Ng Teck Sim Colin and another *v* Hat Holdings Pte Ltd and another and another appeal [2011] SGCA 34

Case Number	: Civil Appeal 155 of 2010 and Civil Appeal 157 of 2010
Decision Date	: 15 July 2011
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Peter Cuthbert Low, Subramanian s/o Ayasamy Pillai and Ong Po Qin (Colin Ng & Partners LLP) for the appellants in CA 155 of 2010 and the respondents in CA 157 of 2010; Edwin Tong Chun Fui, Kristy Tan Ruyan, and Lim Junwei Joel (Allen & Gledhill LLP) for the respondents in CA 155 of 2010 and the appellants in CA 157 of 2010.
Parties	: Ng Teck Sim Colin and another — Hat Holdings Pte Ltd and another

Land

[LawNet Editorial Note: The decision from which these appeals arose is reported at [2010] 4 SLR 840.]

15 July 2011

Chao Hick Tin JA (delivering the grounds of decision of the court):

Introduction

1 This was an appeal (Civil Appeal 155 of 2010) ("the appeal"), and a cross-appeal (Civil Appeal 157 of 2010)("the cross-appeal"), against the decision of the trial judge ("the Judge") in Suit 414 of 2008 ("the Suit"), in which the plaintiffs, Mr Colin Ng Teck Sim and Mrs Maria Ng ("Colin" and "Maria" respectively; collectively "the Ngs"), commenced an action against the defendants, Hat Holdings Pte Ltd ("Hat") and Bolliger Hans Peter ("Bolliger")(collectively "the defendants"), to claim for the final payment due to them for the sale of a house in Phuket, Thailand under an agreement which was governed by Singapore law. The defendants' defence was that the final payment was not due because Hat had not been given good title to the house. The defendants also counterclaimed for damages and specific performance of the agreement.

2 The Judge, following the principle established in *Companhia de Mocambique v British South Africa Co* [1892] 2 QB 358 ("*Mocambique*"), which is that the court does not have jurisdiction to entertain proceedings involving the determination of title to foreign land ("the *Mocambique* principle"), stayed the action and ordered the parties to have the Thai courts determine the issue of title to the house before their contractual rights and obligations under their contract for the sale and purchase of the property could be determined.

Facts

Parties to the dispute

3 The Ngs were the sellers and Hat was the purchaser of No 2 Ayara Surin, Phuket (the "Land") and a house ("Villa 2") erected on the Land. Samuel Foy Colflesh ("Samuel") and Bolliger were Hat's

directors. Villa 2 was purchased by Hat from the Ngs for the use of Bolliger and his family. For a better understanding of the dispute between the parties, it should be noted at the outset that under Thai law, the transfer of land is distinct from the transfer of a building on the land. As such, the land and the house on it must be separately transferred and registered for legal ownership to both to be passed to the transferee. As the Land has been effectively transferred to Hat, the dispute between the parties related only to Villa 2.

The Ngs' acquisition of Villa 2

4 On 8 October 2000, the Ngs entered into a reservation contract with Southern Land Development Co Ltd ("Southern Land"), the freehold developer of the Land, to lease the Land for Thai Baht 27.3m. At the time, Villa 2 had not yet been constructed although one Mr Sarot Tantipatanaseri ("Sarot"), an architect who worked with (but was not an employee of) Southern Land, had been issued a licence ("the Construction Permit") to construct several houses, including Villa 2. The Construction Permit described Sarot as the "owner of the building".

5 On 23 April 2001, the Ngs finally entered into an agreement with Southern Land to lease the Land ("the 2001 Land Lease") for 30 years, with an option to renew for a further two terms of 30 years each. Southern Land registered the 2001 Land Lease as well as the right of superficies for the Land in favour of the Ngs at the Talang District Land Office ("the Phuket Land Office"). The right of superficies refers to the right granted by Southern Land to the Ngs to own buildings and structures on the Land. [note: 1] On 28 May 2001, the Ngs entered into a construction contract with J.V. MIT Co. Ltd for the construction of Villa 2. The Ngs paid for the construction cost of the said building. Upon the completion of Villa 2, the Ngs had exclusive possession, use and enjoyment of Villa 2 for several years before they decided to sell it to Hat.

6 On 23 March 2006, Sarot transferred the Construction Permit with respect to Villa 2 ("the Assigned Construction Permit") to the Ngs.

