IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1992] SGCA 46

CA 67/1990, 120/1990

Between

Thomson Hill Pte Ltd

… *Appellant*

And

Chang Erh and Another and Another Appeal

… *Respondent*

GROUNDS OF DECISION

Land — Conveyance

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Thomson Hill Pte Ltd v Chang Erh and Another and Another Appeal

[1992] SGCA 46

CA 67/1990, 120/1990
Chao Hick Tin J; Chua F A J; L P Thean J
06 July 1992

1 Cur Adv Vult

2 Both these appeals raise an identical legal point, which is, who should bear the loss in the event that the stakeholder under a contract of sale and purchase of immovable property misappropriates the funds and subsequently becomes a bankrupt. Thus we heard them together.

3 The contract of sale and purchase in both instances followed the standard terms prescribed under the Housing Developers Rules 1976, which Rules were in turn made by the Minister pursuant to powers conferred upon him under the Housing Developers (Control and Licensing) Act (Cap 130). In both cases the appellants are the vendors, who are housing developers.

4 The relevant clause under the contract is cl 3(1)(i) which reads as follows:

> *The purchase price shall be paid by the purchaser to the vendor by the instalment and at the times following, that is to say:*
>
> *...*

> (i) on completion of the sale and purchase of the housing unit as provided in cl 14 hereof, the balance of thirty (30) per cent of the purchase price, twenty (20) per cent of which shall be paid forthwith to the vendor and the remaining ten (10) per cent shall be paid to the purchaser`s solicitors as stakeholders, five (5) per cent of which shall be paid to the vendor within seven (7) days of the receipt by the purchaser or his solicitors of the certificate of fitness for occupation issued by the assistant director in respect of the housing unit or a photographic copy thereof duly certified as a true copy of the vendor`s solicitors and the remaining five (5) per cent or any balance thereof (after any deduction has been made in accordance with cl 19 hereof) to be paid to the vendor on the expiry of six (6) months after the date of delivery of vacant possession to purchaser or the date of the issue of the certificate of fitness for occupation, whichever is the earlier.

5 We think that for completeness we will set out the terms of cl 19(1) as well:

> *Any defect, shrinkage or other faults in the housing unit and in the building project and all the common property thereto which shall become apparent within a period of six (6) calendar months after the date of delivery of vacant possession to the purchaser or after the date of issue of the said certificate of fitness for occupation (whichever shall be the earlier) and which shall be due to defective workmanship or materials or to the housing unit and the building project and all common property thereto not having been constructed in accordance with the said specifications and plans (amended or unamended, as the case may be) shall be made good by the vendor at its own cost and expense within one calendar month of its having received written notice thereof from the purchaser and if the said defects, shrinkage or other faults are not made by the vendor as aforesaid the purchaser and the management corporation of the building project shall be entitled to recover from the vendor the costs of making good the same and the purchaser may deduct such costs from any sum which has been held by the purchaser`s solicitors as stakeholder for the vendor:*

6 Provided that the purchaser shall at any time after the expiry of the said period of one month notify the vendor of the cost of carrying out any works to make good the said defects, shrinkage and other faults before the commencement of the works and shall give the vendor an opportunity to carry

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out the works himself within fourteen days from the date the purchaser has notified the vendor of his intention to carry out the said works.

7 But we should add that nothing in the present appeals turns on cl 19. The sums which were misappropriated by the solicitor-stakeholder were the first mentioned 5% in cl 3(1)(i).

8 The same law firm acted for the purchasers in both cases. It was Messrs Philip Wong & Co, of which one Philip Wong Kai Chuen was the sole proprietor. Philip Wong is now a bankrupt and is serving a jail term following his conviction on two charges of criminal breaches of trust of clients` money.

9 As far as we can see, the only real factual difference between the two cases is that in one (Civil Appeal No 67 of 1990), the certificate of fitness was only issued by the competent authority after the solicitor-stakeholder was adjudicated a bankrupt, and in the other (Civil Appeal No 120 of 1990), the certificate was issued well before the solicitor-stakeholder was so adjudicated a bankrupt. However, we do not think that this difference is material to the question which is before us. The crucial fact is that when the time came for the solicitor-stakeholder to make the payment of the first-mentioned 5% to the vendors, he was unable to do so.

