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Consequences of Failing to Terminate a Contract

*Liu Shu Ming & Anor v Koh
Chew Chee [2023] SGHC(A) 15*

19 May 2023

LEGAL UPDATE

In this Update

What happens after a repudiatory breach of contract when the innocent party does not choose to accept the repudiation and terminate the contract?

This update discusses the decision in *Liu Shu Ming & Anor v Koh Chew Chee* [2023] SGHC(A) 15 where the Appellate Division found that there was no valid termination of the contract and overturned the trial judge's award of damages.

03
INTRODUCTION

03
BACKGROUND

04
PROCEEDINGS AT TRIAL IN THE GENERAL DIVISION OF THE HIGH COURT

04
DECISION OF THE APPELLATE DIVISION OF THE HIGH COURT

07
COMMENTARY

INTRODUCTION

Where a contract is breached, the innocent party will expect compensation. Where there has been repudiatory breach, what happens if the innocent party does not validly terminate the contract?

The Appellate Division of the High Court (“**Court**”) in *Liu Shu Ming & Anor v Koh Chew Chee* [2023] SGHC(A) 15 considered such a scenario.

The trial judge had initially found in favour of the claimant and awarded damages for breach of contract on a reliance basis of approximately ~SGD 1.26 million (Singapore Dollars) and ~PHP 340,000 (Philippine Peso).

On appeal, the Court set aside the trial judge’s award of damages. The Court held that the claimant had not pleaded the breach of a condition which entitled her to terminate the contracts, and that she did not validly terminate the contracts.

The Court held that the claimant was instead entitled to seek performance of the contracts, and ordered the defendants to transfer certain property to the claimant’s nominee in accordance with the contracts.

This update discusses the Court’s decision.

BACKGROUND

The defendants (who were the appellants in the appeal), Mr Liu Shu Ming (“**Mr Liu**”) and Ms Tong Xin (“**Ms Tong**”) operated a “condotel” business where they provided condominium units for short term accommodation. In 2016, they tried to expand their business and sought investors. One such investor was the claimant (the respondent in the appeal), Ms Koh Chew Chee (“**Ms Koh**”).

The investment involved purchasing condominium units from the defendants and leasing them back to the defendants for an annual return of approximately 6-7% of the purchase price.

Ms Koh entered two agreements with Mr Liu and Ms Tong:

- (a) First, an agreement by Ms Koh to purchase 5 condominium units (“**Units**”) from Mr Liu and Ms Tong; and
- (b) Second, an agreement that the defendants would rent the Units from Ms Koh for an initial period of 3 years, renewable every 3 years (“**Leaseback Agreement**”). The rent paid was to provide a 6-7% annual return.

(collectively, “**Contracts**”)

By late 2019, the defendants began falling behind on rental payments. On 27 December 2019, Ms Koh allegedly terminated the Contracts.

In February 2020, Ms Koh commenced Court proceedings against Mr Liu and Ms Tong.

PROCEEDINGS AT TRIAL IN THE GENERAL DIVISION OF THE HIGH COURT

Ms Koh's main claim was for breach of the Contracts due to a failure to transfer title to the Units and for non-payment of rent.

Ms Koh also alleged that as part of their agreement, Mr Liu and Ms Tong had agreed to buy back the Units from Ms Koh at the expiry of the leaseback period if the market price of the Units had fallen. However, if the market price of the Units had gone up, then Ms Koh could sell the Units on the open market ("**Alleged Buyback Term**"). The Alleged Buyback Term was not recorded in writing in the Contracts.

Ms Koh's alternative claim was for fraudulent misrepresentation, in that Mr Liu and Ms Tong had made ten categories of false representations to induce her to enter into the Contracts. These included misrepresentations relating to the Alleged Buyback Term, that:

- (a) Mr Liu and Ms Tong were looking for investors to purchase units from them, which they would lease back for a period of time before buying them back;
- (b) upon the expiry of the leaseback period, if the market price of the units purchased had fallen, that Mr Liu and Ms Tong would buy the units back from Ms Koh at the purchase price, but that if the market price had gone up, they would permit her to sell the units on the open market; and
- (c) that Mr Liu and Ms Tong were offering the opportunity to obtain higher interest payments than banks, with a guaranteed return of capital.

