IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1992] SGHC 157

OS 388/1991

Between

Tan Cheow Gek
Another

… Plaintiff

And

Gimly Holdings Pte Ltd

… Defendant

GROUNDS OF DECISION

Civil Procedure — Costs; Contract — Illegality and public policy; Land — Caveats — Withdrawal; Land — Sale of land — Conditions of sale; Words and Phrases

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Tan Cheow Gek and Another v Gimly Holdings Pte Ltd

[1992] SGHC 157

OS 388/1991
Judith Prakash JC
08 June 1992

The plaintiffs in this originating summons are the registered proprietors of the land and premises known as 23 Dedap Road, Singapore 2880 (`the property`). On 12 December 1990, the plaintiffs, in consideration of the payment of $10,000, granted an option to `Lim Jit Wah and/or nominee` to purchase the property at a price of $700,000. The option was valid for 14 days. It could be exercised by the purchaser signing at the portion of the option marked `acceptance copy` and delivering the same together with the sum of $60,000 to the plaintiffs` then solicitors to be held by them as stakeholders pending completion of the purchase.

On 26 December 1990, the defendants (presumably as nominee of the said Lim Jit Wah) accepted the offer constituted by the option and forwarded the acceptance copy of the option duly signed together with a cheque for $60,000 to the plaintiffs` then solicitors. On 11 January 1991, the defendants` solicitors lodged a caveat against the property in the land register. The plaintiffs` solicitors subsequently carried out a search at the Registry of Companies and ascertained that one of the directors and shareholders of the defendant company was not a Singapore citizen. This meant that by virtue of the provisions of the Residential

Property Act (Cap 274) (`the Act`), the defendants were classified as a `foreign person` and were not entitled to purchase the property unless they had the approval of the Controller of Residential Property. The plaintiffs` solicitors accordingly wrote to the defendants` solicitors, asking for a copy of the `clearance letter` from the Land Dealings (Approved) Unit before they could approve the draft transfer prepared by the defendants` solicitors. The clearance letter was not forthcoming despite two further requests. In the event, it turned out that the defendants had not obtained approval from the Controller of Residential Property to purchase the property prior to their exercise of the option on 26 December 1990.

The plaintiffs refused to complete the sale as no clearance letter had been obtained on or before 26 December 1990.

On 27 April 1991, the plaintiffs took out this originating summons in which they asked for the following reliefs:

> (a) an order that the option contract dated 12 December 1990 offered by the plaintiffs as vendors of the property known as 23 Dedap Road Singapore 2880 (hereinafter called `the said property`) to Lim Jit Wah and/or his nominee and exercised by the defendants on 26 December 1990 as nominee of Lim Jit Wah and purchasers of the said property be declared null and void under s 3 of the Residential Property Act (Cap 274).
>
> (b) An order that the plaintiffs retain the sum of $10,000 paid by the defendants as option money paid under the said option contract.
>
> (c) An order that the plaintiffs` former solicitors Messrs Jing Quee Chin Joo & Teck Hui release to the vendors the stakeholders money of $60,000 held by them as part of the 10% of the purchase price paid by the purchaser pursuant to the exercise of the said option contract.
>
> (d) An order that the caveat No CV/48958B dated 9 January 1991 lodged by the defendants on 11 January 1991 against Lot 4802 Mukim 18 comprised in certificate of title vol 109 Folio 99

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> and known as 23 Dedap Road Singapore 2880 be withdrawn from the land register immediately upon the order herein being made.
>
> (e) An order that the costs of and incidental to this application be paid by the defendants in any event.

After hearing submissions from both parties, I made a declaration that the contract of sale dated 26 December 1990 for the sale by the plaintiffs as vendors of the property known as 23 Dedap Road Singapore 2880 to Gimly Holdings Pte Ltd as purchaser was null and void. I also made an order for the removal of the caveat filed against the property. I indicated to the parties that I would be giving written reasons for my decision.

Each issue raised in the originating summons will be discussed separately.

(1) Was the contract of sale of the property null and void?

The argument on this issue centred around the interpretation of ss 3(1), (2) and 25 of the Act. Section 3(1)(c) reads as follows:

> *Except as provided in this Act -*
>
> *...*
>
> (c)) no foreign person shall purchase or acquire any residential property or any estate or interest therein except by way of a mortgage, charge or reconveyance

and sub-s (2) follows on the principle stated in above by providing:

> *Any -*
>
> *...*
>
> (c)) purchase or acquisition of any residential property or of any estate or interest therein by any foreign person, except by way of a mortgage, charge or reconveyance, made in contravention of subsection (1)(c),
>
> *shall be null and void.*

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It was common ground that for the purposes of the Act, the defendants were `foreign persons` and the property was `residential property`.

