Aqua Art Pte Ltd *v* Goodman Development (S) Pte Ltd [2011] SGCA 7

Case Number	: Civil Appeal No 98 of 2010
Decision Date	: 03 March 2011
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Kenneth Pereira and Ganga Avadiar (Advocatus Law LLP) for the appellant; Felicia Ng (ComLaw LLC) for the respondent.
Parties	: Aqua Art Pte Ltd — Goodman Development (S) Pte Ltd

Restitution

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2010] 4 SLR 86.]

3 March 2011

Andrew Phang Boon Leong JA (delivering the grounds of decision of the court:

Introduction

1 Aqua Art Pte Ltd ("the Appellant"), exercised an option ("the Option") to purchase five shophouses ("the Properties") from the vendor, Goodman Development (S) Pte Ltd ("the Respondent"). However, the sale could not be completed because the Properties were restricted residential properties under the Residential Property Act (Cap 274, 2009 Rev Ed) ("the RPA") and the Appellant, being a foreign company under the RPA, was ineligible to purchase them. The Respondent thus forfeited the deposit of $308,800 which the Appellant had paid and obtained a court order declaring the Option void under s 3 of the RPA.

2 The Appellant subsequently commenced these proceedings to recover its deposit and the Option fee of $77,200. The trial judge ("the Judge") dismissed the claim and the Appellant appealed to this Court (see *Aqua Art Pte Ltd v Goodman Development (S) Pte Ltd* [2010] 4 SLR 86 ("the Judgment")). After hearing the arguments of both parties, we allowed the appeal and ordered the Respondent to refund both the deposit and Option fee to the Appellant with interest at 4% from the date of the writ. We now give the detailed reasons for our decision.

The facts

3 The Appellant is a company incorporated in Singapore. It is engaged in the restaurant business and is part of the IndoChine Group of companies. Mr Michael Ma ("Ma"), an Australian citizen and Singapore permanent resident, is a shareholder and director of the Appellant. The Respondent is also a Singapore incorporated company and owned a row of five units of two-storey shophouses at 306–314 Tanjong Katong Road. These shophouses are the Properties referred to at [1] above. Although the Properties comprised multiple shophouses, they were covered by a single certificate of title and thus had to be sold as one unit.

4 On 16 June 2007, Ma went to view the Properties which had been advertised for sale as he was looking to invest in a commercial property for the Appellant's restaurant business. He was

accompanied by his wife, his property agent Ms Odelia Tan ("Tan"), his friend Andrew Neary ("Neary"), and the Respondent's property agent Ms Katherine Poh ("Poh"). The actual events that occurred during the viewing are disputed by the parties but what is undisputed is that Ma was satisfied with the Properties and wanted to purchase them. Ma and Poh agreed on a price of $7.72m and he accordingly handed her a cheque for $77,200 (being 1% of the purchase price) in consideration for an option to purchase (this is the Option referred to above at [1]). The Option stipulated that Ma or his nominee(s) was to be the purchaser.

5 It is unclear from the facts whether the Option fee of $77,200 came from Ma's own funds or whether he was paying on behalf of the Appellant. The Appellant in its pleadings had taken the position that it was the party who paid the $77,200. The Respondent appeared to have accepted this although it maintained that, at the time the $77,200 was paid, it did not know that the Appellant was the prospective purchaser of the Properties. We thus proceeded on the basis that it was the Appellant and not Ma who paid the Option fee of $77,200.

6 The Appellant exercised the Option on 9 July 2007 and paid the Respondent a sum of $308,800 (being 4% of the purchase price). The Appellant then lodged a caveat against the Properties on 25 July 2007. Unfortunately, on 8 August 2007, the Appellant's solicitors discovered that the Properties were zoned "residential with commercial at 1st storey" after a search was made with the Urban Redevelopment Authority ("the URA"), making them restricted residential properties under the RPA. This meant that the Appellant, being a company whose members and directors were not all Singapore citizens, was ineligible to acquire the Properties under s 3(1)(*c*) of the RPA without the approval of the Land Dealings (Approval) Unit ("the LDAU") of the Singapore Land Authority.

