defendants and herself.

The defendants applied to strike out the plaintiff's claim on the ground that it discloses no reasonable cause of action, is frivolous, vexatious or otherwise an abuse of the process of the court. The defendants' case was that the plaintiff had no licence under the Auctioneer's Licences Act (Cap 16) to carry on her business as a housing agent and was, therefore, in breach of s 9(2) of the Act. Accordingly, the contract between them and the plaintiff was illegal and cannot be enforced.

The writ was struck out by the deputy registrar of the Subordinate Courts. The plaintiff appealed to the district judge in chambers. The learned District Judge Mr Khoo Oon Soo dismissed the appeal and the plaintiff thus appealed before me against the decision of the learned District Judge. In the course of argument it became obvious to me that the proper procedure was to apply for a trial of a preliminary issue. The facts and circumstances here do not merit a striking out on the ground that the writ discloses no reasonable cause of action (as the defect is not apparent on the pleadings) or that it was frivolous or vexatious (in which case different considerations apply). However, having come thus far, and since my decision on the arguments as presented achieves the same result, it would be inappropriate and futile to correct that procedural mistake now.

The issue before me is purely one of law. On the facts as I had set out above, was the plaintiff entitled to recover the commission through the process of court? Mr Eric Low for the plaintiff argued very forcefully that a distinction ought to be drawn between a contract which is prohibited by statute and one in which is not prohibited whether expressly or by implication. He submitted that the failure to obtain a licence may be an offence under the Act and renders the plaintiff liable to be fined for it, but there is nothing in the Act which expressly or impliedly suggests that a contract made with an unlicensed housing agent is illegal and cannot be enforced by him.

Mr Low conceded that he will be hard put to argue that an unlicensed doctor should be permitted to

sue for his fees; likewise, an unlicensed architect or lawyer. He distinguished such cases on the basis that the consequences of those unlicensed persons may result in serious harm. In this case, he argued, no harm ensues from the failure of the housing agent who does not obtain a licence to carry on his business as such. Mr Low may have overlooked the case of **Gremaire v Valon** 2 Camp 143; 170 ER 1110 cited in **Cope v Rowlands** (1836) 2 M & W 149; 150 ER 707 which Mr Assomull referred to at the hearing. It is not a point of any significance in my view, but it should be made for the record. In **Gremaire** Lord Ellenborough held that a surgeon was entitled to sue for his fees even though he was not licensed. Parke B in **Cope v Rowlands** doubted the correctness of the decision of Lord Ellenborough, and reminded the parties before him that that case was affirmed on appeal on a different ground, namely, that there was no evidence that the surgeon was not licensed.

Mr Assomull submitted that the licensing requirement was not a purely revenue provision. He argued that the Act was intended to regulate the business of housing agents and auctioneers, and public policy requires that unlicensed agents be prevented from seeking the assistance of the courts to enforce their contracts. Counsel found support in the Canadian case of **Commercial Life Assurance Co v Drever** [1948] 2 DLR 241 in which the Supreme Court of Canada ruled that a person holding himself out as a real estate agent cannot support a claim for commission if he did not possess the requisite licence under the Real Estate Agents` Licensing Act 1942. This was a very brief judgment and did not provide sufficient grounds to satisfy Mr Low`s deeply held belief that unless one can imply a prohibition under the statutory provisions in question, the mere failure to obtain a licence does not render a contract made by an unlicensed housing agent unenforceable.

In the course of further arguments Mr Low drew my attention to the decision in **Foo Kee Boo v Ho Lee Investments (Pte) Ltd** [1988] SLR 620. That case concerned a housing developer who executed an option that was not in the prescribed form under the Housing Developers (Control and Licensing) Rules. The Rules there provided that the penalty for breach is the imposition of a fine or imprisonment. There, the learned judge Grimberg JC was of the view that the penalties provided under the Rules were the only consequence intended by the legislature. He found that there was nothing in the Rules or the Housing Developers (Control and Licensing) Act which expressly prohibits the enforcement of a contract that was made in breach of the rules. The learned judge reviewed various authorities which held that a contract would be rendered void and unenforceable if that was the intention behind the statutory provisions in question. The relevant portion of his decision is found at p 628 as follows:

I turn to apply the principles set out above to the facts of the present case. The rule as to the form of options was imposed as a condition of the granting to the defendants of their licence - see s 21(ii)(d) of the Act. Breach of the rule could have been serious or trivial. It could have resulted in a fine of up to \$5,000 and/or six months` imprisonment - r 20 or, if charged as a breach of the licence, to a fine not exceeding \$20,000 - s 4(8) of the Act. I take the view that liability to penalty or imprisonment was the only consequence intended by the Act and the Rules to flow from a breach of the Rules. To hold that any breach, however trivial, rendered the contract void could lead to absurdity. Were this the result it would have been open not only to the purchaser but also the developer to invoke the invalidity of the contract. This cannot, in my view, have been the intention of the legislature.