10 One of the earlier cases most frequently cited to have dealt with this question is **Rowe v May.** [1854] 52 ER 241 There a mortgagor contracted to sell a property and one of the conditions was that the purchaser should pay a deposit to the auctioneer. The mortgagee subsequently agreed and adopted the contract. The auctioneer later became insolvent. It was held that the vendor, and thus the mortgagee, must bear the loss. The reasons given by John Romilly MR in the report are brief and they are as follows:

> *When a purchaser pays a deposit on his purchase money to the auctioneer, and it is lost, on whom does the loss fall? If the matter goes off because the vendor cannot make a good title, it is the vendor`s duty to repay the deposit and the loss occassioned by the non-completion; and in case an action were brought against him for breach of the contract, the amount of deposit not repaid would be part of his loss, and the purchaser would be entitled to add it to the damages; so if the contract be completed and the deposit cannot be recovered from the auctioneer, who for this purpose is the agent of the vendor, it will be the vendor`s loss and not that of the purchaser.*

11 It would appear that the court`s decision in **Rowe v May** [1854] 52 ER 241 was based on the fact that the auctioneer was the agent of the vendor; and not on the basis that the auctioneer was a stakeholder. We would, however, observe that there is an established presumption, in the absence of an express agreement, that an auctioneer holds a deposit as a stakeholder: see **Harington v Hoggart** [1830] 1 B & Ad 577 and **Furtado v Lumley.** [1890] 6 TLR 168 Be that as it may, the decision in **Rowe v May** [1854] 52 ER 241 may not be faulted on the facts, because even if the more correct approach there would be to treat the auctioneer as a stakeholder, the result in the case would still be the same.

12 The case which confronted the problem head-on is the Australian case of **Grant v O`Leary,** [1955] 93 CLR 587 where the question was whether the purchasers or the vendors should bear the loss of a sum of o989 18s 10d placed under the terms of the contract of sale and purchase in the hands of an agent as stakeholder pending the completion of the contract, and which sum of money disappeared while in the hands of the stakeholder. The contract in question was in a standard form provided by the agents who were described as agents for the vendors. The contract was signed by the agents subject to the vendor`s ratification. At the end of the contract document was a form of ratification which the vendors in fact indorsed. The purchaser sued for specific performance on tendering the remaining purchase price after subtracting the sum paid to the

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agents. He succeeded. The High Court of Australia held that `the correctness of the decisions ... depends on the question whether under the contract the purchasers had performed all the conditions precedent entitling them to a transfer of the land`. The court rejected the contention that on the terms of the contract the vendors came under no obligation to transfer the property until the amount placed in the hands of the agents was actually paid over to the vendors. The court agreed that the agents were entrusted with the money to hold on behalf of the persons to the contract pending performance of the contract. Only in the event of the contract going off would the purchasers be entitled to the money from the stakeholder. If the contract was performed, the vendors would become entitled to the money to the exclusion of the purchasers. The court held that:

> *Except in the event of the vendors becoming disentitled to receive it, the purchasers have parted with it beyond recall. In the events which have happened the vendors alone have any remedy against (the agents) ... There is no term of the contract forming a condition precedent to the obligation of the vendors to make a transfer which the purchasers have not performed. By paying the sum amounting to o989 18s 10d into the hands of (the agents) and afterwards by offering to tender the balance of purchase money they have performed the conditions on their part to be observed and performed.*

13 In **Burt v Claude Cousins & Co Ltd & Anor** [1971] 2 QB 426 Lord Denning MR, in his dissenting judgment, explained in this way the liability of an estate agent or solicitor receiving a deposit as a stakeholder [at pp 435-436]:

> *If an estate agent or solicitor, being duly authorized in that behalf, receives a deposit `as stakeholder`, he is under a duty to hold it in medio pending the outcome of a future event. He does not hold it as agent for the vendor, nor as agent for the purchaser. He holds it as trustee for both to await the event: see* ***Skinner v Trustee of Property of Reed (a Bankrupt)*** *[1967] 2 All ER 1286 at 1289, per Cross J. Until the event is known, it is his duty to keep it in his own hands; or to put it on deposit at the bank: in which case he is entitled to keep for himself any interest that accrues to it; see* ***Harington v Hoggart*** *[(1830) 1 B & Ad 577]. If the purchaser should become entitled to the return of his deposit, he must sue the estate agent or solicitor for it; see*