The Sale and Purchase Agreement between the Ngs and Hat

7 On 13 December 2007, the Ngs granted Hat an option to purchase the Land and Villa 2. This was in effect the sale and purchase agreement for the sale of both the Land and Villa 2 from the Ngs to Hat ("the Agreement", which is the agreement referred to in [1] above). Hat's director, Samuel, represented Hat in this sale transaction. The relevant terms of the Agreement, as set out in [5] of the Judge's Grounds of Decision ("GD"), were the following:

(a) The sale price for the Property was fixed at US$1.85m. Of this sum, US$1m was in respect of the Land, and the remaining sum of US$850,000 was in respect of Villa 2 and the fixtures attached thereto ("the Villa 2 Purchase Price");

(b) The title shall be free from encumbrances and the Property was sold "as is where is";

(c) The completion date was fixed for 4 February 2008, but this could be extended for up to 14 days at Hat's request;

(d) Hat was deemed to have "full notice of the actual state and condition of the [Property] in all respects" and "shall not be entitled to raise any objection or requisition whatsoever in respect thereof";

(e) The Agreement was to be construed in accordance with the laws of Singapore, "without

regard to any principles on conflicts of law". The parties agreed to irrevocably submit to the exclusive jurisdiction of the Singapore court.

8 On 14 December 2007, Hat paid the Ngs US$277,500, purportedly as the option money and deposit.

9 After the Agreement was executed, on 4 January 2008, Maria sent Samuel and Bolliger an e-mail in which she pointed out that her Thai lawyers, Surasak Pittisuree ("Surasak"), had advised as follows:

(a) the registration process for the Land and Villa 2 had to be bifurcated, as the transfer of Villa 2 would take one month to complete due to the need to post a notice of the transfer application for 30 days at Villa 2 and elsewhere as designated by the local authorities; and

(b) Surasak had copies of the Title Certificate, the Assigned Construction Permit and House Registration Book and they were ready for registration.

Maria also suggested postponing completion to 11 February 2008.

10 Hat's Thai lawyers, Tilleke & Gibbins ("T&G") conducted due diligence on Villa 2. The due diligence report ("the DD report") stated that Southern Land owned the freehold land, which was leased to the Ngs under the 2001 Land Lease. The DD report also noted the Construction Permit and the Assigned Construction Permit. The outcome of the due diligence exercise was described as "satisfactory" by Samuel in an e-mail of 20 January 2008 to the Ngs and Bolliger.

11 On 3 March 2008, the parties tried to register the transfer of both the Land and Villa 2 to Hat at the Phuket Land Office. However, the application was rejected because the Assigned Construction Permit, which the Ngs relied on for the transfer of Villa 2, was invalid as it was created after the expiry of the Construction Permit. The officers at the Phuket Land Office suggested that Sarot transfer Villa 2 to the Ngs, after which the Ngs could transfer Villa 2 to Hat ("the Two-Step process"). The Ngs' Thai lawyers instead suggested that Sarot transfer Villa 2 directly to Hat to save time and costs ("the One-Step process"). Samuel agreed to the One-Step Process.

The successful transfer of the Land

12 On 7 March 2008, the parties successfully registered the transfer of Land. As the Judge explained at [10] of the GD, this was achieved by: (a) terminating the 2001 Land Lease between the Ngs and Southern Land; (b) terminating the Ngs as superficies; (c) applying to register a *fresh* lease given by Southern Land to Hat; and (d) applying to register Hat as the superficiary of the Land. Significantly, the *fresh* lease was effective from 7 March 2008 ("the 2008 Land Lease"). On 12 March 2008, Hat paid the Ngs the balance of the purchase price for the Land. As has been mentioned at [3] above, there was no dispute regarding the transfer of the Land.

The transfer of Villa 2

13 While the Land was successfully transferred on 7 March 2008, Villa 2 was not transferred as planned due also to Sarot's concern about his potential income tax liability arising from his purported sale of Villa 2 to Hat. To allay Sarot's fears, on 10 March 2008, the Ngs provided him with a Letter of Guarantee to cover any duty, fee, commission or tax arising from the "sale" of Villa 2 from Sarot to

Hat. On or about 31 March 2008, Sarot executed a power of attorney in favour of one of the Ngs' Thai lawyers, Mr Adul Chueasaman ("Adul"), to facilitate the transfer of Villa 2 to Hat.

14 Earlier on 13 March 2008, Colin wrote to Samuel to request part-payment of the purchase price for Villa 2 before its actual transfer. On 2 April 2008, Samuel offered to pay 20% of the purchase price upfront and 80% upon completion. Colin did not accept this proposal and on 4 April 2008, Samuel agreed to pay 50% of the purchase price of Villa 2 on the first Friday after successful application at the Phuket Land Office, and the remainder on the first Friday following final completion.