Section 25(2) which is also relevant states:

> *Subject to subsection (14), any foreign person who desires to purchase, acquire or retain any estate or interest in any residential property (referred to in this section as the applicant) shall make application (referred to in this section as the application) to the Controller, in respect thereof, in such form as the Controller may require, for the grant of approval to acquire or to retain residential property, as the case may be.*

The plaintiffs` argument was that when the option for purchase of the property was exercised by the defendants, it became an unconditional contract for the sale of the property to the defendants. At that time, however, the defendants did not have in hand an approval to purchase the property pursuant to s 25 of the Act. Consequently, on the basis of ***Lim Xue Shan & Anor v Ong Kim Cheong*** :1

> (1) by entering into the unconditional contract for the sale and purchase of residential property before the defendants had obtained approval therefor, the plaintiffs and defendants had contravened the Act since as soon as a foreign person has formed an intention to purchase residential property, he must apply for ministerial approval;
>
> (2) by virtue of s 25(2) read with s 36(1) of the Act, the agreement between the plaintiff and the defendant was an illegal contract and thus no enforceable rights could arise thereunder.

The defendants recognized that the decision in ***Lim Xue Shan*** `s case1 presented them with a formidable obstacle. Accordingly, the defendants argued that that decision was wrong and should not be followed.

The facts of **Lim Xue Shan & Anor v Ong Kim Cheong** [1990] 3 MLJ 449 were very similar to the facts before me. In that case the plaintiffs, who were

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foreign persons, entered into a written agreement with the defendant to purchase a piece of residential property from the defendant. The plaintiffs paid the defendant a deposit of 10% of the purchase price. After the agreement was signed, the plaintiffs applied to the Controller of Residential Property for approval to purchase the property. The application was rejected. The plaintiffs then demanded the return of the deposit. The defendant refused and the plaintiffs commenced an action to recover the deposit.

AP Rajah J held that the agreement between the plaintiffs and the defendant was an illegal contract. Accordingly, no enforceable rights could arise thereunder. The plaintiffs` claim was dismissed.

The crux of the decision is at p 451 of the report where AP Rajah J said:

> *In this case the plaintiffs not only offended the provisions of s 3 of the Act which makes the contract null and void but they have also offended the provisions of s 25(2) of the Act which lays down that any foreign person who desires to purchase or acquire any estate or interest in residential property shall as a first prerequisite make application to the Controller of Housing for the grant of approval to acquire such residential property. To my mind the Act requires that any foreign person desiring to buy residential property must, some time before he enters into a contract for the purchase of the property, get approval of the Minister to purchase such residential property. `Desires to purchase` must refer to a point of time before the signing of the contract. It refers to the state of mind of the foreign person before he signs the contract. It seems to me that a foreign person no sooner has he formed the intention to purchase property subject to the provisions of this Act must before he signs any contract apply for ministerial approval.*

Mr Rodrigo pointed out that nowhere in s 25(2) or in any other subsection of that section is there any indication or reference to a point of time when the foreign person must make the application for approval. He submitted that the learned judge was wrong in holding that the words `desires to purchase` refer to a point in time before signing the contract. In his submission, the meaning of s

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25(2) was simply that a foreign person who wished to purchase residential property must obtain ministerial approval at some point of time, and that failure to do so would contravene s 3(2)(a) of the Act and attract the penalties provided for under s 36. To state that s 25(2) requires, as a pre-requisite, an application for approval to be made before the agreement for sale is signed is to force an interpretation which the legislature did not intend. Mr Rodrigo submitted that it was by the contract or agreement for sale that the purchaser expressed the desire to purchase a particular property. He argued that when the legislature intended a point of time to be complied with within the provisions of the Act, it said so specifically. In this connection, he pointed to s 9(1) of the Act which makes it very clear that no Singapore company shall become a converted foreign company `without first seeking and obtaining the written approval of the Minister in the manner provided in section 26`. Similar wording is provided in s 9(2) in respect of a converted society. Such precise words are omitted from s 25(2). Mr Rodrigo contended that, therefore, as long as a foreign person obtained the Minister`s approval to purchase under s 25(4) prior to the completion of the purchase, the contract for purchase would be legal.

Mr Rodrigo also argued that the term `purchase` in s 25(2) connotes all the terms in the sale and purchase agreement leading to the completion of the transaction and the vesting of the property in the purchaser. Accordingly, the `purchase` is not effected until the transfer is registered. So even if `desires` does connote a point of time, it would be wrong to hold that the approval must be obtained before the signing of the sale and purchase agreement because this agreement is not the purchase itself but only the start of the purchase. Accordingly, no illegality would be involved as long as the approval is obtained before vesting of the property in the purchaser.

