IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1997] SGHC 166

Suit 1886/1994

Between

K J Kim Company (Pte) Ltd

… Plaintiff

And

Buck & Company (Pte) Ltd

… Defendant

GROUNDS OF DECISION

Version No 1: 20 Nov 2026 (00:35 hrs)

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K J Kim Company (Pte) Ltd v Buck & Company (Pte) Ltd

[1997] SGHC 166

Suit 1886/1994
C R Rajah JC
13 June 1997

Judgment:

GROUNDS OF DECISION

1. The Defendants were incorporated in 1974 and had always had only 2 shareholders who were also its only 2 directors, namely, the managing director, Mr. Khor Buck Chye ("Mr. Khor"), and his wife Madam Low Fook Cheng ("Mdm. Low") who is also a practising advocate and solicitor running her own law firm, Low Fook Cheng & Co. The Defendants were originally carrying on business in the garment industry. In 1983, they ceased doing any business in garments and thereafter invested in immovable properties. All of these properties had been sold by mid-1994 except for the property known as 10, Anson Road, #25-12, International Plaza, Singapore 079903 ("the Property").

2. By an option in writing dated 15/7/94 ("the Option) signed by Mr. Khor as managing director, the Defendants, in consideration for payment of a booking fee of $5,000/-, granted the Plaintiffs an option to purchase the Property at the price of $1,130,470/- subject to the following terms and conditions:-

Version No 1: 20 Nov 2026 (00:35 hrs)

"1) The option shall expire within 2 weeks from the date of delivery of the Sale and Purchase Agreement.

2) To exercise the option, you must sign the Sale and Purchase Agreement and forthwith pay to us 10% of the purchase price (less the booking fee).

3) If you allow this option to expire under Clause 1, we shall forfeit the total sum of the booking fee and the sale will be treated as null and void.

4) You may not assign your right, title and interest under this option.

5) The abovementioned premises is purchased with existing tenancy. We reserve the right to deduct any outstanding accounts owing by the existing tenant from the rental deposit."

3. The Plaintiffs paid the option money or booking fee of $5,000/- on 15/7/94 by their cheque for $5,000/- and obtained a receipt therefor of the same date signed by the Defendants' managing director. The Defendants, however, did not present this cheque for payment.

4. The Property had been advertised for sale in the newspapers by a property agent, Colin Wong. The Defendants responded to this advertisement and the agent took the Plaintiffs' director Mr. Hideo Kato and his secretary Ms. Cheryl Seah Jui Lee to view the Property. The Plaintiffs agreed to purchase the Option from the Defendants in accordance with its terms. The Plaintiffs gave the agent the $5,000/- cheque for the Option for onward transmission to the Defendants and received in return from the agent the Option and the receipt for the $5,000/-, both duly signed by the Plaintiffs' managing director, Mr. Khor. There is no dispute that the cheque was duly received by the Defendants. The agent also

Version No 1: 20 Nov 2026 (00:35 hrs)

informed Cheryl Seah that the Defendants' solicitors in the transaction were Low Fook Cheng & Co.

5. On 18/7/94, the Plaintiffs' solicitors wrote to Low Fook Cheng & Co. as the Defendants' solicitors confirming their purchase of the Option and asking for the draft Sale and Purchase Agreement to be sent to them as soon as possible. Receiving no response they sent 2 reminders dated 22/7/94 and 27/7/94 respectively. No reply was received from Low Fook Cheng & Co. to both these reminders. The Plaintiffs then changed solicitors and their new solicitors, who are also their present solicitors in this action, wrote again to Low Fook Cheng & Co. by a letter dated 5/8/94 asking for the Sale and Purchase Agreement to be sent to them within 7 days. Again there was no response. There is no dispute that all 4 aforesaid letters were duly received by Low Fook Cheng & Co. On 19/8/94, the Plaintiffs' solicitors wrote to Low Fook Cheng & Co. informing they had instructions to commence legal proceedings against the Defendants. On 23/8/94, Low Fook Cheng & Co. replied saying that they had been instructed by Mdm. Low as director and shareholder of the Defendants, that the other director, i.e. Mr. Khor, had no authority to sell the Property. The full text of the main body of this letter is as follows:-

"PURCHASE OF 10 ANSON ROAD

#25-12 INTERNATIONAL PLAZA

We refer to your letters dated 5th & 19th August 1994.

We are instructed by the director and shareholder Low Fook Cheng that the other director has no authority to sell the above property."

