

[1982] SILK

TANG -v- IO (No. 2)

High Court of Solomon Islands
(Daly C.J.)
Civil Case No. 8 of 1981
23rd June 1982

Pleadings - O. 21 r 21 High Court (Civil Procedure) Rules 1964 - failure to plead s. 107(2) Land and Titles Act and Stamp Duties Act - points not to be argued - "overriding interest" s. 104(g) Land and Titles Act.

Facts:

L.C. was the owner of one undivided share in registered land. In August 1970 the Plaintiff, a business associate of L.C., moved into the house on the land. In 1973 he moved out. In 1974 L.C. died survived by his widow N.C. In 1977 the Plaintiff sought transfer of the share to himself. In April 1978 the Plaintiff let the property to a family who remained there until the date of trial. In 1979 N.C. was registered as owner of the share by transmission. The Plaintiff claimed that the share had been sold to him "on or about December 29th 1970" and sought rectification of the register. N.C. died during the action and the Defendant as her representative was substituted. The Defendant counterclaimed for possession. The pleadings did not raise any points upon the adequacy of the agreement in December 1970 for the purposes of section 107(2) of the Land and Titles Act or Stamp Duties Act.

Held:

1. As the suggested inadequacy in law of the alleged document of sale were not pleaded as required by Order 21 Rule 21 of the High Court (Civil Procedure) Rules, 1964 then they could not be relied upon in the trial.
2. As the family at present residing in the property were in possession in May 1979 when N.C. was registered as owner she took the property subject to their overriding interest (section 104(g) Land and Titles Act).
3. On the facts, the sale to the Plaintiff had not been proved so his claim failed. However as possession was subject to the finding in 2, no immediate order for possession to the Defendant would be granted.

For Plaintiff: F. Waleilia
For Defendant: A. Radclyffe

Daly C.J.: This case gives rise to some interesting questions on facts and law. The subject matter of the action is one half undivided share in a fixed term estate in a house and land in Old China Town registered as parcel 191-025-22. It was called rather graphically by one witness "the half-house" and I shall adopt this expression.

Up until 1970 this house was used as residence for single Chinese men working in Solomon Islands. It is not clear who the owners were but there were apparently about 10 men who had a share in the house, one of whom was IO CHUNG. As the men prospered they left the house and most lost interest in it. Some went elsewhere and some died. So on 7th May 1970 IO CHUNG and YIP CHIU become registered as owners of the house; each taking from the Commissioner of Lands a half undivided share in the house and land for a term of 20 years. It is the half share of IO CHUNG which is disputed in this action.

In order to understand the dispute it is necessary to consider the relationship of the parties. IO CHUNG was the head of a family which carried on business from a store in New China Town. The family also lived in that store. IO CHUNG was married to NG CHOW KIN who was the original Defendant in this action. They had a son John IO who is the present Defendant.

Part of the family business involved operation of a trading vessel in Solomon Island waters. In 1955 the Plaintiff IO SHIU TANG was brought to the Solomon Islands by IO CHUNG. The Plaintiff claimed to be adopted in custom by IO CHUNG and said he regarded IO CHUNG as his 'father'. This was disputed by the present Defendant who said that the Plaintiff called IO CHUNG and NG CHOW KIN "uncle" and "aunt" rather than "father" and "mother". There does, however, seem to have been more than a business relationship between the Plaintiff and the two older people.

The Plaintiff worked in Solomon Islands upon the ship operated by IO CHUNG. In 1969 however it was agreed between IO CHUNG and the Plaintiff that the Plaintiff would buy the ship by instalments of \$1200 a year commencing in April 1970. These terms were incorporated in a formal agreement.

At about this time too it seemed that the quarters in New China Town were not adequate to house both the Plaintiff and his family and IO CHUNG and his family. This may have been due to disagreements between the two families, as the present Defendant suggests, or it may have been due to the desire of the Plaintiff to start his own business. At any rate pressure arose for the Plaintiff and his wife to move out of the New China Town House.

This they did. In August 1970 the Plaintiff and his family moved into the half-house in old China Town. Exactly what was the basis on which this move took place is one of the disputes in this case.

The Plaintiff did work on the half-house and thereafter paid in relation to it the ground rent due to the Commissioner of Lands and rates to the Municipal Authority.

In 1973 the Plaintiff moved out of the half-house to the store which he now owns close to the Monetary Authority Building.

