IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1993] SGHC 202

OS 1033/1989

Between

Eng Bee Properties Pte Ltd

… Plaintiff

And

Lee Foong Fatt

… Defendant

GROUNDS OF DECISION

Evidence — Proof of evidence; Land — Caveats; Land; Words and Phrases

Version No 1: 11 Sep 2026 (01:05 hrs)

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Eng Bee Properties Pte Ltd v Lee Foong Fatt

[1993] SGHC 202

OS 1033/1989
Judith Prakash JC
30 August 1993

1 Cur Adv Vult

2 This action arises out of an option for the purchase of the land and premises known as Nos 9 to 13 Spottiswoode Park (`the Park property`) which was granted by the plaintiffs to the defendant on 3 August 1989. The plaintiffs say that the option lapsed, unexercised, on 4 August 1989 but that the defendant wrongfully placed a caveat against the Park property and refused to remove it, thus causing them damage.

3 When the plaintiffs sued in October 1989, they wanted the removal of the caveat and damages for its wrongful entry. They also asked for a declaration that they had validly forfeited the option money paid by the defendant. The plaintiffs later sold the property with the burden of the caveat and, in January 1992, the defendant, after negotiations with the purchaser, removed the caveat on payment by the purchaser of $145,000. Accordingly, the plaintiffs are now asking only for the declaration and damages.

4 From November 1989, when he filed his first affidavit in reply to the claim, up to 1 September 1992 when the action first came on for hearing, the

defendant`s position was that the option period had been extended by agreement and that his caveat had been entered rightfully. He alleged that he had tendered payment of the balance of 10% of the purchase price, as required by the option, within the extended period but the plaintiffs had refused to accept it and had wrongfully failed to complete the purchase of the property. The defendant also put forward a counterclaim.

5 On 1 September 1992, counsel for the defendant applied for leave to amend the defence and withdraw the counterclaim on the basis that he had just been given instructions by the defendant which indicated that the contract of sale between the plaintiffs and the defendant was tainted by illegality. Leave to amend was granted, the counterclaim was withdrawn, and amended pleadings were filed. Thus the defendant fought the trial itself on the basis that the purported transaction between the plaintiffs and himself was illegal. Consequently the plaintiffs were not entitled to make any claim against him for damages as this would result in their profiting from their own illegal conduct. The plaintiffs totally denied the defendant`s allegations.

6 **The plaintiffs` story**

7 The plaintiff company is a property developer. Their main witness was one of their directors, Mr Kwok Wai Hoi. He negotiated to sell two properties to the defendant: the Park property and No 23 Everton Road (`the Everton property`) which was adjacent to it and an essential component of any planned development of the Park property. As far as development was concerned, neither property was of much value without the other.

8 As developers, the plaintiffs had had designs on the Park property for some time. They had been advised by their architect that the Park property could

Version No 1: 11 Sep 2026 (01:05 hrs)

not be redeveloped by itself because of the road reserve running through it and that if they wanted to buy and redevelop it they should also look for adjacent lots. Thus, when in March 1989 they were offered the Everton property, they were quick to enter a contract to buy it for $130,000. Completion of the purchase was delayed, however, as the land on which No 23 Everton Road stood had to be subdivided to give the plaintiffs a proper title.

9 In the meantime the plaintiffs had entered into a contract to purchase the Park property for $200,000. Completion of this purchase was due around 30 August 1989. The plaintiffs were unsuccessful in obtaining financing for the purchase and, as they were facing cash flow problems, decided to try and sell both properties.

10 In late July 1989, Mr Kwok was introduced to the defendant by one Mr Kwan Cheng Kee, a manager of the MUI Bank. The defendant was interested in buying the properties and negotiations started. It was finally agreed that both properties would be sold together and that the defendant would pay $200,000 for the Park property and $180,000 for the Everton property.

11 On 3 August 1989, Mr Kwok prepared and signed, on behalf of the plaintiffs, an option for the sale of the Park property to the defendant. The first two paragraphs of the option read:

> *In consideration of the sum of dollars ten thousand ($10,000) paid by you to me this day by way of option-money, I, the undersigned, Eng Bee Properties Pte Ltd, 190 Middle Rd #12-01 Singapore 0718 hereby grant to you this option,* ***which shall be valid until 4pm on 4 August 1989****, to purchase the abovementioned property at the price of dollars two hundred thousand ($200,000).*

12 This option shall be exercised by a notice in writing signed by you accompanied with a cashier`s order for $10,000 equivalent to balance of 10%

of the purchase price and forwarded to my solicitors, Edwin Chan, 101 Upper Cross Street #04-24 People`s Park Centre Singapore 0105 before its expiry date. [Emphasis added.]