7 Despite the results of the URA search, the Appellant was still committed in going ahead with the sale and purchase of the Properties. To this end, its solicitors advised that if the Properties were strata subdivided into ten separate units, they would no longer be regarded as restricted residential properties and the Appellant would be able to acquire them. Thus, on 29 August 2007, the Appellant's solicitors wrote to the Respondent's solicitors explaining the problem. Paragraph 5 of their letter requested, *inter alia*:

(a) that the Respondent grant an extension of time for completion of the sale and purchase until the Appellant's application for strata subdivision was completed; and

(b) that a fresh option to purchase be granted reflecting that the Appellant would be purchasing the Properties as ten separate units instead of one single unit.

8 The Respondent's solicitors replied on 13 September 2007 as follows: [note: 1]

> Our clients were not aware that your clients were not qualified to purchase the above properties. In any event, the onus is on your clients to ensure that they are permitted under the Residential Properties Act to purchase the above properties.
>
> As stated in your said letter, the sale and purchase cannot be completed. Our clients are therefore entitled to retain the deposit paid.
>
> Your clients' proposal as contained in paragraph 5 of your said letter is not acceptable to our clients.

9 The Appellant, through its in-house counsel, wrote to the Respondent on 25 September 2007 requesting it to meet up and discuss the matter directly instead of corresponding through their

solicitors. Unfortunately, this letter went unheeded. The Respondent then applied to court in Originating Summons No 1840 of 2007 ("OS 1840/2007") for the following orders:

(a) that the Option be declared void under s 3 of the RPA; and

(b) that the Appellant withdraw its caveat lodged against the Properties.

10 OS 1840/2007 was heard on 22 January 2008 with the Appellant not appearing. The judge hearing the application made the orders sought. The Appellant then commenced the present proceedings for the return of the deposit and the Option fee. In its pleadings, the Appellant alleged that Poh had misrepresented to Ma during the viewing of the Properties that they were zoned commercial. The Appellant contended in the alternative that it had paid the deposit and Option fee under a mistake that the Properties were zoned commercial and that the Respondent should not be unjustly enriched by keeping the monies.

The decision below

11 The Judge dismissed the Appellant's claim. He found on the evidence that Poh had not represented to Ma that the Properties were zoned commercial. The Judge also found that Ma knew, at the time the Appellant exercised the option, that the Properties were partially zoned residential. This second finding was an inference drawn from the primary facts and the Judge relied on the following factors to justify his finding:

(a) Ma lived in a shophouse similar to the Properties in question.

(b) Ma was accompanied by Tan who had been in the property business since 1999 and who was his property agent for six years.

(c) Ma had taken photographs of the Properties during the viewing on 16 June 2007 which obviously showed that the upper floors were being used for residential purposes. Neary also testified in cross-examination that the upper floor of the unit they inspected had a kitchen, bathrooms and bedrooms and seemed to be residential.

(d) The option was granted on 17 June 2007 and exercised on 9 July 2007, a time interval of approximately three weeks. The Judge did not believe that Ma would have gotten the Appellant to pay a deposit of $308,800 without verifying that the Properties were indeed zoned commercial during this time.

12 The Appellant had also contended that since the contract between the parties had been declared void in any event, the Option fee and deposit had to be returned as a natural consequence. The Judge rejected this argument and held that since the contract was void for illegality, the Appellant had to show a strong case that it would only be fair and just for it to recover its money. On the facts, the Appellant had chosen to pay over the deposit without verification or contractual protection. The Judge also referred to previous cases where a purchaser who had parted with his money would not be able to recover it if the contract was declared void under s 3 of the RPA. Finally, as regards the 1% Option fee, the Judge held that it was the price paid for the Option which was separate from the contract of sale. The Respondent was therefore entitled to retain the Option fee in any event.

