

Hoy Fatt Pte Ltd v Riway (Singapore) Pte Ltd & another
[2015] SGHC 6

Case Number : Suit No 608 of 2013 (Consolidated with Suit No 102 of 2014)
Decision Date : 20 January 2015
Tribunal/Court : High Court
Coram : Choo Han Teck J
Counsel Name(s) : Nandakumar Renganathan and Denise Teo (RHT Taylor Wessing LLP) for the plaintiff in Suit 608 of 2013 and the defendant in Suit 102 of 2014; Audrey Chiang, Loh Kia Meng and Patrick Wong (Rodyk & Davidson LLP) for the defendants in Suit 608 of 2013 and the plaintiff in Suit 102 of 2014.
Parties : Hoy Fatt Pte Ltd — Riway (Singapore) Pte Ltd & another

Contract – Discharge – Rescission

Contract – Remedies – Specific performance

20 January 2015

Judgment reserved.

Choo Han Teck J:

1 Hoy Fatt Pte Ltd (“Hoy Fatt”) is a company that is in the business of real estate development. It is the registered proprietor of the property at 12 Hoy Fatt Road, Singapore 159506 (“the Property”), which is a six-storey Housing & Development Board (“HDB”) light industrial factory building. The Property is on a 99 year lease which commenced on 1 January 1958.

2 On 18 April 2013, Hoy Fatt granted Riway International Group Pte Ltd (“Riway International”) an Option to Purchase (“the Option”) for the Property in consideration of \$2.7m plus GST (amounting to \$2,889,000) (“option fee”). The purchase price of the Property is \$27m plus GST. The Option states that it ‘remains open for acceptance until 4 pm on the 2 May 2013 (“the Option Expiry Date”)' and is to be exercised by way paying the option fee to Hoy Fatt’s previous solicitors, Drew & Napier LLC (“Drew”).

3 Clauses 7(1) and (2) of the Option also state that the sale and purchase of the Property is subject to HDB’s approval. For ease of reference, I set out cll 7(1) and 7(2) in full:

7(1) The sale and purchase of the Property is subject to the approval of HDB and to such terms and conditions as may be imposed by HDB, on the Purchaser, in granting its approval and to the approval of any other relevant government authorities.

(2) Notwithstanding [clause] 7.1 aforesaid and for avoidance of doubt, the sale and purchase herein contemplated is subject to the approval of the HDB to the sale and purchase of the Property herein only as well as the change of use to use the premises for purposes of showroom, storage, re-packing and ancillary office only. The Purchase warrants that the usage will be in compliance with the URA guidance of 60%/40% and in breach of the warranty, the Vendor shall be entitled to forfeit the monies paid hereunder and thereafter neither party shall have a claim against the other.

4 Clause 7(4) goes on to provide that HDB's approval must be obtained within ten weeks from the date of the Option, *ie*, 27 June 2013 ("the approval date"). The relevant portion of Clause 7(4) reads:

In the event HDB's approval to the sale and purchase herein and to the change of use, is not obtained by the expiry of ten (10) weeks from the date of this Option or approval is refused by HDB prior thereto ...

5 The parties accept that approval from the National Environment Agency ("NEA") is required before HDB gives its approval.

6 Clause 7(3) of the Option states the obligations of both the vendor and the purchaser in ensuring that HDB approval is obtained:

(a) The buyer is to first fill up the relevant application forms and submit them to the vendor within seven calendar days from the issuance of the Option, *ie*, 25 April 2013 ("the submission deadline");

(b) Thereafter, the vendor is to complete the sections in those forms relating to the vendor and return them to the purchaser or its solicitors within ten days of its receipt of the forms from the seller, *ie*, 5 May 2013; and

(c) The purchaser is then required to submit the forms to HDB within 1 week of receipt and make the necessary payments to HDB and/or any other relevant authority, *ie*, 12 May 2013.

Clause 7(3) also provides the following in the event the purchaser fails to discharge its obligations:

(a) First, the vendor has the right to (1) rescind the sale and purchase and (2) forfeit all deposit paid to it or its solicitors;

(b) Second, the purchaser shall also withdraw all caveats lodged at the Singapore Land Registry in respect of the Property; and

(c) Third, neither the purchaser nor the vendor shall have any claim against each other.