In 1974 LO CHUNG died survived by his widow NG CHOW KIN. The estate took some time to settle. In 1977 the Plaintiff went to see a Lands Officer with a view to getting something done about the half-house. The Plaintiff produce a copy of a memorandum which was written by the Lands Officer following that meeting. The relevant part reads:

"Mr Lo Shiu Tang, the son of the late LO CHUNG mentioned to me today that he wished if his father's share in the half-house be transferred to him as he had been working and financing the building and other charges such as land rents, land rates etc. with his father. The father did not leave a will of who to take over the property."

The memorandum is dated 14th December, 1977.

On April 30th 1978 the Plaintiff let the half-house to a Gilbertese family who live there to this day. The Plaintiff receives rent from this family.

By May 29th 1979 the estate of LO CHUNG had clearly been sorted out as on that date his widow NG CHOW KIN was registered as owner of the one half undivided share which she had received by transmission.

The Plaintiff learned from the Lands Department that this registration had taken place. On October 8th 1980 he entered a caveat against the title of NG CHOW KIN and on February 3rd 1981 commenced this action by writ against her. NG CHOW KIN died on March 8th 1981 and her son has been substituted as Defendant.

The Statement of Claim in the action claims that the Plaintiff purchased the half-house from LO CHUNG "on or about December 29th, 1970". This, it is said, entitled the Plaintiff to priority over the Defendant and to rectification of the register to show his prior interest.

The Defence and Counterclaim deny the purchase and asks for possession of the property together with damages for wrongful possession as from the May 29th 1979. It should be observed that neither the inadequacy of the alleged agreement for purchase for the purposes of section 107(2) of the Land Titles Act nor the stamping for the purposes of the Stamp Duties Act are pleaded by the Defence although counsel argued both points. However order 21 rule 21 of the High Court (Civil Procedure) Rules, 1964 provides as follows:

"21. When a contract, promise, or agreement is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract, promise, or agreement alleged, or of the matters of fact from which the same may be implied by law, and not as a denial of the legality or sufficiency in law of such contract, promise, or agreement, whether with reference to the Statute of Frauds or otherwise."

This Rule precludes the Defence from taking points as to the legality of the agreement on the pleadings filed. Where it necessary to do so, support for this proposition and the effect of this Rule could be found in the notes to O.18 rule 8 of the English Rules of the Supreme Court (Supreme Court Practice 1967 at 18/8/12) where it is stated that section 40 of the Law of Property Act (equivalent to our section 107(2) of the Land and Titles Act) must be specially pleaded if reliance is to be placed upon it.

Other matters are raised on the pleadings as to the state of mind of NG CHOW KIN when she became registered as owner of the half-house. However the initial matter which requires consideration is as to the existence of what I shall call the December 1970 agreement for sale of the land by LO CHUNG to the Plaintiff.

The Plaintiff says that he first spoke about the half-house to LO CHUNG at the end of 1969. He says that he wanted LO CHUNG to buy it for him to live in. Repayment would be by instalments as the Plaintiff had no money at that stage. The price was to be \$2400.00 of which YIP CHIU would pay half and LO CHUNG would pay the other half. This money was to buy out the remaining shareholders. It was certainly not a premium paid to the Government as the register shows that the grant of a 20 year lease to LO CHUNG and YIP CHIU was without premium. There has been no evidence that the \$2400.00 or any part of it was ever paid to anyone.

In any event we know LO CHUNG was registered as owner of the half-house in May, 1970 and that in August 1970 the Plaintiff moved in. He said in evidence that when he moved in he

thought he owned the house although the Statement of Claim refers to the agreement to purchase being reached in December 1970. The Defendant's case is that the Plaintiff entered under some form of licence to stay in the half-house until he got a house of his own, on condition that he paid the ground rent and rates.

As evidence that there was an agreement for purchase, the Plaintiff relies upon Exhibit B. This is a curious document written partly in English and partly in Chinese characters. It is headed LO CHUNG STORE STATEMENT and is addressed Mr LO SHIU TANG. In the main it contains sums of money due for cargo provided for the ship operated by the Plaintiff. However one part in Chinese characters reads as follows:

"House price less purchase of goods amount"

and against this is shown the figure of \$1221. As a result of a set-off for goods purchased by LO CHUNG for the sum of \$2814.50, the statement showed a debit balance against the Plaintiff of \$594.95. The statement is marked, again in Chinese characters, "received in full" and the purported signature of LO CHUNG is written on it. I say "purported" as there was a suggestion, not actively pursued on his behalf, by the Defendant that this was not in fact LO CHUNG's signature. I accept on the evidence I have heard that it is the signature of LO CHUNG.

