Foo Song Mee *v* Ho Kiau Seng
[2011] SGCA 45

Case Number	: Civil Appeal No 16 of 2011
Decision Date	: 06 September 2011
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Foo Soon Yien (Bernard & Rada Law Corporation) for the Appellant; Hee Theng Fong, Lin Ying Clare and Leong Kai Yuan (RHT Law LLP) for the Respondent.
Parties	: Foo Song Mee — Ho Kiau Seng

Contract

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2011] SGHC 4.]

6 September 2011

Chao Hick Tin JA (delivering the grounds of decision of the court):

Introduction

1 This appeal arose out of a suit brought by Foo Song Mee ("the Appellant") against Ho Kiau Seng ("the Respondent") to recover outstanding commission monies amounting to $271,913.40, before interest. Her claim was dismissed by the trial judge ("the Judge") in *Foo Song Mee v Ho Kiau Seng* [2011] SGHC 4, where it was held that the Appellant had not proved that there was a contract between the parties under which any payment of commission monies was due to her. At the conclusion of the hearing of the appeal on 6 July 2011, we allowed the appeal. We now give our reasons.

The facts

2 At all material times, the Appellant was a real estate agent with REA Realty Network and the Respondent, a businessman. Sometime in May 2007, the Appellant was informed by one Ray Lau ("Ray"), an assistant vice-president of United Overseas Bank Limited ("UOB"), that a development undertaken by Gazelle Land Pte Ltd ("Gazelle"), consisting of 11 units of apartment at 3 Buckley Road ("the Development"), was available for sale. UOB was financing the Development and Ray was the officer handling this account. The Appellant agreed to assist in the sale of the Development on the understanding with Ray that if the sale was successful, Ray would receive the seller's agent's commission from Gazelle and share a portion of it with the Appellant.

3 The Appellant approached her father for help and he arranged for her to meet one Hoo Long Sin ("HLS"), who was the Respondent's brother. HLS informed her that the Respondent might be interested in purchasing some units and arranged for them to meet. The Appellant agreed with HLS that if the Respondent was to purchase some units in the Development, the Appellant would pay HLS a referral fee.

4 The first meeting between the parties took place sometime in July 2007. The Respondent was interested. She negotiated for a discount on the purchase price for the Development, having it

lowered from $1,650 per square foot ("psf") to between $1,601 and $1,636 psf. On 29 July 2007, the Appellant wrote the Respondent a letter stating that she proposed to be the Respondent's agent for the *purchase and sale* of the Development. The Respondent then informed her that he wished to purchase all eleven units in the Development if the price could be further lowered and that he would pay her a commission on the discount which she could obtain for him. On 18 September 2007, the Appellant finally managed to have it reduced to $1,550 psf. It then dawned on the Respondent that at this price he would still have to pay over a million dollars in stamp duty fees on the purchase. Because of this consideration, he instructed the Appellant to negotiate for a further discount. Eventually she obtained a further reduction of $70,000 for each unit. We should clarify that the Appellant never negotiated directly with Gazelle on the price. All the negotiations with Gazelle in relation to having the purchase price reduced were done through Ray who acted as an intermediary.

5 On 25 September 2007, Gazelle granted the Respondents the options to purchase all the eleven units in the Development ("the Options") at the agreed reduced price. Also around this date, the parties met and determined that $1,459,567 was the total discount which the Appellant had negotiated and obtained. The Respondent agreed to give the Appellant as commission 30% of the savings which amounted to $437,870.10. The sale and purchase agreements for the eleven units were executed on 24 October 2007. In late November 2007, the Appellant requested the Respondent for her commission, claiming that HLS was demanding his referral fee from her. She asked for payment of one-third of the agreed commission.