13 As arranged with the defendant, the signed option was sent to Mr Kwan`s office at the MUI Bank on the same day. The defendant was supposed to hand Mr Kwan the option money of $10,000 in return for the option. He took the option but did not pay the option money. Mr Kwok telephoned Mr Kwan about this and was assured by Mr Kwan that the option money would be delivered to the plaintiffs` then solicitors, ***Edwin Chan*** . No money was paid that day. Instead, the option money was delivered the next day (on 4 August 1989) to ***Edwin Chan*** and, after receiving legal advice that it was in order to accept the option money, the plaintiffs took the defendant`s cheque.

14 The defendant did not send ***Edwin Chan*** or the plaintiffs themselves the signed acceptance copy of the option and the balance of the deposit money by 4pm on 4 August 1989. According to Mr Kwok, since the option was not exercised in accordance with its terms, it lapsed automatically.

15 On 5 August 1989, the plaintiffs` solicitors received a letter from ***Peter Yap & Co*** , the defendant`s solicitors, in relation to the Park property. The letter stated: `We are instructed that there is an obvious typographical error in the said option stating the exercise of the option date as 4 August 1989 at 4pm` and went on to ask ***Edwin Chan*** to ascertain from the plaintiffs the actual date of exercise of option which it said the defendant understood as being `the usual seven or ten days from the date of grant of option`. ***Edwin Chan*** sent a brief reply two days later stating that there was no typographical error in the option. Under cross-examination Mr Kwok denied that he had agreed, as alleged by the

Version No 1: 11 Sep 2026 (01:05 hrs)

defendant, to extend the time for exercise of the option to a period of seven to ten days after the date of the option.

16 Meanwhile, on 3 August 1989, Mr Kwok had given instructions to ***Edwin Chan*** to prepare a sale and purchase agreement in respect of the Everton property. He took this course as the legal title to this property was complicated. The draft agreement was sent by ***Edwin Chan*** to the defendant`s solicitors on 7 August 1989. From the plaintiffs` point of view the most important terms of this sale, as had been agreed with the defendant prior to 3 August 1989, were that 10% of the price was to be paid on signing, a further $45,000 was payable two weeks later and the balance was payable on completion.

17 On 22 August the defendant`s solicitors sent an amended sale and purchase agreement for the Everton property to the plaintiffs` solicitors. The payment terms had been amended to provide that 10% of the price would be paid on signing and the entire balance on completion. According to Mr Kwok, the plaintiffs had been hoping to use the $45,000 to assist them in completing the purchase of the Park property and when the defendant reneged on his agreement on the payment schedule, they decided not to proceed with the sale of the Everton property to him.

18 On the same day the defendant`s solicitors wrote to ***Edwin Chan*** stating that they had been instructed that, pursuant to discussions between the plaintiffs and the defendant, the remaining 10% of the deposit for the Park property would be paid by the defendant directly to the plaintiffs. Mr Kwok said he was amazed by the lies the letter contained. He did not, however, instruct his solicitors to deny the lies as he felt it was pointless to reply.

Version No 1: 11 Sep 2026 (01:05 hrs)

19 Throughout his testimony Mr Kwok maintained strongly that the sale terms of the properties were as disclosed in the option and the draft sale and purchase agreement. He denied the allegations of the defendant that the prices shown in the written documents were incorrect and that the defendant was to pay him in cash as `under the table money` an extra $130,000 for the Park property and an extra $20,000 for the Everton property. He denied that the formal documents had disclosed different prices from the actual prices because the plaintiffs wanted to evade paying income tax on the profit from the sales.

20 Mr Kwok said that the plaintiffs only discovered the existence of the defendant`s caveat against the Park property shortly before 12 September 1989 when their solicitors wrote to the defendant`s solicitors requesting him to remove the caveat. The defendant refused to do so.

21 These proceedings were commenced on 25 October 1989. Two weeks later the plaintiffs entered into an agreement with one Tan Guan Kee to sell the Park property to him, free from encumbrances, at a price of $800,000. The defendant again refused to remove his caveat, however, and the sale fell through. The plaintiffs were only able to sell the Park property two years later in November 1991 when they agreed to sell it at a price of $600,000, subject to the defendant`s caveat, to one Chua Koon Hor. The remarkable increase in the value of the Park property was because it had been declared a conservation property thus making redevelopment unnecessary.