Version No 1: 20 Nov 2026 (00:35 hrs)

6. The Plaintiffs thereafter commenced these proceedings on 23/11/94 claiming that the Defendants had breached an implied term of the Option to deliver the Sale and Purchase Agreement within a reasonable time. Further and in the alternative the Plaintiffs claimed that the Defendants had by their solicitors' letter dated 23/8/94 unlawfully repudiated the Option which unlawful repudiation the Plaintiffs accepted in their commencement of this action. The Plaintiffs therefore claimed damages for such breach and unlawful repudiation, interest and costs.

7. The Defendants' defence was that Mr. Khor had no authority to sell the Property and also that when he gave the Option he did so in contravention of section 160(1) of the Companies Act (Cap. 50) ("the Act"). I set out below the provisions of section 160(1) and also those of section 160(3) which the Plaintiffs raise by way of rebuttal:-

"160(1) Notwithstanding anything in a company's memorandum or articles, the directors shall not carry into effect any proposals for disposing of the whole or substantially the whole of the company's undertaking or property unless those proposals have been approved by the company in general meeting.

.....

(3) A transaction entered into in contravention of subsection (1) shall, in favour of any person dealing with the company for valuable consideration and without actual notice of the contravention, be as valid as if that subsection had been complied with."

8. Mr. Khor and Mdm. Low had matrimonial difficulties and had been estranged since September 1993. Mdm. Low claimed that Mr. Khor had been siphoning

Version No 1: 20 Nov 2026 (00:35 hrs)

money from the Defendants and that he attempted to sell the Property without her knowledge and consent so that he would get his hands on the proceeds of sale.

9. The Defendants also claimed that there was no consideration for the Option as they had not accepted the Plaintiffs' cheque for $5,000/- in payment of the booking fee. They denied that it was an implied term of the contract that they should deliver a Sale and Purchase Agreement to the Plaintiffs within a reasonable time and claimed instead that even if the Option was validly given, it was no more than an agreement to sell the Property subject to contract i.e. subject to the parties entering into a Sale and Purchase Agreement. As no such contract was entered into they said there was no binding agreement to sell and therefore no agreement which they could be in breach of. The Defendants also denied that the Plaintiffs had suffered any damage.

10. After hearing the evidence and submissions from counsel I found in favour of the Plaintiffs and awarded them damages of $179,530/-. The Defendants have appealed and I now give the reasons for my decision.

11. Article 70 and 75 of the Defendants' Articles provide as follows:-

"70 The business of the Company shall be managed by the Directors in such manner as they think fit, and they may exercise all such powers of the Company, and do on behalf of the Company all such acts as may be exercised and done by the Company not being powers or acts which are expressly required by the Act or by these presents to be exercised or done by the Company in General Meeting, subject nevertheless to any regulations, to these presents, to the provisions of the Act, ...

Version No 1: 20 Nov 2026 (00:35 hrs)

75 The Directors may delegate any of their powers, other than the powers to borrow and make calls to the Managing Director or to committees consisting of such members of their body as they think fit. The Managing Director or any committee so formed shall in the exercise of the power so delegated conform to any regulations that may be imposed upon him or them by the Directors."

12. Article 70 therefore empowers the directors to manage the business and exercise all the powers of the Defendants except where the powers are expressly required by the Act to be exercised by the Defendants in general meeting and some other exceptions which are not relevant. Article 75 empowers the directors to delegate to the managing director any of their powers except the powers to borrow and make calls.

13. In Biggerstaff vs. Rowatt's Wharf [1896] 2 CH 93, a decision of the English Court of Appeal, Lindley L.J. said (at pg. 102):

"What must persons look to when they deal with directors? They must see whether according to the constitution of the company the directors would have the powers they are purporting to exercise. Here the articles enabled the directors to give the managing director all the powers of the directors except as to drawing, accepting, or indorsing bills of exchange and promissory notes. The person dealing with him must look to the articles, and see that the managing director might have power to do what he purports to do, and that is enough for a person dealing with him bona fide.

In the same case, Kay L.J. said (at pg. 106):

... it would be extraordinary if a person dealing bona fide with the managing director of the company were bound to inquire whether the powers which the

Version No 1: 20 Nov 2026 (00:35 hrs)

articles authorised the directors to give him had been formally delegated to him. There is a long string of cases shewing that a person so dealing with an officer of a company has a right to presume that all has been done regularly."

14. It is not disputed that Mr. Khor was the Defendants' managing director, and that he signed both the Option and the receipt for the option money or booking fee of $5,000/- paid by way of cheque by the Plaintiffs to the Defendants. There is no suggestion that the Plaintiffs were anything but bona fide in all their dealings relating to this transaction. The Option was signed by the managing director as such; and the Plaintiffs had the right to assume that he had the authority to do so. Even if Mr. Khor did not in fact have the power or authority to give the Option, and I am not satisfied on the evidence that this was so, as the Plaintiffs had no actual knowledge of such lack of power or authority, the Defendants are bound by the Option.