6 According to the Appellant, on 3 December 2007, she went to the Respondent's office to hand over a draft letter (to be signed by him) bearing the same date in these terms: [note: 1]

> In consideration of the services rendered by you in helping me to secure my purchase of the [Development], I agree to pay you a sum of $437,870.10.
>
> .....
>
> Ho Kiau Seng
>
> (NRIC No [xxx])

7 On 5 December 2007, the Appellant received a telephone call from HLS asking her to attend at the Respondent's office to pick up a cheque. She attended the Respondent's office bringing with her a similar draft letter but re-dated to 5 December 2007 ("the 5 December letter"). However, it is pertinent to note that the Respondent had left a cheque dated 3 December 2007 for the sum of $145,956,70 which his Secretary, one Ms Ng Poh Keng ("Ms Ng"), handed over to the Appellant.

8 As requested by the Appellant, Ms Ng signed the 5 December letter for the Respondent by inserting the alphabet "f" beside the Respondent's name. Obviously, for the record, Ms Ng also typed the following at the bottom of that letter which the Appellant signed: [note: 2]

> I, Ms Foo Song Mee, received a cheque UOB 028792 amounting to S$145,956.70 dated 3 Dec 2007 from [the Respondent]
>
> [The Appellant's signature]

Received by: Ms Foo Song Mee

Date: 5 Dec 07

9 On 28 December 2007, the Appellant paid HLS a referral fee of $31,607.50. The Appellant continued to demand payment of the balance of her commission monies from the Respondent. On 3 September 2008, he issued another cheque to her for the sum of $20,000. Thereafter, the Respondent refused to make any more payment to the Appellant. On 13 January 2009, the Appellant, through her solicitors, sent the Respondent a letter of demand for the balance of the commission.

10 On 13 July 2009, the Appellant issued a writ against the Respondent claiming for the balance of $291,913.40. In the Respondent's defence, besides denying that the Appellant was entitled to any commission, he also counterclaimed for the total sum of $165,956.70 ($145,956.70 and $20,000) which the Respondent claimed were personal loans he made to the Appellant.

Grounds of the Judge's decision

11 The Judge dismissed the Appellant's claim and held that there was no contract between the parties for the payment of the alleged commission. He found that even on the Appellant's own case, although the Respondent agreed to pay the Appellant a commission for the discount she had managed to obtain from Gazelle, there was no agreement as to what was the amount of the commission or the formulae on which the commission was to be calculated. What was concluded was only an agreement to pay an unascertainable sum. That being the position, and absent the crucial factor as to the quantum of the commission, a contract could not have come into being on 25 September 2007. All that was left was an unenforceable promise from the Respondent to the Appellant to pay her an unspecified sum.

12 The Judge also gave two further reasons as to why there could not be an agreement of the kind claimed by the appellant. First, it was unusual for an estate agent to collect commission from the buyer. Normally it would be the seller who would pay the estate agent's commission. Second, the alleged commission of $437,870.10 amounted to 1.14% of the purchase price which was higher than the normal 1% payable to an estate agent for such services. He found the Appellant's evidence not credible and instead found that the Respondent's assertion that there was no such agreement was more believable. Accordingly, the Judge found that the Respondent's claim that he would only pay the alleged commission when the resale of the apartments was completed, made more commercial sense.

13 As the Respondent had in his defence made a counterclaim for the return of the two sums paid to the Appellant as friendly loans, judgment was given to the Respondent for his counterclaim of $165,956.70.

Was there an agreement to pay the Appellant for her services to negotiate for a reduction in purchase price ("Price Reduction Services")?

14 The main ground given by the Judge in dismissing the Appellant's claim was that as there was no agreement between the parties as to the precise sum, or an objective formula to determine the quantum, of the commission before the Options were granted by Gazelle to the Respondent, there was thus no concluded contract between them. We noted that the Respondent's evidence on this was: [note: 3]

> 6. The [Appellant] also informed me during subsequent meetings that she could obtain a price reduction on the initial purchase price of the [Development]. In the course of our discussions, the [Appellant] drew up a table in which she calculated for me the amount of savings [the Respondent] would enjoy if she successfully obtains a reduction in the purchase price of [the Development], and calculated the amount of commission that she was seeking, *being 30% of the difference between the original purchase price* ... and the final discounted price...
>
> ...
>
> 8 *Thereafter on 25 September 2007* [the Respondent] signed the Option to Purchase ...
>
> [emphasis added]