The appeal

13 The Appellant argued on appeal that the Judge had erred in finding that (1) there had been no misrepresentation by Poh; and (2) Ma had known the Properties were zoned partly residential at the time the Appellant exercised the Option. Although the Appellant accepted that the contract for sale of the Properties was void for illegality under the RPA, it contended that it was nonetheless entitled to restitution of the monies paid under the void contract because it had not deliberately attempted to circumvent the RPA. As such, it was not *in pari delicto* with the Respondent and/or came within the doctrine of *locus poenitentiae*. The Appellant also argued that it was entitled to restitution of the said monies as it had operated under a mistake of fact. Finally, it submitted that the Respondent had been guilty of unconscionable conduct.

14 The Respondent argued on the other hand that the Judge had been justified in arriving at his findings. It also contended that a party to an illegal contract could recover monies paid pursuant to that contract on the basis that the parties were not *in pari delicto* only if the party seeking restitution had been the victim of fraud, duress, oppression, or abuse of fiduciary position by the other party. The Respondent submitted that the doctrine of *locus poenitentiae* did not apply here because the contract had already been sufficiently performed by the Appellant in exercising the Option and paying the deposit. The Respondent also argued that there had clearly been no mistake on the Appellant's part to begin with. Finally, it submitted that it had not been guilty of any unconscionable conduct.

Was there a misrepresentation by Poh?

15 We were of the view that the Judge's finding that Poh had not made a misrepresentation as to the zoning of the Properties should not be disturbed. The thrust of the Appellant's appeal on this issue was that three of its witnesses (Ma, Tan and Neary) had testified at trial that they had heard Poh say that the Properties were zoned commercial during the viewing on 16 June 2007. However, the Judge had already heard their evidence first-hand and had the opportunity of assessing the relative credibility of all the witnesses. Having done so, the Judge ultimately preferred the evidence of Poh, who said that she had never made any such representation. As the Appellant has not shown any indication that the Judge's assessment was plainly wrong or against the weight of the evidence, an appellate court would be slow to interfere with such a finding.

Was Ma mistaken about the zoning of the Properties when the Appellant exercised the Option?

16 However, we were less hesitant in reviewing the Judge's inference that Ma had known that the Properties were zoned residential when the Appellant exercised the Option. As we observed in *Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd* [2009] 4 SLR(R) 1101 (at [41]), where a finding of fact is based on an inference drawn from the facts or the evaluation of primary facts instead of the assessment of the witness, an appellate court is in as good a position as the Judge to undertake that exercise. In our respectful view, the factors relied on by the Judge did not really support an inference that Ma had known of the Properties being zoned residential.

17 First, the Judge seemed to suggest that as Ma himself lived in a shophouse which was zoned residential, he should have known that the Properties would similarly be zoned residential. However, Ma had also testified in re-examination that he had come across shophouses which were zoned purely commercial in his business dealings. As such, there was no reason for Ma to have realised that the Properties were partially zoned residential.

18 Secondly, the Judge took into account the fact that Tan was an experienced property agent and must have been aware from the photographs and inspection of the Properties that they were not

fully commercial. However, Tan's evidence exactly was that she had checked with Poh and had been told that the Properties could be purchased by a foreigner. Although the Judge accepted Poh's evidence that she had not made any misrepresentation, he did not make any finding that Tan had been lying and it was entirely possible that there had simply been a misunderstanding during the viewing of the Properties on 16 June 2007.

19 Thirdly, the Judge considered that the photographs taken by and what he saw during the actual viewing of the Properties should have alerted him to their residential nature. As with Tan's evidence above, Ma said in cross-examination that he had doubts about the zoning, which was why he had tried to clarify the matter with Poh.

20 Finally, the Judge was of the view that Ma had a substantial amount of time, in between the grant and the exercise of the Option, to verify that the Properties were indeed fully zoned commercial. However, this really assumes that Ma was still left in doubt about the zoning of the Properties after he had viewed them. If he was genuinely convinced that the Properties were not zoned residential, there would have been no impetus for him to verify this with URA.