The trial judge granted Ms Koh's claim for breach of contract, but dismissed her claim for fraudulent misrepresentation. He held that Ms Koh had not proved the existence of the Alleged Buyback Term.

The trial judge held that the defendants' obligation to transfer legal title to Ms Koh was a condition of the Contracts, breach of which entitled Ms Koh to terminate the Contracts and sue for damages. After finding that there was breach of the Contracts and termination of the Contracts, the Judge considered the issue of damages.

Ms Koh had sought to recover her investment of ~SGD 1.5 million based on the Alleged Buyback Term, on the basis that if the defendants had performed their obligations, she would have recovered her principal investment. However, Ms Koh had not adduced clear evidence of when title should have been transferred and crucially, did not adduce evidence proving the market value of the Units at that time.

The trial judge nevertheless held that the defendants were liable to pay reliance damages (*ie* the money which Ms Koh had expended) instead of expectation damages. He awarded damages of SGD 1,468,895.69 being Ms Koh's payment of the purchase price and PHP 340,504.50 which were Ms Koh's costs of incorporating a company in the Philippines to be her nominee for transfer of the properties, and set-off the sum of SGD 202,727

which Ms Koh had received as rental payments under the leaseback arrangement.

Ms Koh appealed the trial judge's decision on breach of contract.

DECISION OF THE APPELLATE DIVISION OF THE HIGH COURT

The Court set aside the trial judge's award of damages. One key issue was whether the breaches of contract had entitled Ms Koh to terminate and whether she had validly terminated the Contracts.

Ms Koh's pleaded case

The Court considered Ms Koh's pleaded case in her Statement of Claim ("SOC"). She had pleaded that the defendants had made late payments, and had failed to make payments falling due from October 2019 onwards.

Importantly, she pleaded that by way of a letter dated 27 December 2019 from her solicitors to the defendants, she had "*accepted the Defendants' repudiation of the Agreement and/or otherwise terminated the Agreement*".

The Court considered that this paragraph did not specify what act by the defendants amounted to repudiation of the Contracts.

Ms Koh had also pleaded in the alternative that the defendants' failure to pay under the Leaseback Agreements was a breach which entitled her to terminate the leases created under the Contracts. However, as noted by the Court, Ms Koh only pleaded her entitlement to terminate the leases for breach, but not the Contracts.

Purported termination of the Contracts

In the 27 December 2019 letter, Ms Koh's solicitors had demanded certain payments and threatened legal proceedings:

"In the circumstances, TAKE NOTICE that our Client demands that you do, within fourteen (14) days hereof, pay the Monthly Lease Back Payment in arrears, the All-in Purchase Price for the five (5) properties, failing which our Client shall commence litigation in respect of the same, in which case you may be liable for the attendant costs thereof."

The Court noted that the broader definition of a repudiatory breach extends its scope to include reference to breach of a condition, and that on the facts of this case, Ms Koh had not pleaded the breach of a condition which entitled her to terminate the Contracts. Further, even if her SOC could be read to include breach of a condition, the further difficulty was whether she had validly terminated the Contracts.

Although Ms Koh had pleaded that the Contracts were terminated by her solicitors' letter on 27 December 2019, the Court held that this letter did not purport to effect any termination of the Contracts.

This was even though the defendants had not challenged this letter as the act of termination, although they disputed Ms Koh's entitlement to terminate the Contracts.

