IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2017] SGCA 47

Civil Appeal No 180 of 2016

Between

CHEONG KOK LEONG

… Appellant

And

CHEONG WOON WENG

… Respondent

In the matter of Suit No 1007 of 2015

Between

CHEONG WOON WENG

… Plaintiff

And

CHEONG KOK LEONG

… Defendant

GROUNDS OF DECISION

[Contract] — [Formalities]

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[Contract] — [Illegality and public policy]

[Land] — [Interest in land]

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Cheong Kok Leong
v
Cheong Woon Weng

[2017] SGCA 47

Court of Appeal — Civil Appeal No 180 of 2016
Andrew Phang Boon Leong JA, Judith Prakash JA and Steven Chong JA
2 August 2017

15 August 2017

Andrew Phang Boon Leong JA (delivering the grounds of decision of the court):

1 This was an appeal against the decision of the High Court judge ("the Judge") in *Cheong Woon Weng v Cheong Kok Leong* [2016] SGHC 263 ("the Judgment"). In essence, the Judge: (a) found that the Appellant held a private property registered in his name ("the Property") on trust for the Respondent in equal shares with the Appellant, pursuant to an oral agreement ("the Oral Agreement") and related written agreements between them; and (b) dismissed the Appellant's counterclaim for the return of monies that he had allegedly advanced to the Respondent. The Judge also found that a sum of $200,000, which the Appellant had received from the Respondent and applied to the purchase of the Property, was an investment (as claimed by the Respondent), and not a loan (as claimed by the Appellant). This entitled the Respondent to a half-share of the Property as a tenant-in-common, a half-share of the net rental

proceeds from the Property, and a half-share of the net sale proceeds of the Property.

2 After carefully considering the parties' submissions, we agreed wholly with the decision of, and the reasons given by, the Judge in the Judgment in granting the Respondent's claim for an interest in the Property as well as in dismissing the Appellant's counterclaim. We also rejected the new arguments raised by the Appellant on appeal, which were as follows:

(a) first, that there was no admissible evidence to establish the Respondent's alleged interest in the Property because the Oral Agreement was not evidenced in writing and a related written agreement titled "Collateral Agreement" had not been stamped;

(b) second, that the Oral Agreement was in any event void for illegality and/or breach of public policy because the Respondent had been the owner of a Housing and Development Board ("HDB") flat at the time when he entered into the Oral Agreement, and the Oral Agreement had accordingly been made to circumvent the prohibition on the concurrent ownership of private property and a HDB flat; and

(c) third, that the Collateral Agreement, which he had signed, was invalid because he had been labouring under a unilateral mistake as to its effect.

3 We therefore dismissed the appeal with costs. In these grounds of decision, we elaborate on why we rejected the *new* arguments that were raised by the Appellant on appeal.

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Admissibility of the Oral Agreement and the Collateral Agreement

4 Turning to the first new argument, the Appellant submitted that the Oral Agreement pursuant to which the Respondent had an interest in the Property was inadmissible under ss 6(*d*) and 7(2) of the Civil Law Act (Cap 43, 1999 Rev Ed) ("the CLA"). In addition, it was submitted that the Collateral Agreement was inadmissible because it was an instrument chargeable with stamp duty that had not been stamped under the Stamp Duties Act (Cap 312, 2006 Rev Ed) ("the SDA").

5 In our view, s 6(*d*) of the CLA ("s 6(*d*)") did not preclude the Respondent from bringing the present action on the Oral Agreement. The provision itself reads as follows:

> **Contracts which must be evidenced in writing**
>
> **6**. No action shall be brought against —
>
> …
>
> (*d*) any person upon any contract for the sale or other disposition of immovable property, or any interest in such property;
>
> …
>
> unless the promise or agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person lawfully authorised by him.