15 In the meantime, Bolliger e-mailed Samuel to record his discomfort over the expired construction permit. Samuel replied to Bolliger stating that their Thai lawyers would ensure that Hat did not have any legal problems regarding Villa 2 before the sale of this building was completed. He added that if the transaction failed, the "only difference between [what is] legal and illegal [in Thailand]" was money.

16 On 9 April 2008, the application to register the sale and purchase of Villa 2 was successfully filed at the Phuket Land Office. The application document referred to Sarot, who was represented by Adul, as the transferor of Villa 2.

17 On 10 April 2008, Maria reminded Samuel that the first 50% of the purchase price was due the following day. Samuel had concerns about paying money to the Ngs when Sarot was named in the transfer documents as the "seller" of Villa 2. On 13 April 2008, he asked Maria how he should go about arranging for payment to stakeholders. On 14 April 2008, Colin explained that the Ngs were in fact the sellers of the Property and that Sarot, the "registered house owner", had executed a Power of Attorney allowing their Thai lawyers to transfer Villa 2 to Hat. Samuel's response on the same day was that Hat would pay 50% of the Villa 2 Purchase Price, with the remaining amount "owing to be paid on the first Friday following completion" if the Ngs would provide a "statement of joint liability" and "receipt for the funds being collected on [Sarot's] behalf".

18 Colin agreed to Samuel's proposal and added:

> I SUPPOSE IT IS RIGHT THAT WE ARE RESPONSIBLE TO THE BUYER IF [SAROT] CLAIMS ANYTHING FROM YOU IN RELATION TO THE HOUSE REGISTRATION. OF COURSE WE DON'T EXPECT THIS. BUT IF IT DOES HAPPEN THEN WE [SHOULD] BE CONSULTED AND IF ANY PAYMENT IS TO BE MADE THEN WE [SHOULD] BOTH AGREE. IN SHORT WE INDEMNIFY THE BUYER AGAINST ANY SUCH CLAIM BY [SAROT]

19 On 14 April 2008, Samuel sent Colin another e-mail to clarify the terms of the joint liability statement, and asked that it include a "clause of non-performance on the part of the "registered owner". Samuel explained that his greater concern was "non-performance" (presumably by Sarot), and not whether the Ngs or Hat would be able to defeat any claim raised by Sarot. Colin agreed to Samuel's request. On that day, Samuel paid the Ngs 50% of the purchase price for Villa 2. In return, the Ngs executed an indemnity in Hat's favour in the event of any claim by Sarot and also agreed to the following:

> If [Villa 2] is not delivered then you can proceed for breach of contract (after reasonable time has been given) against [the Ngs].

20 On 23 May 2008, the registration of the sale of Villa 2 to Hat was completed pursuant to a standard form sale and purchase of house agreement entered into between Sarot and Hat. The document entitled "Agreement to Sell Building" carried the following endorsement:

> I, [Hat], confirm that, in the process of making this Agreement, I had directly come into contact with the [freehold] Land Owner [*ie*, Southern Land] and come to an agreement with him explicitly. Hence as a result, this agreement was documented and registered. And if there should be a case of mistaken identity regarding the Land Owner or the Land itself, I will solely bear all responsibilities. The Officials involved will not be implicated.

21 As the registration of the sale of Villa 2 was effected on 23 May 2008, the remaining 50% of the purchase price, which amounted to S$596,657.50 (the "final payment"), was due on 30 May 2008. However, the deadline passed without any payment. Samuel suddenly and totally unexpectedly claimed that there was an "impasse", that the matter was "under review", and that his "Settlement sheet" was not ready. Despite this, Hat collected the keys from Maria on 3 June 2008 and took possession of Villa 2.

22 On 5 June 2008, Samuel asked Maria for a meeting without Colin and Bolliger to settle outstanding issues.

23 Samuel met Maria on 6 June 2008 and assured her that Bolliger would sign the cheque for the final payment without making any "irrational deductions". In the meantime, Samuel was discussing with Bolliger their strategy for justifying a demand for a 10% discount on the purchase price of Villa 2. In an e-mail to Bolliger, [note: 2] Samuel referred to Bolliger's "intention ... [to have] the final sum owing discounted" and the ideas that were floated for justifying a 10% discount included having Samuel claim a sum equivalent to 10% of the purchase price from the Ngs for his services in the transaction.

24 Samuel claimed that he had informed Maria that Hat would not be making the final payment in full because the Ngs breached an oral agreement ("the Oral Agreement") in which the parties allegedly agreed that Sarot was to issue a receipt to Hat and the Ngs' failure to procure such a receipt meant that they were not entitled to final payment ("the Oral Agreement argument"). Maria denied that this conversation took place and asserted that there was no Oral Agreement.