15. There is a second string to the Defendants' lack of power argument. They say that even all the directors acting together would not have had the power to dispose of the Property. This was because the Property being the only asset of the Defendants, any disposal thereof would require, under the provisions of section 160(1) of the Act, approval of the Defendants in general meeting. There was no such approval. Even the directors therefore had no power to sell the Property. As the directors had no power to sell, neither did the managing director as his powers were, at best, limited to those of the directors.

16. In the circumstances of this case, I have some doubts as to whether the granting of the Option amounts to a disposal of the whole or substantially the whole of the Defendants undertaking or property within the meaning of section 160(1). But even if it did, section 160(3) provides that even if the Option contravened section 160(1), it would nevertheless be valid if the Plaintiffs gave

Version No 1: 20 Nov 2026 (00:35 hrs)

valuable consideration for the Option and had no actual notice that section 160(1) was contravened.

17. The Plaintiffs gave valuable consideration when they gave the Defendants their cheque for the $5,000/- option money or booking fee. The fact that the Defendants chose not to encash or pay in the cheque does not prevent the Plaintiffs' payment by cheque from being valuable consideration any more than non-user by the Defendants of a cash payment made by the Plaintiffs would prevent such cash payment from being valuable consideration. The Plaintiffs also had no actual notice that section 160(1) was contravened. I therefore find that even if the granting of the Option contravened section 160(1), the Option remains valid by reason of section 160(3).

18. My doubts as to whether section 160(1) applies to the Option arise for the following reasons. It appears to me that the object of section 160(1) would be to prevent directors from selling off the whole or a substantial part of the company's undertaking or the assets which allow it to carry on such business without the prior approval of the company's shareholders. I understand "the company's undertaking" to mean the business of the company. If directors, whose primary function is to manage the company's business and assets, wish instead to dispose of such business or assets rather than manage them, it is only right that they should first get the approval of the shareholders who presumably became or remained as shareholders because the company was in business it was in. The Defendants were originally in the garment business. This business had ceased in 1983. Thereafter it invested in immovable properties. It had by mid-1994 realised most of these investments leaving only the Property unsold. The Defendants' business or activity since 1983 was therefore to invest in properties and then realise this investment by selling them.

Version No 1: 20 Nov 2026 (00:35 hrs)

19. It seems to me therefore that the mischief section 160(1) was enacted to prevent was any disposal by the directors of the company's business or assets which would disable it from continuing with its business. In the present case, however, in disposing of the Property the Defendants would not so much be disposing of their present business or assets as pursuing it. However, as this issue in relation to section 160(1) was not canvassed before me and as I have held that section 160(1) does not invalidate the Option even if it applies, I make no findings based on my foregoing observations.

20. With regard to the allegation that Mr. Khor was trying to effect the sale of the Property behind Mdm. Low's back because he wished to make improper use of the proceeds of sale, I make this observation. If that was his motive, it is curious why the property agent, Colin Wong, to whom he had entrusted the sale should inform the Plaintiffs that the Defendants' solicitors for the sale were Mdm. Low's own firm, Low Fook Cheng & Co. If Mr. Khor had told him to do so then Mr. Khor could not have given the Option for the motive alleged against him. If Mr. Khor did not tell him to do so, no explanation has been advanced as to why the agent did so.

21. The Defendants also argued that the Option was subject to contract. The Defendants based this argument on the fact that it was a term of the Option that it would expire 2 weeks from the date the Sale and Purchase Agreement was delivered to the Plaintiffs unless the Plaintiffs exercised the Option prior to to its expiry by signing the Sale and Purchase Agreement and paying the Defendants 10% of the purchase price less the $5,000/- booking fee. As the Sale and Purchase Agreement had not been agreed to between the parties, the Defendants argued that this made the Option subject to the Sale and Purchase Agreement being agreed to and therefore subject to contract.

Version No 1: 20 Nov 2026 (00:35 hrs)

22. The terms of the Option being what they were, it was incumbent on the Defendants to provide the Plaintiffs with a Sale and Purchase Agreement. The Option did not stipulate the time within which the Sale and Purchase Agreement was to be sent. In such circumstances, the law will imply a term in the Option that the Defendants had to do so within a reasonable time. The Plaintiffs sent 4 letters dated 18/7/94, 22/7/94, 27/7/94 and 5/8/94 to Low Fook Cheng & Co. as the Defendants' solicitors asking for the Sale and Purchase Agreement to be sent. All these letters were duly received but no response was made. The Plaintiffs threatened legal action by their solicitors' letter dated 19/8/94. Low Fook Cheng & Co. finally responded by their letter of 23/8/94. They did not say they did not act for the Defendants. They did not say that the Option was subject to contract. All they said was that Mr. Khor had no authority to sell the property. This argument that the Option was subject to contract is, on the evidence before me, a position they took only when they filed their Defence.