From this account of the Respondent, it seemed that before the Option was given by Gazelle, the parties had discussed and even agreed that for the Price Reduction Services rendered, the Appellant would be paid a commission based on the quantum of the amount of reduction she managed to obtain from Gazelle. A table was presented to him showing the computation based on the 30% formula. He stated that the Appellant wanted 30% of the actual reduction she obtained. However, we also noted that the evidence of the Appellant was less than clear with regard to the precise date on which the parties had agreed on the exact amount of the commission or the formula to determine the same. The Appellant agreed that it could be after the Option had been granted by Gazelle. Nevertheless, it was clear that on the evidence, the Respondent had agreed, before the grant of the Option, that he would pay the Appellant a commission for the Price Reduction Services even though the exact quantum or the formula to determine the same might not have been agreed before the Option was granted. As the Appellant had already performed her part of the bargain, and not only did the evidence not suggest that the services were rendered out of goodwill but that she would be remunerated, the law would imply that the Respondent would pay her a reasonable sum for those services which she had rendered.

15 This implication is based on the doctrine of *quantum meruit* which allows a claimant to recover a reasonable amount of remuneration for services rendered; this is in turn based on the broader doctrine that, in so far as contractual *quantum meruit* (see [18] below) is concerned, if remuneration for the supply of goods or for services rendered is not expressly provided for, the law will imply a term of reasonable remuneration where the particular factual matrix concerned shows that such a term ought to be implied to give effect to the parties' presumed intention. As with all instances where terms are implied, this should always be a matter of construction in the light of the precise circumstances of the case, in particular, the objective intention of the parties; see *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR(R) 927 at [41], *Chua Choon Cheng and others v Allgreen Properties Ltd and another appeal* [2009] 3 SLR(R) 724 at [63], and *Ng Giap Hon v Westcomb Securities Pte Ltd and others* [2009] 3 SLR(R) 518 at [35]. As was said in *British Steel Corp v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504 at 511:

> This is plain from the familiar trilogy of cases which show that no hard and fast rule can be laid down but that the question in each case is whether, on a true construction of the relevant transaction, it was consistent with the intention of the parties that even though no price had been agreed a reasonable price should be paid (*May & Butcher Ltd v R* (1929) [1934] 2 KB 17, [1929] All ER Rep 679, *W N Hillas & Co Ltd v Arcos Ltd* (1932) 147 LT 503, [1932] All ER Rep 494 and *Foley v Classique Coaches Ltd* [1934] 2 KB 1, [1934] All ER Rep 88).

The English jurisprudence mentioned above deals with cases for the sale of goods, but the same principles apply equally to cases for the supply of services. In *Way v Latilla* [1937] 3 All ER 759, Lord

Atkin said (at 763):

> There is no material in the present case upon which any court would decide what was the share which the parties must be taken to have agreed. But, while there is, therefore, no concluded contract as to the remuneration, it is plain that there existed between the parties a contract of employment under which My Way was engaged to do work for Mr Latilla in circumstances which clearly indicated that the work was not to be gratuitous. Mr Way, therefore, is entitled to a reasonable remuneration on the implied contract to pay him *quantum meruit*.

16 Similarly, in *Powell v Braun* [1954] 1 WLR 401, a secretary was allowed a claim in *quantum meruit* for a reasonable amount of bonus remuneration earned by her loyalty and diligence, coupled with the strength of a letter from her employer that she was owed such bonus unspecified sum.

17 One of the earliest cases which established that a claim in *quantum meruit* might be made for services rendered was *Lampleigh v Braithwaite* (1615) Hobart 105, 80 E.R. 255 where a horse-backed messenger rode to the King to seek a pardon for a man on death row who had requested him to embark on the journey. The man was pardoned and subsequently promised to pay the messenger a sum of money but later reneged on his promise. The messenger was subsequently able to recover the amount of remuneration because the act was done at the request of the promisor, the man on death row; it was reasonably expected that payment would be made; and this payment would have been legally recoverable (in an action for *quantum meruit*).