25 On 11 June 2008, Samuel offered to pay the Ngs S$336,936 without any explanation for the unilateral deduction of 10% of the purchase price of Villa 2. This offer was rejected by the Ngs.

26 On 16 June 2008, the Ngs' lawyers sent Hat a Statutory Demand for the final payment, threatening to commence winding up proceedings if the full amount remained unpaid. On 3 July 2008, Hat responded by commencing Originating Summons No 890 of 2008 ("OS 890/2008") to restrain the Ngs from winding it up and reiterated the Oral Agreement argument. Kan Ting Chiu J ordered Hat to pay the final payment into court on 15 July 2008. OS 890/2008 was withdrawn upon payment of the sum.

27 On 28 July 2008, the Ngs procured from Sarot a letter resembling the terms of the receipt that Hat alleged that the Ngs did not produce. In the letter, Sarot stated that he was "happy that [Villa 2] had been transferred out of [his] name" (having been a nominee holder to the Ngs hitherto) and that he was "not claiming money from anyone (be it [the Ngs] or [Hat])" for the transfer.

28 On 26 August 2008, the Ngs (through their solicitors) made a "without prejudice" offer to Hat's solicitors to pay the taxes and expenses associated with the transfer of Villa 2 and to provide the receipt and confirmation sought for. Hat did not respond to the offer.

Summary of Pleadings

29 The Ngs' case was that both parties had agreed on 4 April 2008 that the final payment would be made on the first Friday following the date of registration of the sale and purchase of Villa 2. As the registration of the sale and purchase of Villa 2 was completed on 23 May 2008, the final payment became due and payable on 30 May 2008. However, in breach of the Agreement, the defendants failed to pay the final payment, but instead, sought to tender payment of S$336,936.00 (the discounted price) as "full and final settlement" of the purchase of Villa 2 on 11 June 2008. As such, the Ngs commenced the action to recover the final payment.

30 The defence was two-fold. First, the defendants claimed that the parties entered into the Oral Agreement which the Ngs breached in failing to:

(a) pay all taxes, costs and other expenses associated with the transfer of Villa 2 from Sarot to Hat; and

(b) procure a receipt from Sarot evidencing payment by Hat, and/or confirmation from Sarot that he has no further title, interest or any other claims in Villa 2 whatsoever.

31 Secondly, the defendants pleaded that the Ngs were in breach of the Agreement (as varied), which required them to transfer "good, proper and perfect legal title" to Villa 2. They claimed to have discovered in April 2009 that Sarot's title was defective and that "good, proper and perfect legal title" to Villa 2 was not transferred to Hat despite the purported registration on 23 May 2008. The defendants claimed that Sarot's title to Villa 2 was defective for the following reasons: [note: 3]

(a) Although Sarot was the holder of the Construction Permit, he was not the proper applicant and/or holder of that permit in respect of Villa 2.

(b) The transfer of the Construction Permit from Sarot to the Ngs on 23 March 2006 was not a valid way of transferring registered title to Villa 2 as Villa 2 had already been constructed at that time. In any case, Sarot did not have good legal title to transfer, for the reason given above in (a).

32 The defendants contended that as the party who could convey a proper title to Villa 2 was Southern Land, the Ngs were not entitled to payment until they had transferred "good, proper and perfect legal title" to Villa 2 to Hat. As such, they counterclaimed against the Ngs is in respect of: (a) their breach of the Agreement in failing to provide "good, proper and perfect legal title", and (b) their breach of the Oral Agreement. Notably, at the end of the trial, the defendants elected to claim solely for specific performance of the sale and purchase of Villa 2, and for damages arising from the Ngs' failure to procure or transfer title to Villa 2 to Hat. [note: 4]

Decision Below

33 The Judge made the following findings in the GD:

(1) Hat could not rely on the Oral Agreement argument, as it could not prove that there was such an agreement: at [27].

(2) Hat was not entitled to rely on the issue of the taxes and costs to withhold the final payment from the Ngs: at [28].

(3) Applying the *Mocambique* principle, the court had no jurisdiction to entertain proceedings involving determination of title to foreign land and the parties could not consent to the court adjudicating on such disputes of title. However, the court could make an order in an action concerning foreign land where, *inter alia*, personal equities between the parties were involved but such a personal equity should not depend, for its existence, on the law of the locus of the immovable property: at [33], [34], and [38].

(4) The respective claims made by the Ngs and Hat were caught by the *Mocambique* principle. In this regard, the court would have to decide whether Hat had received good title to Villa 2. Given that the parties' respective claims involved the integral question of title, their claims were non-justiciable: at [36] – [38].

