

IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1992] SGCA 19

CA 89/1990

Between

Wong Fook Heng

... Appellant

And

Amixco Asia Pte Ltd

... Respondent

GROUND OF DECISION

Bills of Exchange and Other Negotiable Instruments — Cheques; Contract —
Consideration — Sufficiency of consideration

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Wong Fook Heng v Amixco Asia Pte Ltd

[1992] SGCA 19

CA 89/1990

Warren Khoo L H J; Lai Kew Chai J; Yong Pung How CJ

24 March 1992

1 This is an appeal by the appellant against the decision of AP Rajah J, denying him judgment in his action against the respondents on a dishonoured cheque for the sum of \$20,000. The facts of the case are as follows.

2 On 29 May 1981 the appellant, Wong Fook Heng, and three others granted the respondents, Amixco Asia Pte Ltd, an option to purchase certain office premises, namely, unit Nos 901-904, International Plaza (hereinafter `the properties`). The option was to expire at 4pm on 5 June 1981. The appellant owned unit 903 of the properties; his brother, Wong Dong, owned unit 901; his other brother, Wong Yoong Lee, owned unit 904; and his nephew, Wong Soh Har, owned unit 902. These three others were at no time parties to these proceedings. The appellant testified that the other three owners had given him the fullest authority and had entrusted him with the responsibility of selling their properties. All four properties were to be sold jointly in a single transaction. It was the appellant's role to find a buyer. The other three owners would channel all inquiries regarding their properties to him.

3 On 30 May 1981 the respondents drew a Banque Nationale de Paris cheque for \$20,000 dated 30 May 1981 in favour of the appellant. The cheque was given to the appellant in payment of the option money. He banked the cheque with the Bank of America to open a fixed deposit account.

4 On 1 June 1981 the appellant was informed by the Bank of America over the phone that the cheque he had received from the respondents would be dishonoured as the respondents had stopped payment.

5 On 2 June 1981 the appellant received a note from the Bank of America informing him that payment on the cheque had been countermanded by the respondents. Quek Chek Lan, the managing director of the respondents ('DW1'), testified that he had stopped the cheque because he became suspicious after he was informed by his colleague, Wong Soo Chong ('DW2'), that he (DW2) had received an 'offer of sale' in respect of the properties which the respondents had earlier been granted an option to purchase. DW2 was also a director of the respondents. On further questioning by counsel for the plaintiff/appellant, DW1 admitted that no second option had yet been granted in respect of the said properties at the time he stopped the cheque. This is confirmed by DW2 who stated that the cheque was stopped 'one or two days' before an option in respect of the properties was actually granted to him by the four property owners, including the appellant. On receipt of the note from his bank, the appellant consulted his solicitors and was advised that he could start anew in looking for potential buyers.

6 At this point, there is some slight confusion as to the facts. The appellant stated that on the night of 2 June or the morning of 3 June 1981, he received a phone call from callers interested in buying the properties. To the best of his memory, the appellant subsequently granted a second option in respect of the

said properties on 3 June 1981. This is disputed by DW2 who eventually signed the acceptance copy of the second option. DW2 stated that if he remembered correctly, he gave his property agent the option money of \$20,000 on 2 May or 2 June 1981, and in the late afternoon of the same day, he was given the option. He could not remember which month it was (May or June), but he remembered that 'it happened on the same day'. However, on further questioning by counsel for the plaintiff/appellant, DW2 admitted that it could have been 2 June or 3 June 1981; he could not remember. The actual agreement for the second option was in fact dated 2 June 1981. DW2 eventually exercised his option and the properties were transferred to him.

7 On 4 June 1981 the respondents' solicitors sent the appellant's solicitors a letter seeking to proceed with the purchase of the properties. A fresh cheque for \$20,000 drawn by the respondents in favour of the appellant was enclosed as option money. By letter of even date, the appellant's solicitors returned the cheque to the respondents' solicitors.

8 On 5 June 1981 the respondents sent a cashier's order for \$195,367.63, seeking to exercise the option granted to them on 29 May 1981. The appellant rejected this move.

9 In the present proceedings the appellant's main contention is that there were, at all material times, two separate and distinct contracts in existence involving different parties. The first contract was the cheque contract between the appellant and the respondents. The second contract was the option contract between the respondents and the four property owners, ie Wong Dong, Wong Yoong Lee, Wong Soh Har and the appellant himself. Various authorities were cited to this court in support of the proposition that the giving and taking of a bill of exchange, such as a cheque, creates another contract separate from and

additional to the original underlying contract. The cases relied on by the appellant include **Pollway v Abdullah** [1974] 1 WLR 493[1974] 2 All ER 381 **Glennie v Imri** [] 160 ER 773 and **James Lamont & Co Ltd v Hyland Ltd** [1950] 1 KB 585 These authorities are said to support the general rule in law that he who has given a bill of exchange cannot escape liability on the bill simply because something has gone amiss with the original underlying contract.