The evidence concerning this document, which is the sole documentary evidence of any kind of transaction between the Plaintiff and LO CHUNG about a house, is far from satisfactory all around. From the Defendant's side this arises partly from the fact that his witness to the authenticity, or lack of authenticity, of the document is dead. It was suggested that the present Defendant, John LO, actually wrote the document. In denying this the Defendant got himself into a position where, having denied he could write Chinese Characters, it became apparent that he could in fact do so. One of the features of this case is that, without exception, the witnesses called failed to impress me as reliable.

On the Plaintiff's side the Plaintiff himself maintained that the price for the half-house (\$1200.00 and not \$1221.00 as shown on the statement: the Plaintiff says the balance was stamp duty although he was not really sure) had been paid by instalments prior to December, 1970 and after August, 1970. This gives rise to two difficulties. One is that payment of this sum in that period rather belies the Plaintiff's claim that he had no money to buy a property for himself as he wished to do and renders the whole transaction of LO CHUNG purchasing the property and becoming registered owner, all

merely to provide the Plaintiff with accommodation, rather dubious. The second is that Exhibit B does not reflect at all payment by instalments but a set-off of a debt owed by LO CHUNG to the Plaintiff against a number of items purchased by the Plaintiff from LO CHUNG. The way the document is set out with dates, purchase of goods and so on it would seem more likely that if cash payments by instalments had been made, they would have been shown as such.

The wife of the Plaintiff said that there was one payment only when the paper was signed. She said in fact she saw her husband give \$1200 "and a bit more" to LO CHUNG and cargo from the ship whereas Exhibit B only shows \$594.95 as the cash due and presumably paid.

Another unsatisfactory aspect of the Plaintiff's evidence is as to whether or not he was ever asked to leave the half-house. I take into account here linguistic difficulties but the Plaintiff at one stage clearly stated that after he had moved into the house and repaired it, that is, after August, 1970 he was asked to leave the half-house by LO CHUNG. He subsequently said this was not so, only again later to accept it. Of course acceptance that he was asked to leave by LO CHUNG would indicate a very different transaction between them to the one of which he gave evidence.

The arrangement suggested by the Defendant as being the basis of the Plaintiff's occupation of the premises was given a measure of support by the Plaintiff's wife in cross-examination when she accepted that LO CHUNG said they could use the house until they bought a house of their own and that when the matter was discussed with LO CHUNG all that was said was that the Plaintiff and the witness should move to the half-house.

When one turns to Exhibit C from which I have already quoted, it is clear that in 1977 the Plaintiff was not claiming any form of agreement for purchase with LO CHUNG existed. Having seen the Plaintiff in the witnessbox, it would seem most surprising to me that, if he had, as he now says, bought the half-house in 1970, he did not use this as the basis of his claim to it in 1977. I am also unimpressed by the reasons which the Plaintiff gave for failing to take any steps to register his claimed interest in the half-house.

All in all I am not satisfied on the balance of probabilities, notwithstanding Exhibit B, that there was any agreement for purchase such as the Plaintiff claims in relation to the half-house. As such an agreement is crucial to the Plaintiff's case the claim must fail and there must be judgment for the Defendant on it.

As to the counterclaim for possession and damages I find myself in some difficulty. NG CHOW KIN took the property on transmission subject to the overriding interests contained in section 104 of the Land and Titles Act. One of these overriding interest is as follows:

"(g) the rights of a person in actual occupation of the land or in receipt of the rents and profits thereof, save where enquiry is made of such person and the rights are not disclosed";

It is clear that that time, May 1979, the Gilbertese family were in possession of the half-house and the Plaintiff was in receipt of the rents. There was no enquiry of them. Therefore their interests are protected. In the case of the Plaintiff I have already held that his interest does not amount to that of a purchaser in possession but that he would appear to hold on some form of licence. What that licence is and how it can be terminated has not been argued. What seems probable is that it has not been formally terminated. I am not aware of the basis of the possession by the Gilbertese family and equally their legal position has not been argued before me. If the claims for immediate possession and damages are pursued I wish to hear arguments on these points. I suggest counsel discuss them bearing in mind that my judgment has confirmed that the undivided share in the fixed term estate on the land is the property of the estate of NG CHOW KIN. I hope these matters can be settled amicably now the major issue is resolved.

Judgment for the Defendant on the Claim. Counterclaim adjourned sine die with liberty to apply for continuation of the hearing.

Defendant's costs on the Claim. Costs on the counter-claim adjourned.