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I was unable to accept Mr Rodrigo`s submissions. They centred on the concept of purchase whereas the Act is much wider in that it also deals with the acquisition of an interest in land.

In my opinion, it was clear from the language of s 3 of the Act that unless a foreign person has already obtained the Minister`s approval under s 25(4), he cannot enter into a contract for the sale and purchase of residential property. Section 3(1)(c) provides that except as provided in the Act, a foreign person shall not acquire any interest in a residential property. It is trite law that when a valid contract for the sale and purchase of land is entered into, the purchaser acquires an interest in the land to be purchased. It is an equitable interest and it entitles the purchaser to the remedy of specific performance in the event the vendor fails to complete the sale. Further, where the land concerned is, as in this case, subject to the Land Titles system, the purchaser is entitled, upon the execution of the sale and purchase agreement, to lodge a caveat against that piece of land in the Land Titles Registry pursuant to s 104(1) of the Land Titles Act (Cap 157), which allows `any person ***claiming an interest in land*** ... (to) lodge with the Registrar a caveat in the prescribed form`. (Emphasis added.) Thus, when the defendants lodged the caveat against the property, they were in fact asserting an interest in the property. This assertion of theirs was in accordance with established law. Under s 3(1)(c) of the Act, however, they were not allowed to acquire such an interest except as provided in the Act. It is not logical to contend that whilst one might have an interest in land for the purpose of lodging a caveat, one has not acquired such an interest as is covered by s 3(1)(c). It follows therefore that before a foreign person can enter into an agreement which would give him a caveatable interest in land, he must have obtained the approval of the Minister. Accordingly, any acquisition of an

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interest in land which had arisen prior to such approval being issued would be null and void under s 3(2)(c).

My conclusion on the interpretation of s 3 of the Act accorded with the decision in ***Lim Xue Shan*** `s case.1 I agreed with the learned judge that the words `desires to purchase, acquire or retain any estate or interest in residential property` in s 25(2) must refer to a time before the purchase or acquisition. In the context of s 25(2), the word `desires` must connote the forming of an intention by a foreign person to purchase or acquire an interest in land. Once such an intention is formed, what should the foreign person do? If he immediately enters into an unconditional written contract for purchase of the desired property he would gain nothing as the contract would be null and void under s 3(2). To achieve his object, therefore, he would need to have approval under s 25(5). Thus, his first step on the road to an acquisition of an interest in the land and, eventually, purchase of the property, would be to apply for the requisite approval. The defendants` argument which sought to interpret only `desires to purchase` missed the full implications of the subsection. The phrase encompasses `desires to ... acquire`. The word `acquire` is much broader and is not subject to the limitations which can be read into the word `purchase`.

Mr Rodrigo contended that the foregoing interpretation of s 25(2) meant that foreign persons would face great practical difficulties in purchasing residential property as by the time they obtained the approval, the particular property in which they were interested might have been sold or the price thereof may have risen considerably. This contention was not sustainable. In the first place, s 25(4)(b) of the Act allows the Minister to grant approval for the purchase of residential property of such class or nature as the purchaser may desire to purchase or acquire. Thus, the approval can be in generic terms and need not relate to a specific property. Secondly, where the foreign person wishes to buy

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a specific property at a specific price, the common practice followed among Singapore conveyancers is for a conditional agreement to be entered into between the intended purchaser and the intended vendor. This agreement would specify the property to be purchased, the price thereof and other relevant terms of the purchase, but it would be subject to an overriding condition that it would not come into effect until the proposed purchaser has obtained approval from the Minister under s 25(4). Such a conditional agreement would enable the proposed purchaser to protect his position while the procedure for obtaining the approval is in progress.

I was also unable to accept the argument that the provision in s 9(1) and (2) of the words `without first seeking and obtaining the written approval of the Minister` and their omission from s 25(2) meant that the latter section did not require the Minister`s approval to be obtained before the intended purchase or acquisition etc was effected. Section 9 deals with an entirely different situation from that covered by s 25. I will comment only on s 9(1) as s 9(2) which relates to societies has a similar legal basis. The Act defines the phrase `Singapore company` as `a company formed or incorporated in Singapore, all of whose members and directors are citizens, or in the case of a member being another company, where all the members and directors of such other company are citizens`. Under s 9(1), a Singapore company so defined, which owns an estate or interest in residential property, cannot become a `converted foreign company` without the requisite approval. A `converted foreign company` is defined as a Singapore company which ceases to be a Singapore company and becomes a foreign company by reason of (i) its having as a shareholder an individual or company who is not a citizen or which is not a Singapore company; or (ii) appointing any individual as a director who is not a citizen; or (iii) allowing a director who ceases to be a citizen to remain a director. In all these cases, the