(5) Given that Samuel did not proceed with the One-Step Process with the knowledge that Sarot had no good title to transfer, Hat did not know about the defect in title at the time the variation was agreed to or the transfer of title to Villa 2 was effected: at [44].

(6) There was no evidence that Hat had completed registration of Villa 2 despite knowing that Sarot did not have title to Villa 2. As such, Hat could not be held to have accepted or waived the defect in title: at [47].

(7) Since nothing in the Agreement suggested that Hat was precluded from independently investigating the Ngs' title, Hat was not precluded from raising any objection to title under the Agreement: at [52].

(8) The Ngs argument on the ground of promissory estoppel failed as Samuel had not made an unequivocal representation and even if they had, the Ngs had not relied on it: at [53] and [54]

34 Significantly, the Judge also made the following observations:

(a) Taking Hat's case (that Southern Land had title to Villa 2) at its highest, what ought to have been done on 7 March 2008 was for Southern Land to execute a sale and purchase agreement for Villa 2 and to register the same at the Phuket Land Office. The responsibility of *procuring such registration rested on Hat* as it had been conferred important rights and obligations *vis-à-vis* Villa 2 under the 2008 Land Lease. Hat itself recognised that it could ask Southern Land to transfer title to Villa 2 if the One-Step Process failed. Having agreed to vary the mode of performing the Agreement to such an extent, Hat could not accuse the Ngs of being in breach of their obligation to confer good title, when it was the party which had not sought out Southern Land to effect transfer of title to Villa 2. Moreover, Hat had done various acts consistent with that of the owner of Villa 2. As such, assuming that one takes Hat's case at its highest, it would have had no case against the Ngs for breach of contract:

at [62] to [65].

(b) Even assuming the Ngs were in breach of contract, no decree of specific performance could be made in Hat's favour against the Ngs, as it would be impossible for the Ngs to do so if (as Hat contended) Southern Land was the party with title to Villa 2: at [66].

Summary of Appellant/Respondent's case

35 In the appeal, the Ngs' case was that the Judge erred in staying the action. They asserted that they were entitled to final payment as the Judge had found that they had not breached their obligation to transfer good title to Hat. In addition, the Ngs reiterated their arguments below that the defendants were precluded from complaining about their lack of good title as they had waived their right to do so and were estopped from doing so. In response, the defendants claimed that the Judge erred in her finding that the Ngs had not breached their obligation to transfer good title to them. However, the defendants agreed with the Judge's findings of fact that they did not know about the defect in title and were not estopped from asserting its right to good title.

36 In the cross-appeal, the defendants asserted that the Judge erred in staying the action, and sought specific performance of the contract. As stated above, they argued that the Ngs were in breach by not giving them good title to Villa 2. In response, the Ngs relied on the Judge's finding that they had not breached their obligation to give Hat good title.

Issues in the appeals

37 The issues in the appeal and cross-appeal were intertwined. They essentially raised the following issues:

(a) Whether this dispute was justiciable;

(b) Whether the Ngs' argument, that the defendants could not complain that Hat does not have good title, is sustainable; and

(c) Whether the Ngs had breached their contractual obligations.

Justiciability

The Mocambique principle

38 As mentioned above (at [2]), the *Mocambique principle* is that the court does not have jurisdiction to entertain proceedings involving the determination of title to foreign land (see Collins, *Dicey, Morris & Collins on The Conflict of Laws* (Sweet & Maxwell, 14th Ed, 2006) ("*Dicey & Morris*") at para 23R-021). In *Murakami Takako (executrix of the estate of Takashi Murakami Suroso, deceased) v Wiryadi Louse Maria and others* [2009] 1 SLR(R) 508, this court reiterated (at [9]) that the *Mocambique* rule and the personal equities exception to that rule are a part of Singapore law.

39 As regards the personal equities exception, in *Mocambique*, the court held that "Courts of

Equity have, from the time of Lord Hardwicke's decision in *Penn v Lord Baltimore* [(1750) 1 Ves Sen 444] in 1750, exercised jurisdiction *in personam* in relation to foreign land against persons locally within the jurisdiction of the English Court in cases of contract fraud, and trust" (at 364). In *Deschamps v Miller* [1908] 1 Ch 856, Parker J explained at 863 – 864:

> There are, no doubt, exceptions to the rule, but, without attempting to give an exhaustive statement of those exceptions, I think it will be found that they all depend on the existence between the parties to the suit of *some personal obligation arising out of contract or implied contract*, fiduciary relationship or fraud, or *other conduct which, in the view of a Court of Equity in this country, would be unconscionable*, and *do not depend for their existence on the law of the locus of the immovable property*. Thus, in cases of trusts, specific performance of contracts, foreclosure, or redemption of mortgages, or in the case of land obtained by the defendant by fraud, or other such unconscionable conduct as I have referred to, the Court may very well assume jurisdiction. But where there is no contract, no fiduciary relationship, and no fraud or other unconscionable conduct giving rise to a personal obligation between the parties, and the whole question is whether or not according to the law of the locus the claim of title set up by one party, whether a legal or equitable claim in the sense of those words as used in English law, would be preferred to the claim of another party, I do not think the Court ought to entertain jurisdiction to decide the matter.
>
> [emphasis added]

Applicability of the Mocambique principle to this dispute

40 The Judge ruled that the *Mocambique* principle applied to the present dispute at [36] of the GD:

> It is clear that the respective claims made by the Ngs and Hat are caught by the *Mocambique* principle. *Quite plainly, the court will have to decide whether Hat had received good title to Villa 2 to resolve the dispute between the parties. Borrowing the language of Prescott QC (see*[33] *above), Hat's case is, quite plainly: "Please decide that under Thai law the Ngs or Sarot were never the owners of Villa 2 and that as a consequence, we are not the current owners of Villa 2"*. In other words, the issue of title does not arise incidentally, but is, instead, the principal issue in both of their claims (see, in this regard, the observations of Professor Adrian Briggs in *Civil Jurisdiction and Judgments* (LLP, 4th Ed, 2005) at para 4.07).
>
> [emphasis added]

41 The Judge also ruled that the personal equities exception did not apply to this case as the issue of title was principal to this dispute and the Court would have to make an adjudication touching on the *lex situs* of the land in order to resolve it at [37] of the GD:

> A judgment either way would, in effect, decide on a matter that should be left entirely to the prerogative of the Thai courts. As observed by Lord Wilberforce, determinations as to foreign title "[involve] possible conflict with foreign jurisdictions, and the possible entry into and involvement with political questions of some delicacy" (*Hesperides Hotels Ltd v Muftizade* [1979] AC 508 at 537). *The present case goes further as the dispute to title possibly involves issues relating to Thai custom and tradition of the community given the expert witnesses' evidence that under Thai law, there is no official document to prove one's title to a building, unlike the case of one's title to land*. Furthermore, an estoppel could arise as between the parties in Thailand subsequently, if this issue is finally decided by the Singapore courts.

[emphasis added]

42 Interestingly, both the Ngs and the defendants had appealed against the Judge's decision that the parties' claims were not justiciable because the issue of title of a Thai property was a principal issue in both their claims.

43 The Ngs contended that the *Mocambique* rule did not apply in the present case since the Judge found that in view of variations made to the Agreement (see [48] below), they were not in breach of their contractual obligation to transfer good title. Accordingly, Hat should be ordered to make the final payment for Villa 2. In addition, they argued that even if this court was of the view that the *Mocambique* rule applied, the claim fell within the personal equities exception.

44 On the other hand, the defendants argued that for the purpose of deciding the main issue in their case, which was that the Ngs had breached their obligations under the Agreement, an issue governed by Singapore law, this court had merely to decide whether the One-Step process was effective in conveying good title to it, and not who has title to Villa 2 *per se*. It argued that based on the Ngs' case that Sarot was their agent in the transfer, issues of agency law related, at most, incidentally to title. Hence, they asserted that the *Mocambique* rule was inapplicable. [note: 5] In the alternative, they argued that even if the *Mocambique* principle applied, this case fell within the personal equities exception. [note: 6]

Whether the issue before the court can be framed in a way that did not offend the Mocambique principle

45 In a sense, this was an extraordinary case in that both parties, in their respective appeals, had argued that the Judge erred in her ruling that following the *Mocambique* principle, a Singapore court would not be competent to resolve the dispute as it would involve making a determination of title to foreign land and that the dispute did not fall within the personal equities exception to that rule. In our opinion, we did not think the present dispute between the parties would necessarily involve determining title to foreign land. In the following paragraphs we will explain why we had come to that view.