21 The Judge concluded (see the Judgment at [6]) that "I do not accept that the plaintiff would pay $308,800 without verifying whether the shophouses were zoned commercial". However, this reasoning could also cut the other way. If Ma knew for a fact that the Appellant was ineligible to purchase the Properties because they were partially zoned residential, why would he even get the Appellant to exercise the Option and pay a deposit of $308,800 without providing for any safeguards? It made absolutely no sense for the Appellant to enter into a transaction which it was prohibited by law from completing unless it had intended to deliberately circumvent the provisions of the RPA. There was no suggestion that the Appellant had such an intention in the present case. Thus, the only possible explanation was that Ma had satisfied himself (wrongly, as it turned out to be) that the Properties were zoned wholly commercial.

22 Although the Respondent initially sought to uphold all the Judge's findings in its written submissions, its counsel, Ms Felicia Ng, conceded at the hearing before us (correctly, in our view, based on the objective facts) that Ma had probably been mistaken as to the zoning of the Properties when the Option was exercised. Instead, counsel proceeded on the basis that the Appellant was not entitled to restitution of the deposit and Option fee simply because the contract of sale was illegal. The real issue, then, was whether a mistake resulting in a party entering into an illegal transaction would nevertheless entitle that party to restitution of monies paid under the transaction, and it is to this particular issue that our attention now turns.

The legal effect of the mistake

23 Ms Ng submitted, in oral argument before this court, that the mistake by the Appellant was irrelevant in light of the fact that the contract was illegal. However, as Prof R A Buckley points out in his leading treatise on illegality and public policy (see R A Buckley, *Illegality and Public Policy* (Sweet & Maxwell, 2nd Ed, 2009) ("*Buckley*") (at para 17.08)):

> It has long been clear that restitutionary relief may be available to a party who has entered into an illegal transaction as a result of a mistake as to the facts constituting the illegality.

24 The above principle has, in fact, been endorsed in other well-established works (and even law commission reports) (see, for example, Edwin Peel, *Treitel: The Law of Contract* (Sweet & Maxwell, 12th Ed, 2007) ("*Treitel*") at para 11-135; Nelson Enonchong, *Illegal Transactions* (LLP, 1998) ("*Enonchong*") at pp 315–317; *Chitty on Contracts* (Sweet & Maxwell, 30th Ed, 2008) vol 1 ("*Chitty*

on Contracts") at para 16-187; Lord Goff of Chieveley and Gareth Jones, *The Law of Restitution* (Sweet & Maxwell, 7th Ed, 2007) ("*Goff and Jones*") at para 24-013; Law Reform Committee of the Singapore Academy of Law, *Relief from Unenforceability of Illegal Contracts and Trusts* (5 July 2002) at para 6.0; and Law Commission of England and Wales, *Illegal Transactions: The Effect of Illegality on Contracts and Trusts – A Consultation Paper* (Consultation Paper No 154, 1999) at paras 2.38–2.39). Significantly, in our view, the Appellant did in fact cite the passages from both *Chitty on Contracts* and *Goff and Jones* in its written submissions.

25 Although the principle could – depending on the precise facts – come under the broader umbrella heading to the effect that the parties are not *in pari delicto*, this need *not necessarily* be the case (as, for example, where both parties were equally mistaken, which common mistake served to mask the illegality in question in so far as they were concerned). Indeed, that is perhaps why many writers discuss this principle under the rubric of "restitution" (see, for example, *Treitel* at p 541 (which section heading is entitled "Restitution"); *Buckley* at ch 17 (which chapter is entitled "Illegality and Restitution"); *Chitty on Contracts* at p 1197 (which section heading is entitled "Recovery of Money Paid or Property Transferred under Illegal Contracts"); but *cf Enonchong* at ch 16 (which chapter is entitled "Claimant is Not In Pari Delicto")). Be that as it may, as observed in the preceding paragraphs, the principle itself has been clearly established in the legal landscape.