6 What s 6(*d*) regulates is a "contract for the *sale* or other *disposition* of immovable property, or any interest in such property" [emphasis added]. Given the fact that the Oral Agreement appeared to have been concluded even before the Appellant purchased the Property as well as the nature of (and the circumstances under which) this agreement had been concluded, there might have been a possible issue as to whether or not s 6(*d*) was applicable in the first

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place. However, it was unnecessary for us to decide this particular issue. Let us elaborate.

7 Even assuming that the Oral Agreement was a contract for the "sale or other disposition" of an interest in the Property within the meaning of s 6(*d*), this provision requires only that such a contract be *evidenced* in writing, while the contract itself need not be in writing. We agree with the observations in Tham Chee Ho and Goh Yihan, "Formalities and the Effect of Non-compliance" in *The Law of Contract in Singapore* (Academy Publishing, 2012) ch 8 at para 08.058, citing *Christina Lee (mw) v Eunice Lee (f) and Another* [1992] SGHC 32 (affirmed in *Lee Christina v Lee Eunice and another (executors of the estate of Lee Teck Soon, deceased)* [1993] 2 SLR(R) 644):

> In order to satisfy section 4 of the English Statute of Frauds 1677 [which corresponds with s 6(*d*)], it is clear that the contract itself need not be in writing. Mere written evidence of the contract in a memorandum (or series of memoranda) is sufficient. However, as a rule, the writing(s) relied on to satisfy the Act must contain *all* the terms of the parties' agreement. In the context of a contract for the sale or other disposition of immovable property or any interest in such property, the memorandum must specify the parties, the property, the price plus any other provisions. [emphasis in original]

In so far as the Oral Agreement was a contract for the "sale or other disposition" of an interest in the Property, we were of the view that the Collateral Agreement – which was signed by the Appellant and which specified the identity of the parties, the share of the Respondent in the Property, and the consideration paid by the Respondent for such a share – constituted a sufficient memorandum of the Oral Agreement for the purposes of s 6(*d*). We reproduce the terms of the Collateral Agreement, as follows:

> This acknowledgement is collateral to the memorandum of loan dated 28/7/2000 signed by Cheong Kok Leong [*ie*, the Appellant] in favour of Cheong Woon Weng [*ie*, the Respondent], whereby Cheong Kok Leong acknowledges a *contribution of*

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> *S$200,000 towards the purchase price of the Property* known as Blk 47 Hillview Avenue, #08-04 Hillington Green, Singapore (hereinafter called "the Property").
>
> *In consideration of the said contribution*, the parties hereto acknowledge that *Cheong Woon Weng has a share in the Property* in the proportion of the amount of the contribution vis-à-vis the purchase price of $880,440.00.
>
> In the event that the Property is sold, *Cheong Woon Weng shall be entitled to half a share in the net profits* (ie profits less taxes, interest, reasonable expenses etc), or loss, as the case may be.
>
> Cheong Kok Leong shall not sell the property unless Cheong Woon Weng has agreed, in writing that he agrees with the sale at the price agreed.
>
> This share in the Property is not in addition to Cheong Woon Weng's right to repayment of his contribution towards the purchase price.
>
> Dated this the 28 day of July 2000
>
> ---
>
> *Signed by Cheong Kok Leong*
>
> ---
>
> *Signed by Cheong Woon Weng*
>
> [emphasis added]

8 In any event, equity allows a valid contract to be enforced by a party who has partly performed it, and s 6(*d*) did not abolish this doctrine of part performance in relation to contracts in respect of land (see the decision of this court in *Joseph Mathew and another v Singh Chiranjeev and another* [2010] 1 SLR 338 at [61] and [63]). The Respondent had in fact partly performed the Oral Agreement by advancing $200,000 to the Appellant and could therefore enforce it.

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9 Accordingly, s 6(*d*) did *not* prevent the Respondent from enforcing the Oral Agreement.

