

LEE KAM FOO & ANOR v DRAGON 2012 SDN BHD

CaseAnalysis

| [2018] MLJU 1512

Lee Kam Foo & Anor v Dragon 2012 Sdn Bhd**[2018] MLJU 1512**

Malayan Law Journal Unreported

HIGH COURT (JOHOR BAHRU)

SEE MEE CHUN J

ORIGINATING SUMMON NO JA-24NCVC-116-03 OF 2018

17 September 2018

*Ben Lee (Victor Pang and Teo Chia Boon with him) (Gan & Zul) for the plaintiff.
Christopher Yeo (Chang Kai Ping with him) (David Gurupatham And Koay) for the defendant.*

See Mee Chun J:

ALASAN PENGHAKIMAN Introduction

[1]Enclosure 1 is the Plaintiffs application for a declaration that the Defendant is liable to account for the goods and service tax (GST) under the sale and purchase agreement dated 17-11-2014 (S&P, “Exhibit LKF-2?”) entered into by parties and other consequential relief.

[2]The Defendant is a developer for a commercial development known as “Tiong Nam Business Park @ SILC 7? (project) on HSD 488041, PTD 6905 and HSD 488042 PTD 6906, Mukim Jelutong, Daerah Johor Bahru Negeri Johor.

[3]Pursuant to the S&P entered between the Plaintiffs and the Defendant the Plaintiffs agreed to buy and the Defendant agreed to sell to the Plaintiffs a three-storey shop house in the project (shop). The S&P was executed by the Plaintiffs and the Defendant after the enactment of Goods and Services Tax Act 2014 (GST Act) but before the GST Act came into force on 1-4-2015. The purchase price was RM1.755 million.

Undisputed facts

[4]The Defendant had issued tax invoices for progressive billings for stages 2(e), (f), (g) and 3 which included a GST amount respectively of RM10,530 for stages 2(e) to (g) and RM5,265 for

stage 3 (exhibit "LKF-3?"). The Plaintiffs made payment for the aforesaid progressive billing excluding the GST amount. An earlier stage 2(d) progressive billing which included a GST amount of RM15,795 had been paid. Reminders were issued to the Plaintiffs on the outstanding GST payment.

[5]On 30-8-2017 the Defendant issued a notice of delivery of vacant possession of the shop subject to settlement of monies due ("settled all monies due to us?", exhibit "LKF-5?").

[6]The Plaintiff's solicitor by letter dated 8-9-2017 ("LKF-6?") disputed the GST amounts and asked that vacant possession be delivered. This letter was in turn disputed by the Defendant vide letter dated 28-9-2017 ("LKF-7?"). Ultimately the final reminder (exhibit "SGYS-2?") was issued by the Defendant for the outstanding payment on GST.

Relief sought

[7]This then led to the filing of this application. Other than the declaration that the Defendant is liable for GST, the Plaintiffs are also seeking a refund of RM15,795 paid earlier, the respective tax invoices are null and void, that the Defendant delivers vacant possession of the shop and liquidated and ascertained damages (LAD) for late delivery. The Defendant has in turn counterclaimed for the outstanding amount of GST and late payment interest.

Who is liable to pay GST

[8]When the S&P was executed on 17-11-2014, the GST Act had yet to come into force although the date of royal assent was 9-6-2014. The GST Act came into force on 1-4-2015.

[9]Section 9 of the GST Act lays down the imposition and scope of GST as follows-

"9. Imposition and scope of goods and services tax, etc.

- (1) A tax to be known as goods and services tax, shall be charged and levied on-
 - (a) Any supply of goods or services made in Malaysia, including anything treated as a supply under this Act; and
 - (b) Any importation of goods into Malaysia.
- (2) Except as otherwise provided in subsections 13(3) and 27(5), tax shall be charged on any supply of goods or services made in Malaysia where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.
- (3) Except as otherwise provided in subsections 65(4) and 65(5), tax chargeable on any supply of goods or services is a liability of the person making the supply and subject to Part V, becomes due and payable at the time of supply.?

[10]As to what these supply of goods and services are, and with specific reference to land, the First Schedule to the GST Act provides as follows-

“Land

2(1) In the case of land, any transfer of-

- (a) the whole right of ownership in land;
- (b) land under an agreement for the sale of such land;
- (c) land under an agreement which expressly stipulates that the ownership of such land will pass at some time in the future;
- (d) any interest under Deed of Assignment; or
- (e) any strata title,

is a supply of goods.?.