22 **The defendant`s story**

23 According to the defendant, it was clear during all his negotiations with Mr Kwok that he had to buy both properties together. It was also agreed that the sale prices for the properties would not be fully disclosed. Instead part of the

price of each property would be paid in cash as `under the table money`. The defendant`s stand was that this was a term imposed by Mr Kwok and that he had no choice but to accept it if he wanted to proceed with the purchase.

24 On 3 August 1989, the defendant went to Mr Kwan`s office to receive the options for both properties. Mr Kwan handed him one option only, that for the Park property. The defendant then telephoned Mr Kwok and asked him why there was only one option. Mr Kwok replied that there was a legal problem with the Everton property and as he himself did not know how to prepare the option for it, he had asked his lawyer to draft the document. The defendant then asked Mr Kwok about the option money and was told that it did not matter, it could be paid the next day and he would allow the defendant to exercise the option within a further seven to ten days.

25 The defendant proceeded to his solicitors` office. He handed his solicitor the original option and a cheque for $10,000 drawn in favour of the plaintiffs and instructed them to send the cheque to the plaintiffs` solicitors the next day and to liaise with the latter regarding the purchase of the Everton property. He also informed his solicitor that the plaintiffs had agreed to allow him to exercise the option within seven to ten days.

26 On 10 August 1989, the defendant`s solicitors lodged the caveat against the Park property. Shortly before this the defendant had handed them a cashier`s order for $10,000 drawn in favour of ***Edwin Chan*** . This money was intended to pay the balance of the deposit due on the exercise of the option.

27 On 22 August 1989, after a telephone conversation with Mr Kwok, the defendant took the cashier`s order from his solicitors because Mr Kwok had agreed that the money could be paid over directly to him instead of to the

Version No 1: 11 Sep 2026 (01:05 hrs)

plaintiffs` solicitors as provided by the option. As arranged, one or two days later Mr Kwok and the defendant met at MUI Bank. The defendant gave the cashier`s order to Mr Kwok who accepted it. He then said that he also wanted the `under the table money` for both properties. The defendant told Mr Kwok that he could not hand over the money just like that.

28 The two men then went into Mr Kwan`s office. There the defendant handed Mr Kwan two cheques, one for $130,000 and the other for $20,000 and told Mr Kwok that it was up to Mr Kwan whether he wanted to give the cheques to Mr Kwok. Mr Kwok asked Mr Kwan for the cheques. Mr Kwan was reluctant to hand them over without the defendant`s authorization and thus asked the defendant for permission. In response the defendant advised Mr Kwan that it was up to him to decide what to do with the cheques but if the deal did not go through in the end, he would hold Mr Kwan responsible. Mr Kwan then refused to give the cheques to Mr Kwok who became very angry. He threw the cashier`s order on the table and left.

29 On the scheduled date of completion, ie 4 October 1989, the plaintiffs did not complete the transaction. The next day, the defendant`s solicitors wrote to the plaintiffs` solicitors stating that the defendant was ready to complete and asking when the plaintiffs would complete. No reply to the letter was received.

30 **Was the caveat justified?**

31 The basic premise of the plaintiffs` claim can be stated briefly. At the time the plaintiffs commenced this action they were the registered proprietors of the Park property. This status was prima facie evidence of their unfettered right to deal with the Park property as they pleased free from the shackles which the defendant`s caveat placed on it. Under s 111 of the Land Titles Act (Cap

Version No 1: 11 Sep 2026 (01:05 hrs)

157) the plaintiffs had an absolute right to call upon the defendant to satisfy the court as to why his caveat should not be removed and the burden lay on the defendant to establish why his caveat should stay, or more precisely, in view of the circumstances of this case, why he was entitled to maintain his caveat up to January 1992. See ***Eng Mee Yong & Ors v Letchumanan*** , and ***Tan Cheow Gek v Gimly Holdings Pte Ltd.*** , The question which then arises is whether the defendant can satisfy me that he had a right to maintain the caveat in place up to the time when he voluntarily withdrew it. The defendant contended, on the authority of ***Subramanian Chettiar v JC Chang Ltd*** , and ***Mountford v Scott*** , that from the time the option was granted he had an equitable interest in the property which allowed him to lodge the caveat. In view of these authorities the plaintiffs could not, and did not, dispute that the grant of an option confers such an equitable interest. What the plaintiffs said was that by 10 August 1989, the date of lodgment, the option had lapsed and accordingly the equitable interest which the defendant had obtained thereunder had ended. This submission leads on to the question whether the period for exercise of the option had been extended so that the option was still effective on 10 August.