10 The appellant submits that the following constituted good consideration on his part for the cheque contract: his acceptance of the cheque in lieu of cash which he was legally entitled to demand; his warranty as to his ability to sell the properties in question; and his forbearance from dealing with the said properties at least for the several days prior to the dishonouring of the cheque.

11 As far as the option contract is concerned, the appellant submits that the option contract never came into existence because the respondents gave no consideration for it: a dishonoured cheque, the appellant says, is not good consideration. Even if the option contract did exist, the appellant claims that it was repudiated by the respondents when they stopped the cheque before the four property owners had granted any other option on the same properties.

12 For the respondents, it was contended that their cheque for \$20,000 dated 30 May 1981 was given to the appellant in the consideration that the four property owners, including the appellant, would keep the properties open till 4pm on 5 June 1981. The respondents claimed that the four property owners, including the appellant, granted the second option the very day the cheque was dishonoured, ie during a period when the first option, granted to the respondents on 29 May 1981, was still subsisting. They claimed that in so doing, the appellant repudiated the option contract between the respondents and the four property owners, including the appellant himself. He is thus in no position now

to ask for the option money on behalf of the other property owners because, so the respondents contended, this would amount to asking for the affirmation of a contract which could no longer be performed.

13 We agree with counsel for the appellant on his submissions on the applicable law. It is the general rule that a bill of exchange evidences a contract separate and distinct from the original and underlying contract in pursuance of which the bill is executed. It does not depend for its enforcement on the performance of the original contract. A bill of exchange, once given, is to be treated as cash and `is to be honoured unless there is some good reason to the contrary` (per Lord Denning MR in *Fielding & Platt Ltd v Selim Najjar* .4 Such would appear to be the general proposition to be gleaned from the case law in this area, notably *Glennie v Imri* [] 160 ER 773 *James Lamont & Co Ltd v Hyland Ltd* [1950] 1 KB 585 *Fielding & Platt Ltd v Selim Najjar* [1969] 1 WLR 357[1969] 2 All ER 150 *Montecchi v Shimco* [1980] 1 Lloyd`s Rep 50 and also the decision of the House of Lords in *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH*. [1977] 1 WLR 713[1977] 2 All ER 463 The judgments of Lord Wilberforce and Lord Russell in the last-named case are especially helpful. In that case, it was held by the Law Lords, inter alia, that a claim for unliquidated damages under a contract for sale was no defence to a claim under a bill of exchange accepted by the purchaser, nor was it available as a set-off or counterclaim. Lord Wilberforce, in his judgment at p 716, states clearly that `the contract sued on (the acceptance of the bills) is a separate contract from that of the sale of the machine`; consequently, unliquidated cross-claims in respect of the contract of sale of the machines could not be relied on by way of set-off against a claim on the bills. Lord Russell, too, in his judgment, at p 720, says:

A vendor and purchaser who agree upon payment by acceptance of bills of exchange do so not simply upon the basis that credit is given to the purchase so that the vendor must in due course sue for the price under the contract of sale. The bill is itself a contract separate from the contract of sale. Its purpose is not merely to serve as a negotiable instrument, it is also to avoid postponement of the purchaser's liability to the vendor himself, a postponement grounded upon some allegation of failure in some respect by the vendor under the underlying contract, unless it be total or quantified partial failure of consideration.

14 Within Singapore, too, it was held by Goh Phai Cheng JC in **Yeo Hiap Seng v Australian Food Corp Pte Ltd & Anor** [1991] 3 MLJ 144 that the counterclaim raised by the defendants in that case did not relate to the plaintiff's claim on the dishonoured cheque, but was a separate action altogether; therefore the facts alleged by the defendants were irrelevant to the issue before the court.

15 The rule that a bill of exchange contract is distinct from the original and underlying contract is therefore well established in law. Moreover, there is in none of the relevant cases any suggestion that this rule is restricted in its operation to contracts involving the sale of goods only, as counsel for the respondents appeared to be saying at one stage.

16 That being the case, the only real question before us is the question of consideration where the cheque contract between the appellant and the respondents is concerned: did the appellant give good consideration for the cheque or was there a total failure of consideration which would give the respondents a valid defence to this action on the cheque?

17 Before us, counsel for the respondents contended that there was a total failure of consideration for the cheque contract. This failure is said by counsel to have occurred when a second option on the properties was granted to DW2, thereby rescinding the first option contract then in existence between the

appellant and the respondents, and thereby destroying whatever consideration the appellant had given the respondents for the respondents' cheque.

18 The above argument, however, assumes that the only consideration the appellant had given the respondents for the cheque was the promise to keep the offer to sell open until 4pm, 5 June 1981. However, the appellant's submission was that he had provided good consideration for the cheque in the form of the following: (i) his acceptance of the cheque in lieu of cash; (ii) his warranty as to his ability to sell the properties; (iii) his forbearance from dealing with the properties at least for the period until the moment the cheque was dishonoured. The respondents' defence therefore really touches only on (iii). Where (iii) is concerned, the court does not accept that such forbearance can be said to constitute good consideration for the respondents' cheque. Any promise that was made in respect of the properties must have been a promise to keep them open for sale to the respondents up till 5 June 1981. The respondents can hardly have been contented with forbearance lasting only a portion of the actual stated option period.