18 Claims based on *quantum meruit* can be found upon contract or restitution. The former relates to cases where there is a contract for the supply of services though this same contract lacks a term on the quantum of remuneration, and the latter relates to cases where there is no contract at all. This distinction was alluded to in the case of *Rabiah Bee bte Mohamed Ibrahim v Salem Ibrahim* [2007] 2 SLR(R) 655 at [122] – [123], where Judith Prakash J considered the English case of *Serck Controls Limited v Drake & Schull Engineering Limited* (2000) 73 Con. L. R. 100, and went on to state:

> ...two types of *quantum meruit* exist *viz* contractual *quantum meruit* and, secondly, restitutionary *quantum meruit*. Where there is an express or implied contract which is silent on the quantum of remuneration or where there is a contract which states that there should be remuneration but does not fix the quantum, the claim in *quantum meruit* will be contractual in nature. Where, however, the basis of the claim is to correct the otherwise unjust enrichment of the defendant, it is restitutionary in nature. It is also relevant that there cannot be a claim in *quantum meruit* if there exists a contract for an agreed sum and there cannot be a claim in restitution parallel to an inconsistent contractual promise between the parties.

We should add that this distinction was recognised by this Court in the earlier case of *Gold Coin Ltd v Tay Kim Wee* [1987] 2 MLJ 271 ("*Gold Coin*") which applied *Way v Latilla* (see [15] above).

19 In the present case, before the grant of the Options by Gazelle to the Respondent, the parties had agreed that the Appellant would render the Price Reduction Services for remuneration. What was not definitely agreed upon at that juncture was the precise remuneration or an objective formula to determine the same. Thus we were here concerned with contractual *quantum meruit* rather than restitutionary *quantum meruit. Gold Coin* was such a case. There the claimant was a manager of a chick hatchery, and was exceptionally successful at the business of marketing chicks, with one of his greatest triumphs being that he was able to successfully market day-old chicks to South Vietnam during its civil war in 1968. The defendant was the owner of the hatchery, and had promised the claimant in writing an unspecified amount of commission from the profits of his marketing efforts. This Court held that since the written agreement was deficient as to the amount of commission, there

could not have been a concluded contract obliging the defendant-employers to pay the claimant-manager any commission. However, there could be implied a contract to pay a *quantum meruit*, where the amount of this would be a reasonable commission in all the circumstances (see *Gold Coin* at p 275):

> The express provision for the payment of a commission which fails as a binding agreement because of the absence of the essential term as to the amount or rate of the commission is nevertheless a substantial factor in support of the implication of a contract to pay a *quantum meruit*.

20 If the issue of remuneration in the present case had continued to remain undetermined after the grant of the Options, then the claim of the Appellant would have been in contractual *quantum meruit*. But that was not the position here. The parties had shortly after the grant of the Options agreed on the precise amount of commission due to the Appellant, applying the formula of 30% of the savings which the Appellant had obtained for the Respondent. What could be a more reasonable remuneration than the figure which the parties themselves had *agreed* to be the appropriate sum? In the circumstances, we were unable to accept the Judge's view that this later agreement on the precise amount of the commission payable to the Appellant, although concluded subsequent to 25 September 2007, was unenforceable because of past consideration. Clearly there was consideration. The Appellant had forgone her entitlement to reasonable remuneration from the Respondent in respect of the Price Reduction Services and substituted it with the specific sum which the parties had agreed upon. The error was in viewing this subsequent agreement on the quantum of commission in isolation instead of in its proper context.