32 Factually, there are discrepancies in the defendant`s position. His oral evidence on the grant of an extension is not supported by the contemporaneous letter dated 5 August 1989 from his solicitors. Instead of stating that there had been an agreement to extend time for exercise of the option, Mr Yap`s letter said that the date of 4 August 1989 was an obvious typographical error. Further, there is a question of the certainty of the extension period. The defendant himself said that the option was supposed to be extended for `the usual seven or ten days`. So when did this period end? No one knows. It is trite law that for an agreement to be implemented there must be certainty of terms and if there is no certainty there is no agreement.

Version No 1: 11 Sep 2026 (01:05 hrs)

33 Quite apart from the factual difficulties with the defendant`s assertion, I am satisfied that his oral evidence on the alleged extension is not admissible to prove the point because of the provisions of s 94 of the Evidence Act (Cap 97). This section (then numbered 92) was considered in ***Teo Siew Seng v Guok Sing Ong*** , a case before the Court of Appeal, involving an option for the sale of the land. In that case, the appellant purchaser contended that the vendor had agreed to accept $40,000 (being the 10% deposit less the option money) in exercise of the option instead of the full 10% deposit as provided in the option. The trial judge had excluded evidence of this oral variation as being inadmissible under the Evidence Act.

34 Chua J (delivering the judgment of the appellate court) observed that s 94 stated that when the terms of a contract which are required by law to be reduced to a form of a document had been proved, then no evidence of any oral agreement can be admitted in evidence for the purpose of contradicting, varying, adding to or subtracting from its terms unless the person seeking to adduce such oral evidence can specifically bring himself within one or the other of its provisos. He then agreed with the learned trial judge that the proviso which was relevant to the case was proviso (d) which reads:

> *the existence of any distinct subsequent oral agreement, to rescind or modify any such contract, grant or disposition of property, may be proved except in cases in which such contract, grant or disposition of property is by law required to be in writing …*

35 In dismissing the appeal, Chua J held that:

> *As an option to purchase land is a `contract, grant or disposition of property` which is required by law to be in writing, the purchaser is precluded by s [94] of the Evidence Act from proving that the parties had orally agreed that the $2,000 she has paid as consideration for the grant of option could be deducted from the purchase price or from the 10% deposit she was required to pay when exercising the option.*

Version No 1: 11 Sep 2026 (01:05 hrs)

36 The above case is on all fours with the present situation. The defendant here is, equally, precluded from proving that there was an oral agreement to extend the period for exercise of the option. Accordingly, I have to hold that the defendant was bound to exercise the option on or before 4pm on 4 August 1989 and as he did not do so, the option lapsed automatically. Consequently the defendant did not have any caveatable interest in the property on 10 August 1989 and the caveat should never have been lodged. It also follows that the plaintiffs were entitled to forfeit the option money.

37 The matter does not end here, however, because of the illegality point. During closing submissions, counsel for the defendant conceded that if the case had come up for hearing before January 1992 the caveat would have had to be removed as the defendant was relying on an illegal contract to found it. He contended, however, that this in itself did not mean that the plaintiffs were entitled to the reliefs claimed as they had not proven themselves to be less morally culpable than the defendant. I therefore turn to the issue of illegality.

38 Was there an agreement to pay `under the table money`? After having given the evidence careful consideration I am not satisfied that there was in fact any agreement between the plaintiffs and the defendant that the prices of the properties would be any sums other than those reflected in the option and draft agreement for sale. The burden of establishing this contention lay with the defendant. He was not able to produce sufficient credible evidence to discharge that burden.

39 As stated earlier, the allegation of `under the table money` did not surface until September 1992. Prior to that there had been a period of three years during which there was active correspondence between the solicitors for both parties; the defendant had sworn an affidavit; the defendant had given

Version No 1: 11 Sep 2026 (01:05 hrs)

instructions for a defence and counterclaim; and the case had been actually conducted on a certain basis. During this time, the defendant disclosed the `real` terms of the contract only to Mr Kwan. Suddenly, as the trial was about to start, there was a total change in the defendant`s position. This about-face was in itself somewhat suspect.