> ***Eltham v Kingsman*** *(1818) 1 B & Ald 683;* ***Hampden v Walsh*** *(1876) 1 QBD 189. He cannot sue the vendor, because the vendor has never received it, or become entitled to receive it.*

14 This statement of the law appears to have been approved by the House of Lords in **Sorrell v Finch** [1977] AC 728 In **Sorrell v Finch** [1977] AC 728 the vendor instructed an estate agent to find a purchaser for his house at o5,500. There was no mention of taking any deposit and the vendor gave no such mandate. Six prospective purchasers, including Sorrell, paid a 10% deposit each to the estate agent who acknowledged receipt `subject to contract`. The agent did not state in what capacity he was receiving the deposit. The agent subsequently disappeared. The issue there was who was to bear the loss, the prospective vendor, Finch, or the prospective purchaser, Sorrell. The House of Lords held that where an estate agent was merely instructed to find a purchaser, he had no authority, implied or apparent, to receive pre-contract deposits on behalf of the prospective vendor. Applying first principles of agency law, the House held that the loss should be borne by the prospective purchaser. The House further held that the agent was not then holding the deposit as a stakeholder. It rejected the argument that because the prospective vendor had chosen the agent, justice would demand that the prospective vendor should bear the loss. Lord Edmund-Davies, who delivered the leading judgment, said that the just solution of the problem `should depend very largely (and possibly conclusively) upon what rights could have been asserted by each of them in respect of the money in the agent`s hands at all material times`, quoting what he himself said in **Barrington v Lee** [1972] 1 QB 326 at p 339. In **Sorrell v Finch,** [1977] AC 728 as no contract was concluded, the prospective purchaser was entitled to ask for the money back. Lord Edmund-Davies continued (at p 749):

> *It is not open to the prospective purchaser to deny knowledge of his unfettered legal right to get his money back at that stage, and if, with that actual or imputed knowledge, he chooses to pay a deposit and leave it in the estate agent`s hands, while one must*

> *naturally have sympathy with him, such intuitions of justice as I possess do not demand that he should be recouped by a vendor who shares his innocence and differs from him only in engaging someone to find a purchaser for his house.*

15 We should, however, refer to **Ojelay v Neosale Ltd** [1987] 283 EG 1391 where the Court of Appeal held that where a deposit had been paid to a stakeholder and contracts had been exchanged, then if the stakeholder should default and fail to account on completion to the vendor, the loss would fall on the vendor and not the purchaser. The reason given for that view was that `it is the vendor who can choose the person to whom the deposit is to be paid, and it is only just that his default, where contracts have been exchanged on that basis, should fall on the vendor.` The decision of the House of Lords in **Sorrell v Finch** [1977] AC 728 does not appear to have been cited to that court. These views might well be considered to be expressed per incuriam. But the decision in **Ojelay** [1987] 283 EG 1391 was probably correct on the facts as there was already in existence a binding contract between the parties. And if one were to apply the test in **Sorrell v Finch,** [1977] AC 728 the same result would be obtained.

16 It is clear that a distinction ought to be drawn between money paid to a solicitor or an estate agent as an agent of the vendor and as a stakeholder. When a payment is paid to a solicitor or an estate agent as the agent for the vendor, in law it is as good as being paid to the vendor himself. When a payment is paid to a solicitor or an estate agent as a stakeholder, he is under a duty to hold it pending the outcome of an event. He is not holding it as agent for the vendor; neither is he holding it as agent for the purchaser. According to Denning MR in the passage we have cited above from **Burt v Claude Cousins,** [1971] 2 QB 426 the status of a stakeholder is that of a trustee. However, this view of the matter was dissented from by Pennycuick VC in **Potters v Loppert,** [1973] Ch

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399 who felt perplexed that Denning MR should on the one hand describe the stakeholder as a trustee and yet on the other hand say that the stakeholder was not liable for interest arising from the deposit. It has always been a rule of equity that a trustee is accountable for profit derived from his trust estate. Pennycuick VC preferred to hold that the stakeholder`s liability was of a contractual nature. We would be inclined to accept the latter as the correct view of the matter. There is no need to further label the stakeholder as a trustee or agent. The position of a stakeholder is no doubt similar to that of a trustee, but they are not identical.