[11]In this instant case the sale and purchase of the shop is treated as a supply of goods under the aforesaid paragraph 2(1)(a). Section 9 as earlier set out renders it clear that GST shall be charged on the supply of goods which in this case is the shop; this supply is made by a taxable person in the course or furtherance of his business and the GST is a liability of the person making the supply.

[12]As to the meaning of the person making the supply, it was held in the Singapore case of *Kuo Ching Yun and another v H & L Investments Holding Pte Ltd* [1995] SGHC 218 it was held at page 277 as follows-

“(2) Under s 8(3) of the Act, tax was the liability of the vendor. As there was no provision in the option between the plaintiffs and the defendant for the plaintiffs to pay the defendant’s GST attracted by the sale, reg 65(1) of the Goods and Services Tax (General) Regulation (Cap 117A, Rg 1, 1994 Rev Ed) applied such that where the vendor quoted a price, then that price was deemed to include GST. . .?.

[13]Section 8(3) of the Singapore GST Act which is essentially similar to our section 9(3) provides as follows-

“(3) Tax on any supply of goods or services is a liability of the person making the supply and (subject to provisions on accounting and payment) becomes due at the time of supply.?.

[14]It was therefore the finding of the Court that Defendant as the vendor and the person making the supply is liable to pay the GST. However the matter does not end here. This is because and as recognised by Plaintiff in paragraph 20(b) of its written submission dated 11-6-2018 that-

“(b) The Defendant is entitled to seek reimbursement from the Plaintiffs for the GST, in addition to the purchase price, if there is specific provision in the said SPA which entitle the Defendant to do so. In absence of such provision, the purchase price as stated in the said SPA shall deemed to have included the GST.?”

[15]The above flows from the case of *Q Sentral Retail Lot 11-2 Sdn Bhd v Cosy Bonanza Sdn Bhd* [2016] 1 LNS 942 as follows-

“[30] Thus, notwithstanding the fact that the SPA was executed before the effective date, with the coming into operation of the GST Act on 1.4.2015, the vendor is required by the new law to pay the GST at 6% on the Property for the progress payments of the balance purchase price of the Property. The Defendant, as the Vendor, is then entitled to seek reimbursement for payment of the same from the Purchaser i.e. the Plaintiff.?”

[16]This Court is inclined towards the view of **Q Sentral** (supra) that although the Defendant is liable for the GST it can nevertheless seek reimbursement from the Plaintiff. This is subject to whether the S&P provides for such a reimbursement.

[17]In this regard the Court was of the considered opinion that clause 28 of the S&P is the enabling clause for such reimbursement. Clause 28 provides as follows-

“28. Disbursement, Stamp, Registration Fees and Taxes

The disbursement, stamp duties, registration fees for the Agreement and the subsequent transfer of the said Property shall be borne and paid by the Purchaser but each party shall bear its own solicitors' costs. The Purchaser undertakes to pay such applicable tax which may be imposed by the relevant authorities from time to time but not limited to such sales and/or service tax in relation to the purchase and/or assignment and/or transfer of the said Property.?”

[18]The words “and Taxes?” in the heading and the substantive words “the Purchaser undertakes to pay such applicable tax which may be imposed by the relevant authorities from time to time including but not limited to such sales and/or service tax in relation to the purchase and/or . . . transfer of the said Property?” is wide enough to include GST.

[19]The submission of the Plaintiffs that the words “such applicable tax?” must necessarily mean the transactional tax attached to the sale transaction is not supported by the broad and wide wording of clause 28.

[20]The Plaintiffs had sought to distinguish **Q Sentral** on the basis that the GST Act was not in existence or within the contemplation of the parties then whereas the implementation of GST Act was a certainty in this case. This however does not detract from the fact that when the S&P was executed on 17-11-2014 the GST Act was not yet in force.

[21]The other distinguishing fact sought to be established was that clause 26.1 in **Q Sentral** provided that the purchaser shall reimburse the vendor. Despite the absence of the word "reimburse?", the intention of it appears from our clause 28 where it must follow that if the Purchaser undertakes to pay GST and such has been paid by the Vendor, the Purchaser will have to reimburse or pay back the Vendor.

[22]As ultimately it is Plaintiff's responsibility to pay the GST, its application would have to be dismissed.

[23]Defendant's counterclaim on the outstanding amount of GST and the late payment interest was allowed. The late payment interest was premised on clause 8 of the S&P which allows for such interest on unpaid amounts calculated from day to day at the rate of 10% up to the date of payment. There was no dispute on the amount payable but whether it ought to be paid.

Conclusion

[24]For the above reasons, the Plaintiffs application was dismissed and the Defendant's counterclaim for the amount of RM46,496.03 was allowed.