46 First and foremost, we would underscore the fact that on the evidence before the court, there was no dispute at all as to who was then *entitled* to the title to Villa 2. Hat is registered in the Phuket Land Office as the lessee of the land and the owner of Villa 2 (see [12] and [21] above). All the relevant parties, including the Ngs, Hat, Southern Land and Sarot, were in agreement that Hat was entitled to Villa 2, which stands on land already leased to Hat. Although registration under Thai law is not conclusive of legal ownership, the fact was that all third parties who could have a legal claim to Villa 2 had not demurred to Hat's entitlement. What was also undisputed was that Hat had enjoyed undisturbed *de facto* ownership rights and quiet possession of Villa 2 for the last 2½ years. The defendants' expert, Pitchitpon acknowledged that Southern Land accepted that Hat was the owner of Villa 2. [note: 7]

47 As it was common ground that Hat is entitled to the ownership of Villa 2, and even taking the defendant's case at its highest, which was that Southern Land was still the owner of Villa 2, it did not follow that the question of title to Villa 2 had to be determined by this Court. What seemed to have been overlooked by the Judge was the fact that as Southern Land did not dispute that Hat was entitled to Villa 2 (see [46]), what was needed to be done to regularise Hat's title to Villa 2, based on the position taken by Hat, was purely procedural. It would be wholly unnecessary for this Court to rule on title. On this premise, the focus of the inquiry would not be on whether the Ngs ever had title

to Villa 2 but *whether the Ngs had breached their contractual obligations to provide Hat with a good title to Villa 2*. Undoubtedly, there would be no reason why the Ngs should not be entitled to final payment if they had fulfilled all their outstanding obligations under the contract.

Whether the Ngs breached their contractual obligations to convey good title

48 The defendants' primary complaint was that as the Ngs never had title to Villa 2, they could not have conveyed good title in Villa 2 to Hat. If the terms of the Agreement had not been varied by consent, this would have been an irrefutable point. But this was not the case. Undoubtedly, under the Agreement as it originally stood, the Ngs were obliged to transfer their title to the lease of the land as well as Villa 2 to Hat. However, the parties subsequently varied this arrangement. The variation came about by the abrogation of the Ngs' 2001 Land Lease with Southern Land and the issuance by Southern Land of a fresh lease to Hat, which was reckoned from 2008. This arrangement, intended or otherwise, brought some additional benefits to Hat, as it accorded to Hat seven extra years of the lease of the land.

49 In our opinion, the Ngs' obligations under the Agreement would have to be viewed in the light of this variation. The abrogation of the Ngs' lease and the issuance of a new lease in Hat's favour effectively meant that thereafter the Ngs no longer had any rights to the Land and the superficies, including Villa 2. The title to the land and the right to superficies on the Land would, on the issue of the new lease, have vested in Hat. From that point onwards, it would be Hat, and not the Ngs, which would have any contractual relation with Southern Land.

50 The Judge held at [61] that, taking Hat's case at its highest, the only "missing step" (the "missing step") for Hat to acquire a good title to Villa 2 was for Southern Land to execute a standard form sale and purchase agreement with Hat and register the same with the Phuket Land Office. But the question to ask is, in the light of the Agreement as so varied, were the Ngs still obliged under the Agreement to ensure that the missing step was carried out? To this question, the Judge held that Hat should complete the missing step. She explained (at [63] of the GD):

> In my view, this obligation would fall squarely on Hat for the following reasons. Before entering into the 2008 Land Lease, it is clear that Hat was the driving force behind procuring the transfer of title to the Land and Villa 2, having sent out various e-mails seeking the relevant stakeholders to do the necessary. **Once the 2001 Lease was terminated (ie, on 7 March 2008), the Ngs no longer had any contractual nexus with Southern Land**. (There is no suggestion that Thai law is different from Singapore law.) It could not compel Southern Land to register title to Villa 2 in Hat's name… With the benefit of legal advice, Hat should or ought to have known that the implication of asking the Ngs to terminate the 2001 Lease and entering into a fresh lease with Southern Land (*ie*, the 2008 Land Lease) would have been that the Ngs were no longer in the position to ask Southern Land to register title to Villa 2 in Hat's name. Hat itself had recognised that it could ask Southern Land to transfer title to Villa 2 if the One-Step Process failed (see [14] above). [emphasis added]

51 The defendants argued that the Judge had erred in her finding that Hat was obliged to complete the missing step because: [note: 8]

(a) The driving force of the Agreement, as varied, was irrelevant and in any event Hat was not the driving force;

(b) The terms of the 2008 Land Lease did not require Southern Land to register a sale and purchase agreement with Hat in respect of Villa 2. Nor did they oblige Southern Land to transfer its title to Villa 2 to Hat. Hence, the contractual connection between Southern Land and Hat could not, and did not, affect the Ngs' obligations under the Agreement. By not completing the missing step, the Ngs had breached their contractual obligations;

(c) Hat did not realise that it could ask Southern Land to transfer title to Villa 2 if the One-Step Process failed; and

(d) the Ngs had a closer personal relationship with Southern Land when they entered into the Reservation contract, and would have been in a better position to secure the transfer.