Ultimately, the Court held that Ms Koh did not validly terminate the Contracts and that she was therefore not entitled to claim damages on the basis of termination, whether as expectation or reliance damages. Instead, as the Contracts had not been terminated, Ms Koh was entitled to seek performance of the Contracts. The Court ordered Mr Liu and Ms Tong to transfer title of the Units to Ms Koh's nominee.

The practical consequence was that despite proving breach of contract, Ms Koh was not entitled to damages and the trial judge's award of damages had to be set aside.

KEYPOINT

The Appellate Division held that the claimant failed to plead repudiatory breach and failed to validly terminate the Contracts. The consequence was that the trial judge's award of damages for breach of contract was set aside.

Reliance damages

Given the Court's decision that Ms Koh had failed to validly terminate the Contracts, the issue of whether reliance damages should have been granted was academic. The Court nevertheless considered whether the trial judge had been right in awarding Ms Koh damages on a reliance basis.

The issue of whether reliance damages could be awarded would have been significant because Ms Koh had failed to adduce evidence on the market value of the Units.

The Court noted that a claimant is ordinarily entitled to claim expectation damages. The Court also agreed that the impossibility of proving expectation damages was not a prerequisite to claiming reliance damages.

After reviewing the law and cases from Singapore and other jurisdictions which considered the circumstances in which reliance damages could be awarded, the Appellate Division concluded in summary that it is not open to a claimant to claim reliance damages simply because he chooses not to adduce evidence of expectation damages. A claimant does not have an unfettered option to claim reliance damages, and that the Court does not have a wide discretion to grant reliance damages.

Instead, relief in the form of reliance damages would usually be available if it is impossible, or at least extremely difficult, for a plaintiff to prove expectation damages in the usual way or if his contract was not for profit.

In reaching this conclusion, the Appellate Division also disagreed with the proposition in *CCC Films (London) Ltd v Impact Quadrant Films Ltd* [1985] QB 16 (“**CCC Films**”) that a claimant has an unfettered option to claim reliance damages instead of expectation damages. There have been earlier decisions by the High Court which appear to have endorsed this proposition in *CCC Films*. However, the Court noted that these cases were not binding on the Appellate Division.

KEYPOINT

Parties who assert the existence of certain facts must adduce sufficient evidence to prove their claims.

COMMENTARY

When a contractual relationship breaks down and a contract is breached, it is critical for the potential claimant to carefully consider his contractual rights. Does he have a contractual right to terminate the contract and seek damages for breach? Does the breach amount to repudiation of the contract, which the innocent party can accept to terminate the contract? Or is the actual remedy for breach under the terms of the contract something altogether different?

It would be risky to assume that the same consequences flow from every breach. An innocent party faced with repudiatory breach of a contract can choose to affirm the contract and treat it as subsisting, or accept the repudiation and bring the contract to an end. In each scenario, the innocent party may be entitled to a different remedy.

Failure to terminate a contract when faced with repudiatory breach can mean that the innocent party waives his right to terminate the contract and claim damages for breach. This reinforces the importance of carefully considering whether repudiatory breach has arisen on the facts, and what the innocent party should do to protect his rights.

The decision whether to terminate a contract requires careful assessment of legal and commercial risks. This is because an attempt to terminate a contract without basis could itself amount to a wrongful repudiation of the contract. It is therefore crucial for parties to seek legal advice when faced with such a scenario to ensure that they can make an informed decision, with the proper appreciation of the legal and other risks involved.

Legal advice can be beneficial even when the dispute is in its infancy, especially where this may help reinforce or clarify the factual basis of any eventual claims.

It is equally important to ensure that all relevant and necessary evidence is adduced to prove contractual damages. A failure to do so may result in the claimant getting nominal damages even though there has been a clear breach of contract. Successfully proving breach of contract in such circumstances would be a hollow victory as the innocent party would not be compensated for the loss he fails to prove.

Given the importance of these issues, an innocent party faced with the unpleasant situation brought about by a breach of contract should carefully consider the above issues with his legal advisor, in order to achieve the best possible outcome.

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