I am fortified in my view by the fact that the Act does not provide expressly that an option or agreement that arises from it, is incapable of enforcement if a statutory offence is committed in that the prescribed forms have not been used.

I am of the view that the facts and circumstances in **Foo Kee Boo**'s case is entirely different. I am loathe to distinguish a decision of a lawyer and judge, especially one who is as well regarded as the learned Mr Grimberg, without stating precisely why I do so. I begin with the obvious observation that the nature and objectives of statutes may differ from one to the other. In **Foo Kee Boo** the offending conduct was the use of a wrong form which, in the learned judge's view, did not prejudice the substance of the private contract between the plaintiff purchaser and the defendant vendor. There were sufficiently serious sanctions under the statute concerned in the event of a breach of the statute and its by-laws, including the penalty of imprisonment. In this case before me the only penalty is a fine of no more than \$2,000. The difference in the respective penal provisions is, in my view, significant for reasons which I shall elaborate shortly. I have no disagreement with the views of Mr Grimberg on the broad principles or the authorities cited by him. Indeed, I find comfort in the brief passage from the judgment of Lord Wright in the **Vita Food Products Inc v Unus Shipping Co Ltd [1939] AC 277**, cited by Mr Grimberg in his decision:

[T]he rule by which contracts not expressly forbidden by statute or declared void are in proper cases nullified for disobedience to a statute is a rule of public policy only, and public policy understood in a wider sense may at times be better served by refusing to nullify a bargain save on serious and sufficient grounds.

I accept that public policy is best gauged through the parliamentary pulse; and when it becomes necessary to determine what public policy, if any, a legislative enactment was intended to pursue, the purpose of the licensing requirements of the Act in question must be considered to be of paramount importance. The Act in this case seeks to regulate and control persons carrying on the business of housing agents. It provides expressly that one may carry on such a business unless licensed. The prohibition against carrying on such a business encapsulates a prohibition against making contracts which form the very business itself. The licensing requirement in the Auctioneers' Licences Act is more than merely a revenue generating provision as Mr Low argued. Section 14 of the Act clearly envisages a policing policy. The Act prohibits certain persons (such as a person who has committed a breach of trust) from carrying on the business of a housing agent or appraiser as the case may be. Thus, the licensing regime was enacted to ensure integrity of the licensees for the protection of the public. It is not right to allow an unlicensed housing agent to enforce his contractual rights (\$27,000 in this case) with the court's assistance when the maximum fine for his offence is only \$2,000. The payment of the fine in these circumstances becomes a gesture of mockery instead of the penalty that it was intended to be. The test, as Mr Grimberg aptly put in **Foo Kee Boo**, is whether the aims of the [Housing and Developers] Act would be promoted. In the case before him, he found that it would not be if the contract there in question was invalidated. I am of the view that the aims of the Auctioneers' Licences Act in this case would not be promoted if the unlicensed agent is able to enforce his contract; a contract which under the Act he has no business to make. I am, therefore, of the view that it is contrary to public policy for the courts to assist the unlicensed agent in collecting his fees. The contract itself may not be void, but I think that it is certainly unenforceable by the agent. Whether it could be enforced by the client if he seeks to recover money already paid is not the issue before me, but I should think that that answer also depends on the facts and circumstances of the case.

I should, in passing, say that the conduct of the defendants in this case is not a material or relevant consideration. It is natural to attach some odium to a party who reaps the benefits of his contract but does not perform his part of the bargain, but Mr Assomull tells me that the agreement between the defendants and the plaintiff was that no fee was payable in respect of the property in this case

because the parties had agreed that in consideration of the waiver of the fees by the plaintiff, the defendants would let him manage their other and future properties. Whether this is true can only be decided after a proper enquiry, but the determination of the point of law before me has rendered that enquiry unnecessary.

For the reasons above, this appeal was dismissed.

Outcome:

Appeal dismissed.