23. The Defendants did not call either Mr. Khor or the agent Colin Wong to throw any light on the issue of whether the Option was subject to contract or not. They rely purely on the wording of the Option. Nowhere in the Option do the words "subject to contract" or words to similar effect appear. The Plaintiffs had paid the $5,000/- option monies and Mr. Khor had signed the Option as the Defendants' managing director. There was nothing left to be done for the Option to create a binding contract for an option to purchase.

24. The fact that the Sale and Purchase Agreement had not been agreed to does not mean that the Option was subject to contract. The Option contained all the necessary terms for an option, namely,

(a) A description sufficient to identify the property for which the option to purchase was granted i.e. the Property.

Version No 1: 20 Nov 2026 (00:35 hrs)

(b) The price of the Option i.e. $5,000/-.

(c) The price at which the Property was to be sold if the Option was exercised i.e. $1,130,470/-.

(d) How the Option was to be exercised i.e. by the Plaintiffs' payment of 10% of the purchase price less $5,000/- and signing of the Sale and Purchase Agreement prior to expiry of the Option.

(e) When the Option expired i.e. 2 weeks after delivery of the Sale and Purchase Agreement to the Plaintiffs.

25. I therefore find that the Option was not subject to contract and created a binding contract between the Plaintiffs and the Defendants in accordance with its terms, express and implied. These terms required the Defendants to send the Plaintiffs within a reasonable time a Sale and Purchase Agreement for the Plaintiffs to sign and return to the Defendants. This the Defendants had failed to do right up to the time the Writ of Summons herein was issued on 23/11/94, a period of 4 months and 8 days from the date of the Option, despite 4 requests in writing from the Plaintiffs. In the circumstances, I find that the Defendants have breached an implied term of the Option that they send a Sale and Purchase Agreement to the Plaintiffs within a reasonable period.

26. Instead of providing a draft Sale and Purchase Agreement to the Plaintiffs, Low Fook Cheng & Co. informed the Plaintiffs by their letter of 23/8/94 that Mr. Khor had no authority to sell the Property. From the terms of this letter it was clear that the Defendants did not intend to honour the Option. The Defendants' refusal to send a Sale and Purchase Agreement for the Plaintiffs to sign and return confirmed this. The Plaintiffs were entitled to treat the 23/8/94

Version No 1: 20 Nov 2026 (00:35 hrs)

letter as a repudiation of the Option by the Defendants on the alleged grounds that Mr. Khor had no actual or ostensible authority to give the Plaintiffs a valid Option. The Plaintiffs did so treat this letter and on the basis of the Defendants' repudiation was unlawful accepted the Defendants' repudiation and terminated the Option. As I have found that the Defendants are bound by an option given on their behalf by Mr. Khor as their managing director, the Defendants' repudiation of the Option was unlawful and I find that the Plaintiffs were entitled to accept the unlawful repudiation and terminate the contract as they did and claim for such damages as they suffered by reason thereof.

27. Whether there would have been any disagreement between the parties on the terms of the Sale and Purchase Agreement the Defendants were required to send Plaintiffs remains a matter for speculation as the Defendants never sent the same to the Plaintiffs. I do not therefore propose to address this issue. I note, however, that the Defendants' stand when they repudiated the Option by Low Fook Cheng & Co.'s letter of 23/8/94 was not that the Option was not binding on them because it was subject to contract or even because the parties were unable to agree on the terms of the Sale and Purchase Agreement. They claimed the Option was not binding on them only because Mr. Khor had no authority to give the Option.

28. The Plaintiffs adduced evidence through a qualified valuer that the value of the Property as on 2/12/94 was $1,310,000/-. There was no dispute between the parties that if the Plaintiffs succeeded in this action their damages should be in the amount of $179,530/- which is the difference between $1,310,000/- and the purchase price of $1,130,470/-. I accordingly awarded the Plaintiffs damages in this amount and made no order on their claim for interest. I also awarded the Plaintiffs their costs to be taxed.

Version No 1: 20 Nov 2026 (00:35 hrs)

C R Raja

JUDICIAL COMMISSIONER

C R Rajah JC

Phua Siow Choon (Michael B B Ong & Co) for the plaintiffs
Douglas Leong with Pradeep Kumar (Hilborne & Co) for the defendants

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Version No 1: 20 Nov 2026 (00:35 hrs)