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word `citizen` refers to citizens of Singapore. It will be obvious from the foregoing that the procedure whereby a Singapore company could become a `converted foreign company` would be laid down in the company`s own articles and memorandum of association and is entirely outside the Act. Accordingly, it was important to provide clearly in the Act that before a company took any step which might ipso facto result in it becoming a `converted foreign company` it must have the Minister`s approval. It was not necessary to provide these same explicit words in s 25(2) because s 3(2)(c) had already declared that any purported acquisition of an interest in residential property by a foreign person was void. Further, the legislature was probably of the opinion that the words `desires to` appearing before `acquire` were sufficient to indicate that the application must be made before the acquisition.

The defendants` interpretation of s 25(2) has undesirable results. If adopted, it would put vendors who are innocent of any wrongdoing, like the plaintiffs herein, in a situation akin to a legal limbo. Such vendors would not know whether the contract of sale which they had unwittingly entered into with a foreign person was valid or void until the Ministerial decision had been made. In the meantime, the property would have been kept off the market and loss may have been sustained. This was not a case where the plaintiffs knew that the defendants were foreign persons before the contract was concluded. They issued a valid option and had no control over who exercised it. Once they had ascertained that defendants were not foreign persons, they should have been able to deal with the property as if the option had lapsed unexercised.

The purpose of the Act was also relevant to the issue. It was enacted to ensure that foreign persons would be unable to obtain any interest at all in certain classes of residential property in Singapore except under carefully controlled conditions. One reason for this was to prevent speculation in residential

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properties in Singapore by foreigners leading to a rise in property prices which would adversely affect the interests of Singapore citizens. This was why s 3(1) dealt not only with transfer of land but also with trusts for sale and the purchase or acquisition or retention of residential property. It would defeat the purpose of the Act if a foreign person could, without the permission of the Controller of Residential Property, validly enter into a contract for the purchase of a residential property, acquire an interest therein and then sell that interest to a sub-purchaser. Yet that was where the argument of the defendants that the Ministerial approval is only required prior to vesting of the title would have led. The construction advocated by the defenwas contrary to the intention of the legislature.

I therefore took the view that since at the date the defendants entered into the contract for the sale of the property, they had not received Ministerial approval to acquire an interest in such property, the contract of sale was illegal and their purported acquisition of an interest in the property was, pursuant to s 3(2)(c) of the Act, null and void.

(2) Were the plaintiffs entitled to retain the option money?

At the hearing, the plaintiffs` counsel withdrew his application in connection with this issue. He took the view that the authorities were clearly in his favour since if the contract was held to be illegal, the defendants would not be able to sue for the return of the option money. Accordingly, no order was made on the relevant prayer.

I would, however, like to express my views on this point. The option money would be retainable by the plaintiffs in any event. It was not tainted by the illegality of the contract for the sale of the property. The plaintiffs were paid the

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option money on 12 December 1990 in consideration of their granting an option for the purchase of the property at a price of $700,000, such option to be valid for a period of 14 days of the date thereof. The option was a separate contract independent of the contract for sale. There was no contention that the option was illegal. Neither was there any basis for such a contention. Once the option money was paid, it was not recoverable unless the consideration therefor had wholly failed or the plaintiffs had breached the option by selling the property to someone else. No one sought to argue that such a failure or breach had occurred. The plaintiffs had earned the option money and they were not liable to return it.

(3) Should the caveat lodged by the defendants against the property be withdrawn?

The defendants argued forcibly that on the basis of the plaintiffs` own contention that the contract for sale was illegal, the plaintiffs were not entitled to ask for the withdrawal of the caveat. The case cited in support of this argument was another decision of AP Rajah J on the Act, viz **Cheng Mun Siah v Tan Nam Sui.** [1980] 2 MLJ 269 In that case, the plaintiff, a Malaysian citizen, had entered into an agreement to purchase a house from the defendant who knew of the plaintiff`s status. The plaintiff did not complete the purchase and the defendant forfeited the deposit paid by the plaintiff. The plaintiff sued for the return of the deposit on the basis that the agreement was null and void under s 3 of the Act. AP Rajah J refused to give the plaintiff any relief. He held that the whole of the transaction was an illegal one and as both parties had contravened some of the provisions of s 3 of the Act (since they were both aware of the plaintiff`s status), the court could not be called upon to assist either one or the other of them with regard to the agreement in question. Applying the maxim ` ***in pari delicto prior est conditio defendentis*** `, he held that a party to an illegal contract who seeks to recover what he has transferred under it will be

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denied relief on the ground that he cannot be heard to heard to allege his own turpitude and that any loss he may suffer is well deserved.