21 We now move to the secondary reasons given by the Judge for his decision. The first reason was that it was not normal for a buyer of property to pay commission to the estate agent who clinches a deal. We do not dispute this as a general proposition. But it seemed to us that the Judge had not given sufficient regard to the fact that the commission was something agreed to by the Respondent in respect of a special service which the Respondent had requested, i.e. the Price Reduction Services. We have, in [14] above, ruled that the parties had indeed entered into an agreement whereby the Appellant was to render the Price Reduction Services to the respondent for a commission. Thus the normal practice as to the payment of commission to an estate agent could have no relevance in a case like the present where there was an agreement for special services and for commission in regard thereto. The provision of these special services was entirely consistent with the letter of 29 July 2007 where the Appellant wrote to the Respondent declaring her wish to be his agent for the "purchase" and "sale" of the apartments within the Development. The relevant part of this letter reads: [note: 4]

> As your agent, I would help you negotiate a better purchasing price for the whole 11 units of the [D]evelopment, which in the last proposal I showed you was going for $1601 p.s.f. Upon [the] purchase of this [D]evelopment, I would be your exclusive marketing agent for this project, selling off the units individually at your desired market price.

It was clear that in this letter the Appellant was offering two distinct services to the Respondent. The first was the Price Reduction Services and the second was, after the Respondent had purchased the 11 units, to be the Respondent's exclusive agent to sell the 11 units.

22 We now turn to the second subsidiary reason given by the Judge *viz*, that the commission asked for by the Appellant amounted to 1.14% of the purchase price, when the normal rate of commission payable to an estate agent is only 1%. While it is not disputed that 1% is the normal rate of commission of an estate agent, two points must be made here. First, the Price Reduction Services

were expressly requested for by the Respondent. Second, the commission to be paid for those services was computed on an entirely different basis. It was not based on purchase price but on the actual savings which the Appellant could obtain for the Respondent from the seller, Gazelle, and the rate was not 1% but 30%.

23 We would, in this connection, also observe that the finding of the Judge that there was no agreement by the Respondent to pay the Appellant the commission of $437,870.10 was not consistent with the position taken by the Respondent in this appeal, which was *not* that no such commission should be paid to the Appellant in respect of the Price Reduction Services, but that it should only be payable to the Appellant as a bonus, after she had secured the sale by the Respondent of those apartments to other buyers, at which point the Appellant would get the $437,870.10 plus the 1% normal commission for the subsequent sale. [note: 5] In this scenario, the uncertainty lies not in the amount payable or its computation but *when* it would be payable. There was thus clearly a contract made between the Appellant and Respondent for the payment of commission in respect of the Price Reduction Services.

24 At the time of the hearing before us, none of the units in the Development had been sold, and if the Respondent's version were true, then the Appellant would not have been entitled to receive any commission at all from him even in respect of the Price Reduction Services. On the basis that the payment of the commission for the Price Reduction Services was linked to the eventual resale of the Development to third persons, the Respondent asserted that he had agreed to appoint the Appellant as his exclusive marketing agent for the resale. Despite the importance of this agency agreement, the Respondent was unable to adduce any documentation as evidence of this agency, or elucidate any of the terms of the agreement. His failure to set out the terms of the exclusive agency convinced us that no such exclusive agency existed in the first place. In the context of the sale and purchase of real estate, one of the most important terms of an exclusive agency mandate is the duration of the mandate. As long as the mandate subsists, the seller of property is obliged to sell the property through the exclusive agent, and is precluded from selling the property himself or with the help of other agents. This fetter on the seller's freedom to dispose of his property as he pleases is very restrictive, and it is important to clearly delineate its duration. The omission of such an important term would necessarily cause the Respondent's version to be viewed with much wariness.

25 All that the Respondent was able to produce was a letter dated 31 October 2008 written by his then solicitors to the Appellant, instructing her that she was to be appointed his exclusive agent for a period of one month from 31 October 2008 to 30 November 2008. What is significant about this letter is that it was written one year after the Respondent had completed the purchase of the Development on 24 October 2007. His explanation was that the Appellant's exclusive agency mandate subsisted from 24 October 2007 all the way to 30 November 2008, or a period of 13 months, and that the letter of 31 October 2008 was merely written as a favour to the Appellant upon her request that she needed such a letter to convince an unnamed third party that she was the exclusive agent for the Development. It bears noting that at the time the alleged exclusive agency began on 24 October 2007, there was no evidence to indicate what was the duration of the mandate. Furthermore, the Respondent himself had stated that at the time he purchased the Development, the Appellant had represented to him that she had ready buyers for it. If that were the case, why should it have been necessary for him to grant her a mandate of such a long duration, and why was the duration of the mandate not spelt out? For the reasons stated above at [24], it is vitally important for the seller to clearly set out the duration of the exclusive agency. Yet this was not done. To test the credibility of the Respondent's assertion, if indeed the Appellant's reward for the Price Reduction Services was tied to the subsequent sale, we would have expected the Respondent to demand a specific period within which she would be given the exclusive right to sell the property. We would also have expected some discussion between the parties on the duration of this exclusive agency. None of those occurred. The