26 Ms Ng relied on three High Court cases which were also cited by the Judge in the court below. In *Cheng Mun Siah v Tan Nam Sui* [1979-1980] SLR(R) 611 and *Lim Xue Shan v Ong Kim Cheong* [1990] 2 SLR(R) 102, the purchasers who had entered into contracts to purchase restricted property in contravention of s 3 of the RPA were unable to recover their deposits from the vendors because the parties were *in pari delicto*. The third case, *Tan Cheow Gek v Gimly Holdings Pte Ltd* [1992] 2 SLR(R) 240, was slightly different as the deposit monies were being held by the vendors' former solicitors as stakeholders, although Judith Prakash JC observed, by way of *obiter dicta* (at [32]), that if the deposit had been paid directly to the vendors then the purchasers would be unable to recover the same on the authority of the preceding two cases.

27 We are of the view that these cases did not assist the Respondent because they were concerned with the parties being *in pari delicto* and the issue of mistake was not raised in those cases. As we explained above (at [25]), the principle of a party being able to recover monies paid under an illegal contract on the ground of mistake did not necessarily come under the broader umbrella principle to the effect that the parties are not *in pari delicto*.

28 It should be noted, however, that the relief accorded by the court in the context of mistake is *only* by way of *restitution* – and no more. To allow the claimant to obtain more than restitution would, *in substance and effect*, be to allow it to *enforce* the *illegal* contract – which would obviously be a contradiction in terms (see also, for example, *Buckley* at para 17.02 and *Enonchong* at p 317).

29 Turning to the facts of the present appeal, it is clear that the effect of the mistake would entitle the Appellant *only* to *restitutionary* relief (which was precisely what it was claiming), and the appeal succeeds as a result.

Repentance or timely repudiation

30 In the circumstances, it is unnecessary for us to consider the issue of repentance or timely repudiation (also encompassed within the pithy Latin phrase "*locus poenitentiae*" (*viz*, a place for repentance)), which also constitutes a route by which *restitution* can be made in the context of an illegal contract. We pause to observe – parenthetically – that, whilst the general thrust of this doctrine is easy to grasp, its doctrinal formulation as well as practical application raise numerous

difficulties (see, for example, the oft-cited trilogy of articles (J K Grodecki, "In Pari Delicto Potior Est Conditio Defendentis" (1955) 71 LQR 254 ("*Grodecki*"); J Beatson, "Repudiation of Illegal Purpose as a Ground for Restitution" (1975) 91 LQR 313 ("*Beatson*"); and Robert Merkin, "Restitution by Withdrawal from Executory Illegal Contracts" (1981) 97 LQR 420 ("*Merkin*") (reference may also be made to S U Ahmed, "Locus Poeitentiae – Repentance by a Party to an Illegal Contract" (1982) 12 *U Queensland LJ* 120 and Francis Rose, "Restitutionary and Proprietary Consequences of Illegality" in F D Rose (Ed), *Consensus Ad Idem – Essays in the Law of Contract in Honour of Guenter Treitel* (Sweet & Maxwell, 1996), ch 10 ("*Rose*"), especially at pp 226–234)) as well as the relevant chapters in two specialist books on illegality and public policy (see *Enonchong* at ch 19 and *Buckley* at ch 18)). One major controversy centres around the ostensibly different approaches adopted in the two leading English decisions of *Taylor v Bowers* (1876) 1 QBD 291 ("*Taylor*") and *Kearley v Thomson* (1890) 24 QBD 742 ("*Kearley*"), the latter of which appears to adopt a stricter approach towards recovery. It is clear, however, from the leading judgment of Fry LJ in *Kearley* (at 746) that the very doctrine itself was not received with any sort of legal warmth to begin with (but *cf* the observations in the Privy Council decision (on appeal from the Chief Court of Lower Burma) of *Petherpermal Chetty v Muniandy Servai and others* (1908) 26 TLR 462 at 463 (a decision which has been correctly described as "not [seeming] to have received the attention it deserves" (see *Grodecki* at p 263)). On the other hand, it has been perceptively pointed out that *Taylor* involved an arrangement that was not wholly executory but that the same result could nevertheless have been achieved *via* yet another legal route (*viz*, an independent cause of action) (see, for example, *Chitty on Contracts* at para 16-189; *Beatson* at p 314; and *Goff and Jones* at para 24-007). Returning to the apparent conflict between *Taylor* and *Kearley*, it has been suggested (correctly, in our view) that both decisions are in fact consistent with each other if it is borne in mind that the focus ought to be on whether the illegal *purpose* – as opposed to the *performance* – of the contract had been substantially achieved (see, for example, *Treitel* at para 11-137; *Enonchong* at pp 340–342; *Beatson* at p 313; and *Rose* especially at p 229; though *cf Merkin* at p 427), with the result that any apparent conflict between these two decisions becomes one which can be resolved based on the *different facts*, as opposed to any difference in *legal* approach as such (see also *Rose* at pp 230–231); and for later decisions, see, for example, the English Court of Appeal decisions of *Tribe v Tribe* [1996] Ch 107 ("*Tribe*") and *Collier v Collier* [2002] BPIR 1057; as well as the English High Court decision of *Q v Q* [2009] 1 FLR 935).