10 We turn now to s 7(2) of the CLA ("s 7(2)"), which requires that a disposition of an equitable interest or trust subsisting at the time of the disposition "itself must be in writing, not merely evidenced by signed writing" (see the recent Singapore High Court decision of *Tan Kim Heng v Tan Kim Li* [2017] SGHC 177 ("*Tan Kim Heng*") at [38] citing Tan Sook Yee, Tang Hang Wu & Kelvin FK Low, *Tan Sook Yee's Principles of Singapore Land Law* (LexisNexis, 3rd Ed, 2009) ("*Tan Sook Yee*") at para 5.9). Section 7 of the CLA reads as follows:

> **Trusts respecting immovable property and disposition of equitable interest**
>
> **7**.—(1) A declaration of trust respecting any immovable property or any interest in such property must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will.
>
> (2) A disposition of an equitable interest or trust subsisting at the time of the disposition must be in writing signed by the person disposing of the same or by his agent lawfully authorised in writing or by will.
>
> (3) This section does not affect the creation or operation of resulting, implied or constructive trusts.

11 Given the nature of (as well as the circumstances under which) the Oral Agreement had been concluded, there might have been a possible issue as to whether or not s 7(2) was applicable in the first place. However, it was unnecessary for us to decide this particular issue. Let us elaborate.

12 It is clear that s 7(2) "does not affect the creation or operation of resulting, implied or constructive trusts" (see s 7(3) of the CLA ("s 7(3)")). Although the Judge made no mention of the type of trust on which the Appellant

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held the Property for the Respondent, based on the totality of the evidence, we were of the view that a constructive trust had arisen by virtue of the common intention of the parties, which intention the Respondent had relied upon in advancing the sum of $200,000 to the Appellant (see the decision of this court in *Chan Yuen Lan v See Fong Mun* [2014] 3 SLR 1048 at [97] citing the decision (also) of this court in *Tan Thiam Loke v Woon Swee Kheng Christina* [1991] 2 SLR(R) 595 at [18]). Alternatively, a constructive trust could also have arisen by virtue of the fact that the Property was a joint venture acquisition pursuant to the Oral Agreement, which contemplated that the Appellant would take steps to acquire the Property and that if he did so, the Respondent would acquire an interest in the Property (see *Tan Sook Yee* at paras 7.52–7.54, citing the Singapore High Court decision of *Ong Heng Chuan and another v Ong Boon Chuan and another* [2003] 2 SLR(R) 469, which endorsed the applicability of the English High Court decision of *Pallant v Morgan* [1952] Ch 43 in Singapore). In this regard, we noted that the Appellant denied only that a resulting trust had arisen in light of the written document titled "Memorandum of Loan" that described the $200,000 advancement as a "loan", and had made no submission that a constructive trust could not have arisen. Accordingly, s 7(3) entitled the Respondent to enforce the trust created by the Oral Agreement notwithstanding any lack of writing signed by the Appellant.

13 In any event, as observed by Sundaresh Menon JC (as he then was) in the Singapore High Court decision of *Re Estate of Tan Kow Qwee (alias Tan Kow Kwee)* [2007] 2 SLR(R) 417 at [15] (which was followed by the Singapore High Court in *Tan Kim Heng* at [40]), equity will not allow s 7(2) to be used as an instrument of fraud, and to mitigate the rigour of the requirement of writing, the courts have invariably taken a pragmatic approach in recognising the applicability of the doctrine of part performance. Given the advancement of

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$200,000 by the Respondent, which advancement the Appellant accepted pursuant to the Oral Agreement, equity operated, in our view, to enforce the trust that had been created in favour of the Respondent.