only reasonable inference one could draw in the circumstances was that no exclusive agency was contemplated by the parties at the time. This could only mean that the payment of the Price Reduction Services was not and could not be linked with the eventual sale of the development.

26 Apart from his failure to explain the terms of the alleged exclusive agency, another feature of the Respondent's case which we found unacceptable was his explanation for the payments of $145,956.70 and $20,000 to the Appellant by way of cheques dated 3 December 2007 and 3 September 2008 respectively. The Appellant said that the cheque payments were part payments of the commission due to her in respect of the Price Reduction Services. The Respondent's explanation was that these payments were some form of friendly interest free loans to the Appellant to tide her over the period when she was to procure buyers for the Development. We found it hard to imagine that the Respondent would lend such large sums of money to the Appellant, given that they did not know each other at all before this transaction and their relationship was entirely an arms-length professional relationship. Furthermore, the first payment of $145,956.70 was in fact exactly one-third of the agreed commission of $437,870.10. The precise amount of the first payment, right down to the last seventy cents, and its relation to the agreed commission would appear to suggest that this payment was more likely to be a part payment of the commission rather than a friendly loan.

27 The Respondent was also unable to tell us what the terms of the purported loan were. He claimed that these purported loans were advances on the commission amounts due to the Appellant upon successful resale of the Development, and that they would be offset from the commission monies actually due to her upon resale. If this were so, then he should have demanded the repayment of the purported loans when the Appellant failed to resell the Development for him. According to the letter of 31 October 2008 referred to above at [25], her exclusive mandate was to expire on 30 November 2008, and if the Respondent's explanation were true he should have then issued her a letter of demand for repayment of the purported loans. He did no such thing, and the next instance of correspondence between the parties was only on 13 January 2009 when the Appellant, *via* her solicitors, issued him with her own letter of demand for the balance commission. The Respondent replied *via* his solicitors in a letter of 22 January 2009 stating that he denied having agreed to pay the Appellant any form of commission for the purchase of the Development, and demanded that the Appellant repay the loans. In the same letter, the Respondent also failed to clarify that the commission was only due upon the resale of the Development, and furthermore, his demand of the loan monies was reactive to the Appellant's letter of demand, not proactive as one would have expected from a creditor who was owed such a large sum of money.

28 Having considered all the objective factual circumstances alluded to above, we had ineluctably come to the conclusion that the Appellant's version of events was more likely to be true. In contrast, the Respondent's claim that the commission due in respect of the Price Reduction Services was only payable if the Appellant managed to resell the Development simply could not hold.

29 For the reasons above, we found that the Appellant's version of events was more plausible. There was a contract made between the parties to pay the Appellant a commission of $437,870.10, it being due to her for her efforts in procuring a discount on the purchase price of the Development, and were payable upon the Respondent's successful completion of purchase of the Development on 24 October 2007. As the Appellant had already received $165,956.70 from the Respondent, judgment was therefore entered in her favour for the outstanding balance of $271,913.40 with interest at 5.33% from the date of the writ. Costs here and below were also awarded to the Appellant.

[note: 1] See the Appellant's Core Bundle vol II ("2ACB"), p 42.

[note: 2] *Ibid*.

[note: 3] Affidavit of Evidence in Chief of Ho Kiau Seng affirmed on 13 January 2010 in Record of Appeal vol III Part A, p 99-100.

[note: 4] See 2ACB, p 35.

[note: 5] See Respondent's Case at paras 208-209.