

Harris Hakim v Allgreen Properties Ltd
[2000] SGHC 271

Case Number : OS 896/2000
Decision Date : 13 December 2000
Tribunal/Court : High Court
Coram : S Rajendran J
Counsel Name(s) : George Pereira (briefed) and Serence Chan (Tan Lee & Choo) for the plaintiff;
Benedict Peter (Ramdas & Wong) for the defendants
Parties : Harris Hakim — Allgreen Properties Ltd

Contract – Remedies – Damages – Contractual right of forfeiture – Right exercisable without prejudice to any other rights available at law or in equity – Whether right to claim damages limited to deposit forfeited – Whether entitled to claim in excess of deposit forfeited – Whether contractual clause a liquidated damages clause

Land – Sale of land – Contract – Contract of sale and purchase – Contract in prescribed Form E of Housing Developers Rules 1990 – Purchaser's default – Developers' contractual right of forfeiture of 20% of purchase price – Whether developers' claim for damages limited to 20% of purchase price – Form E cl 5(3) Housing Developers Rules (Cap 130, R 1, 1990 Ed)

Statutory Interpretation – Construction of statute – Intention of Parliament – Whether legislative intent may be gathered from subsequent amendments to legislation

: The plaintiff, Harris Hakim (`HH`), entered into an agreement dated 14 May 1996 for the sale and purchase of a unit in a private housing development known as Springdale Condominium, with the defendants, Allgreen Properties Ltd (`Allgreen Properties`) who were the developers of Springdale Condominium. The agreement was in the prescribed Form E of the Housing Developers Rules 1990 which incorporated within it the Singapore Law Society's Conditions of Sale 1994. The purchase price of the unit was \$1,165,000 which was to be paid in the various instalments set out in cl 3 of the agreement as the construction of the development proceeded. Completion was to take place on or before 30 June 2003.

The agreement provided that in the event HH defaulted in the payment of any instalment for more than 14 days, Allgreen Properties were entitled to charge interest at the specified rate. The agreement further provided [in cl 5(3)] that if HH defaulted in payment of any instalment for more than 14 days, Allgreen Properties were entitled, without prejudice to any other rights available to Allgreen Properties, on giving not less than 21 days' notice to HH, to treat the agreement as having been repudiated and upon the expiration of the 21 days the agreement will be annulled. As the issue in this case centres around the construction of this provision, I will set it out in full.

*5(3) If any such unpaid instalments and interest remain unpaid for any period in excess of fourteen (14) days after its due date, the Vendor shall be entitled at **its option** on giving to the Purchase or his solicitors not less than twenty-one (21) days' notice in writing to treat this Agreement as having been repudiated by the Purchaser and (unless in the meanwhile the unpaid instalments and interest shall have been paid) this Agreement shall at the expiration of such notice (and in this respect time shall be of the essence) be annulled and in such an event, **without prejudice to any other rights available to him at law or in equity**, the Vendor shall be entitled:*

(a) to resell or otherwise dispose of the building unit as the Vendor shall see fit

as if this Agreement had not been entered into;

(b) to recover from the instalments (excluding payments for interest) previously paid by the Purchaser all interest calculated in accordance with paragraph (1) of this clause owing and unpaid; and

(c) to forfeit and retain for his own benefit a sum equal to twenty (20) per cent of the purchase price from the instalments (excluding payment for interest) previously paid by the Purchaser . [Emphasis added.]

Soon after entering into the agreement, HH got into financial difficulties and found it difficult to keep up with the instalment payments. In a letter dated 28 July 1998, his solicitors requested Allgreen Properties to consider:

... serving our client with the relevant notice to repudiate the sale and purchase agreement under cl 5 thereof. In such an event your clients may forfeit and deduct the sum of \$233,000 (ie 20% of the purchase price of \$1,165,000) from the sum of \$699,000 (being the total amount paid by our client to date) and refund the balance thereof, ie \$466,000 to our client.

By letter dated 30 July 1998, the solicitors for Allgreen Properties replied that their clients were not agreeable to HH's request.