14 Accordingly, we found that the Oral Agreement was admissible to prove, and did in fact establish, the Respondent's interest in the Property. As a result, there was no need for us to consider the argument by the Appellant that the Collateral Agreement could not be admitted as evidence because it was an instrument chargeable with stamp duty that had not been stamped pursuant to ss 52(1) and 4 read with paras 3 and 4 of the First Schedule of the SDA. Nevertheless, and in any event, s 52(2) of the SDA provides for an unstamped instrument chargeable with stamp duty to "be admitted in evidence on payment of the duty and the penalty, if any, chargeable in respect thereof". Hence, once the requisite stamp duty (and any applicable penalty) has been paid on the Collateral Agreement, it would become admissible. The Appellant offered no reason to the contrary, beyond a mere assertion that the payment of the stamp duty "has not been done to-date, and the Court should not allow the Respondent to circumvent the statute". Given the belatedness with which the Appellant took the objection as to the admissibility of the Collateral Agreement, we would have been minded to give the Respondent an opportunity to make good any deficiency in the stamping of the Collateral Agreement. But in light of our finding that the Oral Agreement sufficed to establish the Respondent's interest in the Property, there was no need to so.

Illegality

15 Turning next to the issue of alleged illegality, the Appellant took the position in this regard that the Oral Agreement as well as the Collateral Agreement were void and unenforceable for illegality because: (a) they had

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been "entered into with the illegal object of circumventing HDB's concurrent ownership prohibition"; (b) the Respondent "[could not] establish title to the Property without relying on his illegality"; and (c) further or in the alternative, "it [was] a proportionate response to declare both agreements void and unenforceable".

16 We were unable to accept these arguments. Let us elaborate.

17 The only express restriction on the concurrent ownership of a HDB flat and private property ("Concurrent Ownership") is found in s 47 of the Housing and Development Act (Cap 129, 2004 Rev Ed) ("the HDA"), which restricts the entitlement of a person who has an (existing or recent) interest in private property to subsequently purchase a HDB flat. However, as Steven Chong J (as he then was) observed in the Singapore High Court decision of *Teo Ai Hua (alias Teo Jimmy) and another v Teo Mui* [2011] 3 SLR 935 ("*Teo Ai Hua*") at [27], which decision was affirmed by the Court of Appeal, s 47(1) of the HDA "does not expressly provide that it is illegal for an HDB flat owner to own a share in a private property". We set out s 47 of the HDA, as follows:

> **Restrictions as to purchase**
>
> **47**.—(1) No person shall be *entitled* to purchase ***any*** *flat, house or other living accommodation sold subject to the provisions of this Part* if such person, his spouse or any authorised occupier —
>
> (*a*) is the owner of any ***other*** *flat, house, building or land* or has an estate or interest therein; or
>
> (*b*) has, at any time within 30 months immediately prior to the date of making an application to the Board to purchase the same, or between the date of such application and the date of completion of the purchase of the flat, house or other living accommodation, sold any flat, house, building or land of which he was the owner, or divested himself of any interest therein.

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> …
>
> (2A) The Board shall on discovery of such a purchase —
>
> > (*a*) serve a written notice upon the *purchaser of* ***the*** *flat, house or other living accommodation* of its intention to lodge with the Registrar of Deeds or the Registrar of Titles, as the case may be, an instrument under subsection (3) for the *vesting in the Board of the title to or the estate or interest in* ***that*** *flat, house or other living accommodation*; or
>
> …
>
> [emphasis added in italics and bold italics]

18 The Appellant framed his arguments with respect to the alleged illegality of Concurrent Ownership by claiming that the Respondent had "prevent[ed] HDB from exercising its discretion to compulsorily acquire a HDB flat owned by a person who has acquired another property" under s 56(1)(*b*) of the HDA because he had "conceal[ed] his ownership [of the Property] by way of a beneficial interest in an unstamped agreement". Section 56(1)(*b*) of the HDA itself reads as follows:

> **Board may compulsorily acquire property sold subject to the provisions of this Part**
>
> **56**.—(1) The Board may compulsorily acquire any *flat, house or other living accommodation sold subject to the provisions of this Part*, whether before or after 2nd June 1975 —
>
> > …
> >
> > (*b*) if the owner thereof, his spouse or any authorised occupier has at any time, whether before or after 2nd June 1975, acquired whether by operation of law or otherwise any title to or an estate or interest in any other flat, house or building or land;
> >
> > …
>
> [emphasis added]