Clause 7(3) reads:

(3) The Purchaser shall, forthwith upon the issuance of this Option and no later than 7 calendar days, fill up all necessary forms and do all acts to apply to HDB (in accordance with all regulations, guidelines and procedures which may be prescribed by HDB and with all such particulars and documents which may be required by HDB) for approval to purchase and submit all application forms to the Vendor or the Vendor's solicitors. Thereafter, the Vendor shall, within ten (10) days upon receipt from the Purchaser the necessary forms complete all relevant sections of the forms relating to the Vendor and return the forms to the Purchaser's or its solicitors for their necessary submission to HDB within 1 week from date of receipt of the forms from the Vendor and make all requisite payments to HDB and/or any other relevant authority. If the Purchaser shall fail and/or neglect, for any reason whatsoever, to provide the completed forms to the Vendor within the said 7 calendar days or submit the application to HDB for approval to purchase the Property within the said 1 week, the Vendor shall be entitled (but not obliged) to rescind the sale and purchase herein by given written notice of its intention to rescind whereupon the sale shall be cancelled and the Vendor shall forfeit all monies paid to them or their solicitors.

7 On 23 April 2013, Rodyk & Davidson LLP ("Rodyk"), the solicitors acting for Riway International and Riway Singapore, e-mailed Drew to request that the submission deadline be extended from 25 April 2014 to 2 May 2013. On the same day, Drew e-mailed back to say that Hoy Fatt was only willing to extend the submission deadline to 29 April 2013 ("new submission deadline"). Drew's e-mail stated that save for this extension, the rest of the terms of the Option remained unchanged:

We are pleased to inform that our clients have agreed to extend the submission of the application form under Clause 7(3) to 29 April 13.

Save for the said extension of time to 29 April 13, the rest of the terms in the granted option dated 18 April 13 remains unchanged.

...

8 On 30 April 2013, Rodyk informed Drew that Riway International wanted to exercise the Option through Riway Singapore to enjoy tax benefits. Drew replied on 2 May 2013 to confirm that Hoy Fatt agrees with this arrangement, and will let Riway Singapore exercise the Option instead.

9 Riway Singapore exercised the Option on the Option Expiry Date before 4pm, and Rodyk delivered to Drew a Letter of Nomination, Authorisation and Indemnity ("Letter of Indemnity") from Riway International in favour of Hoy Fatt. Paragraph 2(d)(ii) of the Letter of Indemnity states:

In consideration of [Hoy Fatt] agreeing to [Riway International] nominating Riway (Singapore) Pte Ltd (ACRA No: 200810529C) to exercise the Option, [Riway International] hereby irrevocably agrees and undertakes to indemnify and hold harmless and keep [Hoy Fatt] indemnified from and against any claims or losses arising from or in connection with Riway (Singapore) Pte Ltd[s] breach of its obligations under the Option.

10 However, on 28 June 2013, Rodyk wrote to Drew to say that Riway Singapore intended to rescind the Option and asked for a refund of the option fee and deposit paid. Rodyk said that the approval from HDB was not obtained on time by 27 June 2013. In this regard, Rodyk relied on cl 7(4) (c) of the Option (see below: [13]).

11 On 3 July 2013, Drew replied to say that Riway Singapore had no right to rescind the Option. Hoy Fatt then sued both Riway Singapore and Riway International on 11 July 2013 in Suit 608 of 2013 ("S608/2013"). Hoy Fatt retained RHT Taylor Wessing LLP ("RHT") to act for it in S608/2013. Hoy Fatt says that rescission is wrongful, and claims the following relief:

- (a) Specific performance of the Option by Riway Singapore to complete the sale and purchase of the Property;
- (b) Further and/or in the alternative, damages for Riway Singapore's breach of the Option;
- (c) Further and/or in the alternative, a declaration that Hoy Fatt is entitled to retain for its own benefit the option fee and the deposit, and that Riway Singapore is to withdraw or procure the withdrawal of all caveats lodged at the Singapore Land Registry by Riway Singapore against the Property; and
- (d) A declaration that Riway International is to indemnify Hoy Fatt against any and all claims or losses arising from or in connection with Riway Singapore's breach of the Option.

During oral closing submissions, Mr Nandakumar, counsel for Hoy Fatt, confirmed that Hoy Fatt no longer seeks damages.

12 Riway Singapore in turn commenced Originating Summons No 640 of 2013 ("OS 640/2013") on 16 July 2013 to obtain a declaration that its rescission of the Option was valid and to compel Hoy Fatt to return to it the deposit paid. OS 640/2013 was later converted to a writ action (Suit 102 of 2014) and consolidated with Suit 608 of 2013 on 16 January 2013 as the main issue in both is the same, namely, whether the rescission of the Option by Riway Singapore was valid. I heard the consolidated suits on 5 to 7 August 2014.