19 In any case, it is not at all clear that (iii) is in fact relevant to the cheque contract between the appellant and the respondents, since the promise not to deal with the properties during the option period would have been made by all four property owners together and not by the appellant alone, ie any forbearance from dealing with the properties would have been forbearance by all four property owners. Even if we say the promise to forbear was given as consideration for the cheque, it was consideration that moved from all four property owners acting in unison and not from the appellant acting alone. Therefore it is doubtful whether what forbearance there was may be said to be consideration in respect of the cheque contract which was between the appellant alone and the respondents.

20 Putting aside (iii), the respondents would still have to show that (i) and (ii) cannot be said to constitute good consideration for their cheque. After all, the onus of proving lack of consideration in an action on a bill of exchange falls on the adverse party since, unlike most simple contracts, for a bill of exchange contract it is not necessary to aver consideration for any engagement on the bill or to prove the existence of such consideration (*Byles on Bills of Exchange* (26th Ed) p 243).

21 The respondents claim that (i) cannot be good consideration for their cheque because the appellant could not have realistically expected that the respondents would hand him \$20,000 in cash anyway. The view that acceptance of a cheque in lieu of cash may form good consideration for the cheque was suggested by Buckley LJ in **Pollway v Abdullah** [1974] 1 WLR 493[1974] 2 All ER 381 but the English Court of Appeal did not find it necessary to decide the issue in that case. This court does not find it necessary either in the present case to decide the status of (i) as valid consideration for a cheque.

22 The respondents appear to have avoided grappling directly with (ii). This is unfortunate in view of the similarity of many of the facts in the present case to those found in **Pollway v Abdullah** [1974] 1 WLR 493[1974] 2 All ER 381 a case cited to us by both counsel. In that case there were three different parties involved: the vendors, the purchaser and the auctioneers. The auctioneers acted as agents for the vendors in receiving from the purchaser the cheque naming them (the auctioneers) as payees. Roskill LJ (with whose judgment both Buckley and Megaw LJJ agreed) was inclined towards the view that the consideration provided by the auctioneers for the cheque consisted in their warranting to the purchaser their authority to sign the memorandum of sale on the vendors` behalf and to receive the cheque payable to themselves as named payees in diminution of the purchaser`s obligation to pay the full amount of the

purchase price to the vendors (at p 497). There was therefore a valid cheque contract between the purchaser and the auctioneers which was separate and distinct from the contract for the sale of land between the purchaser and the vendors. The fact that the vendors had rescinded the contract of sale following the dishonouring of the cheque thus did not affect the consideration the auctioneers had provided in respect of the cheque contract between the purchaser and themselves.

23 Bearing the authority of **Pollway v Abdullah** [1974] 1 WLR 493[1974] 2 All ER 381 in mind, we find the following facts of the present case to be relevant: that the four properties to be sold were always intended to be sold jointly in a single transaction; that the other three property owners had authorized the appellant to act on their behalf in the sale of the properties; that the cheque for \$20,000 was drawn in favour of the appellant alone but that he testified that he would have had to account to the other three property owners for their respective shares of this option money; that the option agreement given to the respondents was signed by all four property owners. Counsel for the appellant has submitted before us today that the appellant's warranty to the respondents in accepting their cheque was that he, the appellant, was authorized to offer to sell them all four properties in question and to receive the cheque payable to himself as named payee in diminution of the respondents' obligation to pay the full amount of the purchase price upon exercise of the option. As we have just noted, such a warranty was regarded by Roskill LJ in **Pollway v Abdullah** [1974] 1 WLR 493[1974] 2 All ER 381 to be good consideration for a cheque; and the cheque contract being distinct from the underlying option contract, this warranty need not have been affected by subsequent repudiation of the option contract. In any case, consideration need not be equal or

appropriate to the value of the other promise: see, for example, **Westlake v Adams** [1858] 5 CB 248 **Haigh v Brooks** [1839] 10 Ad & E 309 etc.

24 Accordingly, we held that in this case the appeal be allowed and the decision of AP Rajah J be set aside. There will be judgment for the appellant on his claim for the sum of \$20,000, plus interest to be calculated at 8% from the date of the writ of summons (2 July 1981) to the date of this judgment (21 November 1991). The appellant will have his costs both here and below. Deposits to be returned to the appellant`s solicitors.

25 **Outcome:**

Warren Khoo L H J
Lai Kew Chai J
Yong Pung How CJ

R Doraisamy (Cooma Lau & Loh) for the appellant/plaintiff
S Rai (Hin Rai & Tan) for the respondents/defendants