17 Reverting to the present two cases, it is clear that the solicitor was holding the 5% as stakeholder. He was not the agent of either party. He would be bound to pay the stake to the vendors in accordance with the terms of the contract, namely, the issue of the certificate of fitness, and until then, he could not pay the sum to either party without the consent of the other: see **Collins v Stimson** [1883] 11 QBD 142 Now the solicitor-stakeholder had misappropriated the two sums. Applying the test enunciated in **Grant v O`Leary** [1955] 93 CLR 587 and **Sorrell v Finch,** [1977] AC 728 the vendors must bear the loss. The purchasers have done everything under the agreement to obtain title to the property. It may appear superficially attractive to argue that even though the terms of the agreement for sale and purchase were prescribed by law, the particular solicitor in question was appointed by the purchasers and thus there is a certain element of fault on the part of the purchasers and they should accordingly be responsible for the loss due to the misappropriation by that solicitor. In our view, the true position in law is that by mutual consent the parties have made the purchaser-solicitor the stakeholder, and he is to hold the money to await the outcome of a certain event. The fact that the particular solicitor, Philip Wong, was appointed by the purchasers as their solicitor is quite immaterial. The loss must be allowed to remain where it falls. There is no duty

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on the part of the purchasers to ensure that the vendors do receive the money from the stakeholder. The remedy of the vendors is to proceed against the stakeholder.

18 Counsel for the appellants also sought to argue the case on the basis of implied term, as the event that had happened is not expressly provided for in the sale and purchase agreement. He submitted that, on this basis, a reasonable person would say that the risk should at least fall on both the purchasers and the vendors equally as neither party was at fault and the terms of the agreement were prescribed by legislation. Reliance was placed on a recent decision of the Court of Appeal in **Rockeagle Ltd v Alsop Wilkinson** [1991] 4 All ER 659 But in **Rockeagle** [1991] 4 All ER 659 the question that arose for consideration was whether a solicitor, taking a deposit on a contract for the sale of land as stakeholder, acquired any contingent security for money that was owed to him by his client being either the vendor or the purchaser. In that case both the vendor`s assignee and the purchaser required the solicitors of the vendors to transfer the sum to a new stakeholder. Staughton LJ, who delivered the leading judgment, first said that in such an arrangement, besides the sale contract between the vendor and the purchaser there was concluded a second tripartite contract between the vendor, the purchaser and the stakeholder. After stating that the duty of a stakeholder was to hold on to the money to abide the event of the contract and that until then the stakeholder should not pay the money to either party without the other party`s consent, he held that it must be implied in the tripartite contract that the vendor and the purchaser may change their stakeholder if they wished. The stakeholder was obliged to comply with the joint instructions of the vendor`s assignee and the purchaser and pay the stake over to a new stakeholder.

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19 It should be noted that the issue in **Rockeagle** [1991] 4 All ER 659 is entirely different from the issue in the present cases. Whether it would be fair and reasonable to imply a term into a contract would depend upon the facts and circumstances of the case. If, as we think it is, the correct principles to be applied are those enunciated in **Grant v O`Leary** [1955] 93 CLR 587 and **Sorrell v Finch** [1977] AC 728 there is really no room for us to go into the realm of speculation, which we will not do. There is no evidence at all what the parties thought, or what two reasonable-minded persons would think, should be implied into the agreement.

20 In the result, we affirm the decisions of the High Court and dismiss the appeals with costs.

21 **Outcome:**

Chao Hick Tin J
Chua F A J
L P Thean J

Chua Lee Ming (Lee & Lee) for the appellants in Civil Appeal No 67 of 1990
Gan Hiang Chye (Allen & Gledhill) for the respondents in Civil Appeal No 67 of 1990
Shriniwas Rai (Hin Rai & Tan) for the appellants in Civil Appeal No 120 of 1990
Chan Eng Thai (David Ong & Lim) for the respondents in Civil Appeal No 120 of 1990

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