13 Clause 7(4) of the Option is central to the dispute on whether the rescission of the Option by Riway Singapore is valid. Clause 7(4) provides the rights of both Hoy Fatt and Riway Singapore in the event HDB's approval for the sale and purchase is not obtained, or if it is obtained late, *ie*, not within ten weeks from the date of the Option, which is 27 June 2013. In brief:

(a) Clause 7(4)(a) states that Riway Singapore (as purchaser) can (1) rescind the Option; (2) enforce the right to specific performance for the sale and purchase of the Property; and (3) treat the sale and purchase as repudiated by Hoy Fatt if the failure to obtain HDB approval on time is *solely* attributable to Hoy Fatt's fault in not completing and returning the requisite forms/documents required by HDB and/or any relevant authority within the time stipulated in the Option, or in the absence of such stipulation, within a reasonable time;

(b) Clause 7(4)(b) states that Hoy Fatt (as vendor) can (1) rescind the Option; (2) proceed with the sale and purchase of the Property; and (3) treat the sale and purchase as repudiated by Riway Singapore and sue for damages if the failure to obtain HDB approval on time is *solely* attributable to Riway Singapore's fault in not completing and returning the requisite forms/documents required by HDB and/or any relevant authority within the time stipulated in the Option, or in the absence of such stipulation, within a reasonable time; and

(c) Clause 7(4)(c) states that if the inability to obtain HDB's approval is not due to either Hoy Fatt or Riway Singapore's fault, then either of them may rescind the contract.

Clause 7(4) reads:

(4) In the event HDB's approval to the sale and purchase herein and to the change of use, is not obtained by the expiry of ten (10) weeks from the date of this Option or approval is refused by HDB prior thereto, then:

(a) If the inability to obtain HDB's approval is solely attributable to the Vendor's default in not completing and returning the requisite forms/ documents required by HDB and/or any relevant authority within the time herein stipulated within reasonable time, the Purchaser may elect to (i) rescind this agreement by giving written notice of its intention to rescind to the Vendor and to require the Vendor to refund to the Purchaser all monies paid hereunder after the Purchaser has withdrawn or procured to be withdrawn all caveats lodged at the Singapore Land Registry against the Property by the Purchaser or any person claiming under the Purchaser and the sale and purchase shall be treated as cancelled and no further effect whatsoever and neither party shall have any claim or demand against the other for damages costs compensation or otherwise or (ii) enforce the right to specific performance by the Vendor of the contract for the sale and purchase of the Property, including requiring the Vendor to complete and return the requisite forms/documents required by HDB and/or any relevant authority or (iii) treat the sale and purchase as repudiated by the Vendor and to

recover damages against the Vendor for repudiation of the contract for the sale and purchase of the Property;

(b) If the inability to obtain HDB's approval is solely attributable to the Purchaser's default in not completing and submitting the forms/documents/ information required by HDB and/or any relevant authority within the time herein stipulated or in the absence of such stipulation within reasonable time, the Vendor may elect to (i) rescind this agreement by giving written notice of its intention to rescind to the Purchaser whereupon the sale and purchase herein shall be treated as cancelled and of no further effect whatsoever and neither party shall have any claim or demand against the other for damages, costs, compensation, or otherwise save that the Vendor shall be entitled to retain for its own benefit the Option Fee and the Deposit and to require the Purchaser to forthwith withdraw or procure to withdraw all caveats lodged at the Singapore Land Registry against the Property by the Purchaser or any person claiming under the Purchaser or (ii) proceed with the sale and purchase and require the Purchaser to complete and return the requisite forms/documents required by the HDB and/or any relevant authority to the Purchaser forthwith or (iii) treat the sale and purchase as repudiated by the Purchaser and to recover damages against the Purchaser for repudiation of the contract for the sale and purchase of the Property;

(c) If the inability to obtain HDB's approval is not due to the Vendor's or Purchaser's default, then either party may elect to rescind this agreement by giving to the other party written notice of its intention whereupon the sale and purchase herein shall be treated as cancelled and all monies paid without any interest or deduction after the Purchaser has withdrawn or procure to be withdrawn all caveats lodged at the Singapore Land Registry against the Property by the Purchaser or any person claiming under the Purchaser and neither party hereto shall have any further claim or demand against the other.