52 In this connection, we would observe that the Agreement had expressly provided that it was governed by Singapore law and that the parties would submit to the exclusive jurisdiction of the Singapore courts. As the question, which now arose, namely, whether it should be the Ngs or Hat to complete the missing step, was not something which was expressly addressed in the Agreement, it was therefore for the Singapore courts to determine, *in view of the circumstances brought about by the variation*, on whom the duty to complete the missing step should fall. It would be recalled (see [50] above) that the Judge found that Hat was the driving force behind the variation. But even if we were to disregard this finding of the Judge, the fact remained, as stated in [49] above, that with the abrogation of the Ngs' 2001 Land Lease, the Ngs would *no longer have any contractual nexus with Southern Land* and they would have no basis to require Southern Land to transfer title to Villa 2 to Hat. While it is true that the 2008 Land Lease does not require Southern Land to register a sale and purchase agreement with Hat in relation to Villa 2, there could be no doubt that Hat, as the present lessee of the Land, as well as the *de facto* owner of Villa 2, was clearly in a better position than the Ngs to procure this transfer. On this, we agreed with the Judge (see [50] above).

53 We would, at this juncture, point out that the finding of the Judge that the driving force behind the variation was Hat was not without basis. In an e-mail dated 29 March 2008 which Samuel wrote to Bolliger the former stated that the "best scenario" was for Hat to take possession of Villa 2 as this would remove the Ngs from the scene and leave Hat and Southern Land to resolve any consequential problems. Samuel further added that he was "relaxed" because: (a) the Land was in Thailand; (b) Hat had title to the Land; (c) Hat had not paid the US$850,000 over to the Ngs; and (d) Southern Land was professional. Clearly, Hat was fully aware from the start that in the changed circumstances arising from the variation they would have had to deal with Southern Land if the One-Step Process, which involved a direct transfer of title to Villa 2 from Sarot to Hat, should fail.

54 Given the background as to how this dispute as to title of Villa 2 arose (see [31] above), we had considerable doubt as to the *bona fides* of the defendants in raising it. Hat is, after all, the registered owner of both the Land and Villa 2 and has enjoyed undisturbed registered ownership of the 2008 Land Lease and quiet possession of Villa 2 for the last 2 ½ years. Furthermore, Hat has been given the right of superficies to Villa 2 and as mentioned earlier (see [46] above), its expert witness, Pitchitpon, conceded that Southern Land recognised Hat's ownership of Villa 2 and gave it the most important attribute of a good title, namely the right to deal with Villa 2 in any way, including, extending it, demolishing it and *transferring it to another party without its consent*. Whatever the defendants had alleged about the Ngs' failure to give it a good title, it seemed to us clear that in truth, their real motive in concocting a dispute was its desire to secure *a 10% discount on the agreed price of Villa 2*. The defendants would have been contented to live with the situation had the Ngs

acceded to their desire to have the purchase price reduced. If Hat was not compelled to take steps to rectify what it alone claimed to be a defect of title, it could simply sit back and enjoy the benefits of *de facto* ownership of Villa 2 while depriving the Ngs of the final payment. Of course, the final payment was eventually ordered to be paid into court pursuant to an interim order (see [26] above).

55 To sum up, the Ngs had already done everything that they had been asked by the defendants and T&G to do, including providing an indemnity and accepting liability for breach of contract if Villa 2 was not delivered to Hat. Taking the defendants' case at its highest, that the legal title to Villa 2 still resided with Southern Land, for the reasons stated, Hat should be the party to procure the registration of the transfer of title to Villa 2 from Southern Land to itself. Its complaint that the Ngs had breached their contractual obligation to transfer a good title to Villa 2 is wholly without merit. The defendants took this stand for an ulterior motive, *ie*, to force the concession of a discount. In passing, we should add that for the purposes of these appeals, the Ngs had also raised other defences *eg*, waiver and estoppel, to resist Hat's assertion of a dispute. However, in view of our decision above on the basis of the construction of the contract, we shall say no more on these other defences.

Conclusion

56 For the reasons stated, the Ngs' appeal was allowed and the defendants' cross-appeal was dismissed. Accordingly, the Ngs were awarded costs of the appeals and of the trial below.

[note: 1] Section 1410 of the Thai Civil and Commercial Code.

[note: 2] Core Bundle at 237..

[note: 3] Defence and Counterclaim at para 11.

[note: 4] Transcripts of Evidence dated 1 October 2009 at p 81.

[note: 5] Cross-Appellant's Case ("CAC") at p 33, para 48.

[note: 6] CAC at p 18, para 36.

[note: 7] Transcripts of Evidence dated 28 September 2009 at p 158 and Transcripts of Evidence dated 30 September 2009 at p 33.

[note: 8] CAC at p 49 – 61, para 73 – 98.

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