In my opinion, this decision was not relevant to the question of the removal of the caveat. Under s 111 of the Land Titles Act (Cap 157), at any time after a caveat has been lodged in the Registry of Titles, the caveatee may summon the caveator to attend before the court to show cause why the caveat should not be withdrawn or otherwise removed. In the well-known case of **Eng Mee Yong & Ors v Letchumanan,** [1979] 2 MLJ 212 Lord Diplock, delivering the judgment of the Privy Council, stated [at p 215]:

> *In their Lordships` view a distinction must be drawn between cases where the applicant is the registered proprietor of the land (ie the caveatee) and cases where the applicant is some other person who claims a right to an interest in it. In the former case the caveatee can rely upon his registered title as prima facie evidence of his unfettered right to deal with the land as he pleases; it is for the caveator to satisfy the court that there are sufficient grounds in fact and law for continuing in force a caveat which prevents him from doing so.*

Although the case dealt with s 327 of the Malaysian National Land Code, his Lordship`s observations are equally applicable to s 111 of the Land Titles Act.

Thus, the plaintiffs as the registered proprietors of the property had an absolute right to call upon the defendants to satisfy the court as to why their caveat should not be removed. This right was quite independent of the contract for sale and did not arise out of that contract. It was therefore unaffected by the illegality of that contract.

It was for the defendants to establish why their caveat should stay. They could only do so if they were able to prove that they had a caveatable interest in the property pursuant to s 104(1) of the Land Titles Act. The only interest which the defendants could possibly have in the property would have arisen under the

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contract of sale. That contract was illegal. The interest acquired thereunder was null and void. The defendants therefore could not satisfy me that the caveat should remain.

(4) Are the plaintiffs entitled to the balance of the deposit money paid to the stakeholders?

If the defendants had paid the balance of the deposit money directly to the plaintiffs, the defendants would, on the basis of the decisions in **Cheng Mun Siah v Tan Nam Sui** [1980] 2 MLJ 269 and **Lim Xue Shan,** [1990] 3 MLJ 449 have been unable to recover the same from the plaintiffs. In this case, however, the money was paid to the plaintiffs` solicitors as stakeholders. The plaintiffs, accordingly, wanted the stakeholders to be ordered to pay the sum over to them. I refused to make this order. In the first place, the stakeholders were not a party to the action and would not be bound by an order made herein. Secondly, I could not see any basis in law for the plaintiffs to be entitled to the balance of the deposit in the hands of the stakeholders.

The way in which a stakeholder should deal with the stake he holds is clearly set out in an often cited passage from **Skinner v The Trustee of the Property of Reed (a bankrupt) & Ors.** [1967] Ch 1194 At p 1200, Cross J stated:

> *... the stakeholder holds the deposit on trust to deal with it in different ways in different contingencies. In the first place, if the contract goes off owing to the default of the vendor, the deposit is returnable to the purchaser. If the contract goes off owing to the default of the purchaser, the deposit is forfeited to the vendor. Finally, if the contract is completed, the purchaser is entitled to be given credit for the deposit on completion ....*

It is clear that the vendor is not entitled to forfeit the deposit unless the contract has gone off owing to the `default` of the purchaser. A default occurs when a party to a contract fails, without legal excuse, to fulfil his obligations thereunder.

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In this case, the contract being illegal, it could not be performed by either party. No legal obligations arose under it. The plaintiffs could not contend that the failure to complete was due to any default on the part of the defendants. The plaintiffs thus could not assert any right to forfeit the deposit.

(5) ***Should an award of costs be made?***

The defendants submitted that no order for costs should be made. Once again they cited **Cheng Mun Siah v Tan Nam Sui** [1980] 2 MLJ 269 where AP Rajah J made no order as to costs for the reason that both parties had offended against the law. In this case, the position was different. The parties were not in pari delicto in that the plaintiffs were innocent of any wrongdoing. They had been embroiled in an illegality by an action on the part of the defendants which they could not prevent. Secondly, as registered proprietors of the property, they had an absolute right to deal with it as they chose. This right had been fettered by the defendants` wrongful refusal to withdraw the caveat. The plaintiffs had had no alternative but to invoke the aid of the court. Accordingly, I awarded the costs of the summons to the plaintiffs.

Outcome:

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HT Sam (HT Sam & Co) for the plaintiffs
Len P Rodrigo and John Tan Thong Young (Len P Rodrigo & Co) for the defendants

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