14 Mr Nandakumar submits that the rescission by Riway Singapore is wrongful, and in this regard, submits the following:

(a) First, cl 7(4)(b) applies as the inability to obtain HDB approval by 27 June 2013 was solely attributable to Riway Singapore's and/or Riway International's default;

(b) Second, in any event, cl 7(4)(c) cannot apply as the failure to obtain HDB approval by 27 June 2013 was at the very least partly attributable to Riway International and/or Riway Singapore;

(c) Third, even if cl 7(4)(c) applies, Riway Singapore may not "arbitrarily, capriciously or unreasonably exercise its right in rescinding the Option"; and

(d) Fourth, the Option provided sufficient time for the parties to obtain HDB approval on time. Clause 7(4) provides for a period of ten weeks from the date the Option for HDB approval to be obtained. Mr Nandakumar says that this is sufficient as HDB approval was obtained in less than ten weeks on two occasions:

(i) The Property was subject to a sale and purchase in 2007. In that transaction, Wywy Pte Ltd issued an option to purchase dated 26 April 2007 to Monterey Pte Ltd. HDB approval was obtained in eight weeks and one day from the date the option was issued; and

(ii) HDB approval was obtained in six weeks and three days from the date an option to purchase dated 27 March 2007 was issued in respect of a sale of a property at 39

Mactaggart Road between Asia Radio Singapore Ltd and Tay Thian Boon.

15 Mr Nandakumar also says that Riway Singapore and Riway International wanted the sale and purchase of the property to be terminated because:

- (a) First, Riway Singapore and Riway International only wanted to purchase the Property with vacant possession; and
- (b) Second, Riway Singapore had difficulties obtaining a financing loan.

16 Ms Audrey Chiang, counsel for Riway Singapore and Riway International, argues:

- (a) First, cl 7(4)(b) does not apply for the following reasons:
 - (i) Riway Singapore submitted the documents required by HDB (including the approval from NEA) on 13 May 2014, on time. The latest deadline for submitting the documents required by HDB was extended by four days to 16 May 2013 when Hoy Fatt agreed to the new submission deadline; and
 - (ii) The failure to obtain HDB approval on time was not solely attributable to Riway Singapore and/or Riway International. In fact, Ms Chiang argues that Mr Gary Leong, the HDB officer in charge of granting approval for the sale and purchase of the Property was responsible for at least part of the delay. It therefore cannot be said that the failure to obtain timely HDB approval was "solely attributable" to Riway Singapore and/or Riway International. Ms Chiang submits that Mr Gary Leong admitted that:
 - (A) He had to consult the Singapore Land Authority and wait for its response before approving the sale and purchase;
 - (B) He reviewed the application for the sale and purchase of the Property using the usual procedures and time frames as he did not appreciate that the parties had earlier agreed that HDB approval had to be obtained by 27 June 2013; and
 - (C) He did not review or attempt to review Riway's financial documents sent to him on 7 May 2013 until 22 days later on 29 May 2013;
- (b) Second, cl 7(4)(c) applies as the failure to obtain the HDB approval was not due to either her client's or Hoy Fatt's fault;
- (c) Third, Hoy Fatt's reliance on cl 7(4)(b) is a mere afterthought;
- (d) Fourth, Hoy Fatt's allegation that Riway Singapore and Riway International dragged its feet to ensure that the sale and purchase of the property does not happen is baseless; and
- (e) Fifth, specific performance is not an appropriate relief as the plaintiff can be adequately compensated with damages.

17 In my judgment, the rescission by Riway Singapore is not wrongful. Riway Singapore submitted the documents required by HDB (including the approval from NEA) on 13 May 2013, on time. The latest deadline for submitting the documents required by HDB was extended by four days to 16 May 2013 when Hoy Fatt agreed to the new submission deadline (see above: [7]).

18 When the parties agreed to extend the submission deadline to 29 June 2013 and for 'the rest of the terms in the granted option dated 18 April 2013 [to remain] unchanged', there is no natural implication that all deadlines are similarly or proportionately extended. Any extension of any other deadlines, including the deadline for HDB's approval remains. The reason for extending the submission of forms to the NEA does not mean that HDB needed an extended time itself.

19 Thus the term that HDB's approval must be obtained by 27 June 2013 cannot be extended merely by implication. It is clear that the email offer by Hoy Fatt referred only to the extension of the submission deadline and not any other deadlines, including the deadline for HDB to grant approval. There is no evidence to suggest that an extension of four days to submit the forms to HDB means that the HDB will not be able to grant approval by 27 June 2013.

20 HDB's approval not having been obtained by 27 June 2013, Riway was entitled to rescind its agreement with Hoy Fatt. Accordingly, Hoy Fatt's claims are dismissed and Riway Singapore's claim for a declaration and return of deposit is allowed.

21 I will hear parties on costs on a later date if they are unable to agree.

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