40 Only three pieces of writing in any way supported the defendant`s story: the two cheque butts and a police report which he lodged on 4 October 1989. Dealing with the report first, the defendant said that after the transaction fell through, he met Mr Kwok outside MUI Bank on a number of occasions between 29 September 1989 and 4 October 1989. Each time Mr Kwok shook his fist at the defendant and threatened to beat him. Although none of these threats was ever mentioned to his lawyer, Mr Yap, and although he was not really frightened by them since, in his own words, `This society is governed by law so there`s nothing to be afraid of`, he decided to make a police report. In that report he specifically stated that he had agreed to pay the plaintiffs `under the table money` for both properties. This is odd as there was really no reason to mention this detail in the report which was supposedly made to protect him against Mr Kwok`s threats. Further, although the defendant mentioned Mr Yap`s name in the report, in court he asserted that he had never notified his lawyer about the supposed threats to him or about the report itself until September 1992. It may be significant that the report was made on the same day as that on which the plaintiffs were allegedly supposed to complete the sale. It appears to me from all the above that, as submitted by the plaintiffs, the report was part of a calculated plan.

41 The element of calculation is further supported by the fact that the only evidence which the defendant could give of the cheques he purportedly handed to Mr Kwan on or about 24 August, were the butts. The cheques themselves

Version No 1: 11 Sep 2026 (01:05 hrs)

have since disappeared and the defendant pleads ignorance of their whereabouts. It is odd that though he managed to preserve the cheque book intact he was unable to keep the cheques themselves safely. Also the defendant did not produce his bank statements for the relevant period although he was specifically asked to do so during the trial. Such statements would have helped the court ascertain whether cheques with numbers corresponding to those of the butts had ever been presented to the bank.

42 There is also a discrepancy in the evidence over when the meeting at which the cheques were produced took place. In the amended defence it was alleged that this meeting took place on 23 August. When the defendant produced his cheque book in court, however, it seemed to show that the `under the table money` cheques, though undated, were issued after a counterfoil dated 24 August 1989. In examination-in-chief the defendant, obviously wanting to be consistent with the document, said that the relevant meeting took place one or two days after 22 August. Later, under cross-examination, he said that the two cheques could have been written on 24 August because the meeting was around that time.

43 On the other hand Mr Kwan, who was called to testify on behalf of the defendant, said that the cheques were handed over to him by the defendant on a certain date in August some time before the actual meeting with Mr Kwok. He could not, however, remember the exact date of the meeting. On the basis of the foregoing, either the meeting itself was held well after 24 August or the cheques were written out considerably before that date. In either case, the defendant`s story is not a coherent one.

44 Mr Kwan also contradicted the allegation of the defendant that there was a cheque or cashier`s order for $10,000 passing between the defendant and Mr

Version No 1: 11 Sep 2026 (01:05 hrs)

Kwok on the day of the meeting. Mr Kwan did not observe Mr Kwok return this cheque to the defendant. If the defendant`s statement that Mr Kwok had thrown the cheque onto Mr Kwan`s table and stalked angrily out of his office is true, it is hard to believe that Mr Kwan could either have failed to observe the incident or could have forgotten it altogether.

45 Next, the main point about the scene in Mr Kwan`s office was that the defendant was afraid that if the `under the table money` was paid to the plaintiffs prior to completion of the transaction, he would have no way to recover it in the event of the sales not going through. At the same time the defendant would have the court believe that the `illegal` transaction was agreed to even before the option was issued and that although he himself did not trust Mr Kwok to complete, Mr Kwok (who had not received any money at all) trusted him enough to issue an option which, if exercised by 4pm on 4 August, would have bound the plaintiffs to sell the Park property to the defendant for only $200,000.

46 In fact the defendant contradicted himself later on when giving evidence in relation to the draft sale agreement for the Everton property. In that connection, he disputed Mr Kwok`s claim that the agreement was not signed because of the amendments made by the defendant to the payment provisions. His explanation was that although he was agreeable to the change in the terms, Mr Kwok did not sign the agreement because `he was actually waiting for the under the table money to be given to him before he signed the agreement`. This statement made it more difficult to accept the defendant`s story. On the one hand, you have a Mr Kwok who is naive enough to issue an option which can become legally binding by an unilateral act of acceptance by the defendant and on the other you have a Mr Kwok who is smart enough not to sign an agreement for sale until he has the extra money safely in his grasp. Which picture does the defendant wish me to accept?