HH subsequently defaulted in the payment of further instalments due under the agreement. On 19 August 1999, the solicitors for Allgreen invoked cl 5(3) of the agreement and gave notice thereunder to HH that unless HH pays all unpaid instalments and interest within 21 days thereof, the agreement shall, at the expiration of the said 21 days be annulled and Allgreen Properties will, ***without prejudice to any other right available to them at law or in equity***, proceed in accordance with cl 5(3) of the agreement.

HH was unable to comply with the notice and by a letter dated 6 December 1999 the solicitors for Allgreen Properties gave notice that 'the 21-day period has expired' and that:

In accordance with Condition 29 of the Singapore Law Society's Conditions of Sale 1994, without prejudice to any other rights or remedies available to our clients at law or equity, the deposit paid by your client has been forfeited and retained for our client's own benefit.

Mr Benedict Peter, counsel for Allgreen Properties, told the court that the reference in this letter to Condition 29 of the Singapore Law Society's Conditions of Sale 1994 was in error. The forfeiture of the 20% was not a forfeiture under Condition 29 but was a forfeiture under cl 5(3)(c).

Allgreen Properties subsequently re-sold the unit. By a letter dated 23 March 2000, their solicitors informed HH that from the total instalments of \$699,000 received from HH, Allgreen Properties would be refunding to HH the sum of \$399,259.87. The computation by which this sum of \$399,259.87 was arrived at was stated in the letter to be as follows:

1	Original sale price	\$	1,165,000.00		
2	New sale price	\$	900,000.00		
3	Shortfall	\$	265,000.00		
Add	Outstanding Interest	\$	20,896.30		
	Legal Fees Outstanding	\$	350.20		
	Maintenance Charges	\$	2,532.54		
	Agent`s Commission	\$	9,000.00		
	Outstanding Property Tax	\$	1,652.09		
	Auction/Valuation Charges	\$	309.00	\$	299,740.13
4.	Off-set amount paid by original purchaser to date (60%)			\$	699,000.00
5.	Refund Amount	\$	399,259.87		

Mr Peter submitted that Allgreen Properties` right to invoke cl 5(3) and forfeit 20% of the purchase price from the instalments paid by HH, on a plain reading of cl 5(3), was a right exercisable `without prejudice to any other rights` available to Allgreen Properties at law or on equity. He submitted that, that being so, Allgreen Properties were entitled not only to the 20% but (in the event the 20% was not enough) to hold HH liable for all additional damages that Allgreen Properties may have suffered as a consequence of HH`s breach of contract. As the damages suffered in this case, taking into account the loss and expenses incurred in the re-sale of the property, was in excess of the 20%, Allgreen Properties were entitled to take these losses into account in computing the amount that was to be refunded to HH.

Mr Pereira, counsel for HH, disputed the computation by Allgreen on the amount refundable to HH. Mr Pereira submitted that what cl 5(3) did was to give Allgreen Properties a contractual right to treat the agreement as having been repudiated if HH defaulted in payment and failed to comply with a notice requiring him to remedy the default within a period of 21 days. Mr Pereira submitted that upon such default occurring, Allgreen Properties were put to an election. They could re-sell the property as absolute owner **without recourse to the agreement** and pursue a claim at common law for unliquidated damages for breach. Alternatively, Allgreen Properties could elect to proceed under cl 5(3) of the agreement. If Allgreen Properties elected to proceed under cl 5(3), then Allgreen Properties were limited to such compensation as cl 5(3) allowed. Allgreen Properties, he submitted, cannot recover additional damages for the breach at common law. Mr Pereira submitted that Allgreen Properties, having invoked cl 5(3), were not entitled to damages at common law but entitled only to 20% of the purchase price plus interest. He therefore sought, on behalf of HH, a further refund from Allgreen Properties of a sum of \$41,659.20.

The premise that has to be established for Mr Pereira to succeed in his submission is that by invoking their rights to forfeit the 20% under cl 5(3), Allgreen Properties were forfeiting any other rights and remedies they had against HH. The difficulty that Mr Pereira faced, in this respect, was the express preservation of other rights contained in the phrase `without prejudice to any other rights available to him at law or in equity` in cl 5(3). On the face of it, cl 5(3) gave Allgreen Properties the right to forfeit the 20% as well as pursue other rights they may have against HH for the breach of contract.