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19 It is difficult to see how the act of merely complicating the efforts of the HDB to compulsorily acquire a HDB flat owned by a person who has subsequently acquired another private property can be illegal. The HDA does not prohibit an (existing) owner of a HDB flat from subsequently acquiring an interest in a private property. Rather, an individual who owns or acquires an interest in a private property is, under the HDA (and the relevant rules made thereunder), constrained only in his ability thereafter to purchase or retain his interest *in a HDB flat*. In other words, the illegality in Concurrent Ownership (if any) attaches not to the ownership of the private property but to the subsequent acquisition or retention of the interest in the HDB flat. This conclusion is reinforced by the scope of the powers of the HDB under ss 47 and 56 of the HDA. Under ss 47(3) and 56(1), respectively, of the HDA, the powers of the HDB in situations of Concurrent Ownership are limited to the *vesting in itself* or *compulsorily acquiring* the HDB flat that has been acquired or retained by the individual. At no time do the powers of the HDB extend to the private property as well. Further, we were of the view that the position on the legality or illegality of Concurrent Ownership should be the same, regardless of the sequence in which the HDB flat and the private property was acquired. As a matter of principle, whether or not a contract is held to be unenforceable on the ground that it is illegal or contrary to public policy should not depend on the characterisation of the illegality (see the decision of this court in *Ting Siew May v Boon Lay Choo and another* [2014] 3 SLR 609 ("*Ting Siew May*") at [31]).

20 In any event, there was no need for the Respondent to rely on his ownership of the HDB flat to enforce the trust in his favour with respect to the Property against the Appellant. Even if it was illegal for the Respondent to retain his HDB flat when he acquired his interest in the Property, there was no illegality with respect to the Property. The trust in his favour in relation to the

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Property arose from the parties' common intention (see [12] above). It followed that the alleged illegality did not preclude the declaration of the trust in favour of the Respondent.

21 It also bears mention that the Respondent was seeking to enforce his claim in respect of the Property and not his HDB flat. His purpose in registering the Appellant as the sole owner of the Property was distinct from the parties' common intention for him to have a half-share of the Property. Consequently, the trust arising from such common intention and which grounded the Respondent's cause of action remained untainted by the illegality.

22 In this regard, we agree with and endorse the observations in *Teo Ai Hua* at [33], where Chong J rejected an argument by the defendant that the retention by the second plaintiff of an interest in a private property after he had purchased a build-to-order ("BTO") HDB flat was void for illegality:

> … *once the second plaintiff acquired a beneficial interest in the [private] Property, he is not eligible to hold any interest in his BTO flat.* However, that is not the issue before me in this case. The resulting trust in this case is with respect to the Property, and not the second plaintiff's BTO flat. Hence, it follows that the resulting trust arising in favour of the second plaintiff is neither illegal nor contrary to the policy considerations of the HDA. [emphasis added]

23 Finally, we rejected any implication of *common law* illegality in so far as the Appellant suggested that the parties had entered into the Oral Agreement with the intention of committing an illegal act (see generally *Ting Siew May*). This was not pleaded by the Appellant. Moreover, there was no evidence before us of such an intention to begin with.

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Unilateral mistake

24 Given our affirmation of the findings of the Judge as to the existence and effect of the Oral Agreement, the question as to whether the Appellant had been labouring under a unilateral mistake as to the effect of the Collateral Agreement did not arise for decision.

Conclusion

25 For the reasons set out above, we dismissed the appeal with costs and with the usual consequential orders.

Andrew Phang Boon Leong Judge of Appeal	Judith Prakash Judge of Appeal	Steven Chong Judge of Appeal

Paul Tan, Daniel Gaw and David Isidore Tan (Rajah & Tann Singapore LLP) for the appellant;
Loh Kia Meng and Quek Ling Yi (Dentons Rodyk & Davidson LLP) for the respondent.

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