31 The other major controversy centres around the issue as to whether in order for "repentance" to be successful, it must be both *genuine and voluntary*, with the result that, where the contracting party concerned had no choice but to repent because the fulfilment of the illegal purpose was no longer possible owing to external circumstances beyond the control of the parties, the doctrine will not apply (see the leading English decision of *Bigos v Boustead* [1951] 1 All ER 92 ("*Bigos*")). *However*, in the more recent English Court of Appeal decision of *Tribe*, only voluntariness – as opposed to the genuineness – of repentance was emphasised (for a comprehensive discussion of the arguments for as well as against such an approach, see *Enonchong* at pp 337–338). There may well be an overlap between – or even coincidence of – these two elements, depending on the fact situation concerned. Indeed, if the relevant legal proposition is that the concept of genuineness is unnecessary in so far as it connotes a *subjective* feeling of *remorse* on the part of the party concerned (and *cf Goff and Jones* at para 24-008), there may well be no practical difficulties inasmuch as the concept of voluntariness means that, on the facts of cases such as *Bigos*, the result would be the same (see *Enonchong* at p 339; but *cf per* Millett LJ in *Tribe* at 135).

32 However, as already noted above (at [30]), it is unnecessary to consider the application of the doctrine of repentance or timely repudiation in the context of the present appeal, and there is therefore no need for us to deliver definitive pronouncements on the various conceptual as well as practical difficulties arising from this doctrine (including the two major controversies noted briefly above).

Refund of the Option fee

33 Since the Appellant had exercised the Option and paid the deposit under a mistake as to the zoning of the Properties, it was entitled to restitution of the deposit notwithstanding the fact that the contract for sale of the Properties was illegal. The question then was whether the Option fee should also be refunded along with the deposit.

34 In this regard, the Judge rightly recognised that there were two contracts here: the first being the contract for sale of the Option (for which the Appellant paid a fee of $77,200), and the second being the contract for sale of the Properties (which arose when the Option was exercised and for which the Appellant paid the deposit of $308,800). If it were the case that only the latter contract was void under s 3 of the RPA, the Respondent would still be able to retain the Option fee of $77,200 since it had provided good consideration (*viz*, the Option) for the fee.

35 However, the Respondent had obtained a court order in OS 1840/2007 declaring the entire Option void, and not just the actual contract for sale of the Properties that arose when the Option was exercised. Since the Option itself had been declared void, there was a total failure of consideration with respect to the $77,200 Option fee and the Appellant was therefore also entitled to restitution of the same.

Conclusion

36 For the reasons set out above, we allowed the appeal with costs and the usual consequential orders, and ordered the Respondent to refund both the deposit and Option fee (amounting to a total of $386,000) to the Appellant with interest at 4% from the date of the writ.

[note: 1] See Appellant's Core Bundle, Vol 3, p 354.