And, in the absence of any restrictive words in cl 5(3), these other rights must include Allgreen Properties' right to damages (by way of expenses in the re-sale and any drop in the sale price) should those damages exceed the 20% forfeited by Allgreen Properties under cl 5(3).

Mr Pereira attempted to overcome this difficulty by submitting that the phrase 'without prejudice to any other rights available to him at law or in equity' gave Allgreen Properties the right to elect either to claim unliquidated damages at common law without recourse to cl 5(3) or to claim the (liquidated) damages as spelt out in cl 5(3), (b) and (c). In support of this submission, Mr Pereira referred to three English cases that dealt with similar phrases in Condition 19 of the Law Society's General Conditions of Sale in England and Condition 22 of the English National Conditions of Sale. These two conditions are similar to Condition 29 of the Singapore Law Society's Conditions of Sale 1994. The three cases were **Talley & Anor v Wolsey-Neech** (Unreported) ; **Wallace Turner v Cole** (Unreported) and **Sakkas & Anor v Donford Ltd** (Unreported) . The context and content of the conditions being considered in those cases were, however, materially different from the provisions of cl 5(3) that we are concerned with here. The courts in those cases held that those conditions provided for liquidated damages and that the parties, having pre-agreed on the quantum of damages were (despite the words 'without prejudice to any other rights available to him at law or in equity') precluded from claiming additional amounts, not within the scope of the liquidated damages agreed, as damages.

Clause 5(3) in our present agreement does not appear to be a clause setting out the liquidated damages payable on breach. Whilst cl 5(3) entitled Allgreen Properties to forfeit 20% of the purchase price, it does not say, nor can it readily be inferred from the context, that this 20% is to be treated as liquidated damages. Indeed, cl 5(3) leaves the question of damages for breach open because the right to forfeit the 20% is prefaced by the words 'without prejudice to any other rights available to him at law or in equity'. These words appear to have the effect of preserving the right of Allgreen Properties to recover damages or seek other remedies at common law or in equity should Allgreen Properties suffer damages in excess of the 20%. The effect of the words 'without prejudice to any other rights available to him at law or in equity' in cl 5(3) appears to me to be that should the damages suffered by Allgreen Properties be less than 20%, Allgreen Properties are entitled to all of that 20% but should the damages exceed 20%, Allgreen Properties are entitled to the additional damages.

Mr Pereira also submitted that his construction of cl 5(3) would be consistent with the legislative intent of protecting purchasers who enter into agreements with developers. The legislature, he submitted, could not have intended that developers could extract from purchasers damages over and above what was spelt out in cll 5(3), (b) and (c). This, he submitted, was evident from the revision, in 1999, of Form E of the Housing and Developers Rules which made such legislative intent very clear.

The provision equivalent to cl 5(3) in the 1999 Form E is cl 7. In the new cl 7, the words 'without prejudice to any other rights available to him at law or in equity' have been deleted, a time-frame has been specified within which the developer has to refund any balance due to the purchaser after the forfeiture of 20% of the purchase price and it is specifically spelt out that after the balance has been returned to the purchaser 'neither party shall have further claims against each other'.

I agree with Mr Pereira that in the 1999 revision to Form E the legislature has made it clear that the developer cannot extract from the purchaser damages over and above 20% of the purchase price. It does not, however, follow from that that the legislative intent in respect of cl 5(3) was the same. Legislative intent can only be gathered from the language used in the legislation. The words used in cl 5(3) do not support the legislative intent which Mr Pereira seeks to uphold. The very fact that the legislature in its new Form E made such drastic changes to cl 5(3) appears to indicate that the

legislature had changed its mind about the degree of protection it wanted to accord to developers and was now removing the right that developers had enjoyed of not only forfeiting the 20% but being at liberty to claim more than the 20% if the damages they suffered exceeded the 20%. The amendments, in my view, do not support HH`s case but support the case of Allgreen Properties that cl 5(3) did not restrict their right to claim damages in excess of 20% and that in order to achieve that effect cl 5(3) had to be drastically amended.

For the above reasons, I find that Allgreen Properties were entitled to make the deductions that they did from the instalments paid by HH. HH`s claim is therefore dismissed with costs.

Outcome:

Plaintiff`s claim dismissed.