Version No 1: 11 Sep 2026 (01:05 hrs)

47 Further, I was not impressed with Mr Kwan`s evidence. Although he did support the defendant`s claim on the actual prices of the properties, Mr Kwan`s testimony differed from that of the defendant on other material points and, overall, did not assist him in establishing the credibility of his defence.

48 I must say, however, that if I had found in favour of the defendant on this point, I would have agreed with his counsel`s submission that the arrangement would, if effected, have rendered the whole transaction illegal in the sense that it offended public policy. The defendant`s explanation for the proposal was that the plaintiffs wanted to minimize their profits from the sale and thus evade income tax. The plaintiffs denied this contention and their counsel submitted that the defendant had not proved that this was the plaintiffs` intention. That is true. What cannot be denied however, is that the concealment of the actual sale prices of the properties could assist the plaintiffs if, in fact, they did want to evade income tax. Further, the defendant himself may very well have benefitted from the lower prices shown on the faces of the documents as his liability to pay stamp duty would have been reduced thereby.

49 No attempt was made to put forward a valid commercial reason for the arrangement and in these circumstances the inference which I would have drawn was that it was a device designed for the avoidance, on the part of one or both parties, of the imposition of fiscal levies that would otherwise have been applicable. The court cannot condone such behaviour and I would thus have had no hesitation in finding the transaction to be illegal had the facts alleged by the defendant been proved and had it actually been concluded.

50 It is important to note however, that the illegality was never really given effect to, even on the defendant`s version of the facts. As the defendant himself said, the momentous August meeting between himself ended with the cheques

Version No 1: 11 Sep 2026 (01:05 hrs)

in Mr Kwan`s hands and Mr Kwok expressing his disagreement with the whole situation by throwing back the cashier`s order and walking out. Thereafter both sales were effectively dead. Thus at the most what the defendant`s allegations pointed to was, as the plaintiffs submitted, an attempted illegality which never crystallized.

51 Should compensation be awarded to the plaintiffs? Section 112 of the Land Titles Act (Cap 157) provides that any person who has sustained damage by reason of a caveat having been lodged, or having been allowed to remain, wrongfully or vexatiously or without reasonable cause may claim compensation from the caveator and the court may award such sum as seems just. This section is the foundation of the plaintiffs` claim herein for damages.

52 In ***Tan Soo Leng David v Wee, Satku & Kumar Pte Ltd & Anor*** , GP Selvam JC decided that the word `wrongfully` in the section should be construed as meaning simply `without legal right`. He distinguished the Australian decision of ***Becca Developments Pty Ltd v Idameneo (No 92) Pty Ltd*** , in which the New South Wales Court of Appeal had held that in order to obtain compensation under a similar Australian section, it was necessary to prove that the caveator did not have an honest belief that he had reasonable grounds for lodging the caveat, on the basis that in the Australian section, the words `wrongfully` and `without reasonable cause` are used conjunctively rather than disjunctively as is the case in our s 112.

53 I agree that `wrongfully` in the Singapore section bears the straightforward meaning given to it by GP Selvam JC. In the present case the defendant had no legal right to place the caveat against the Park property on 10 August 1989 as no valid option existed at that date. He did not have any legal right to maintain the caveat thereafter since nothing occurred which gave him

Version No 1: 11 Sep 2026 (01:05 hrs)

such right. Thus he acted wrongfully both in lodging the caveat and in allowing it to remain.

54 The plaintiffs have proved to my satisfaction that they sustained damage by reason of the caveat having been allowed to remain. It is apparent from the circumstances of the plaintiffs` sale of the Park property that the price which they obtained for it was reduced by the existence of the caveat. The purchaser was willing to pay the defendant $145,000 to remove the caveat. That sum provides a clear indication of the value of the property to the purchaser and the amount for which the plaintiffs could have sold it had there been no caveat. In my judgment it is just to award the plaintiffs $145,000 as damages for the wrongful entry of the caveat.

55 Mr Yap argued very strongly that I should find the transaction to be illegal and on that basis it would not be just for the court to award damages to the plaintiffs. He said that the word `just` as used in s112 incorporated the concept of equity and that as the plaintiffs had been involved in an illegal transaction they had not come to the court with clean hands and were not entitled to relief. In effect he was relying on the `ex turpi causa` maxim. After careful consideration, I have concluded that even if I had found that the plaintiffs had been party to an attempted illegal transaction it would not have been correct to withhold an award of damages from them on that basis.

56 The basis of the plaintiffs` claim is not the allegedly illegal transaction. The plaintiffs` claim is based on their rights as the registered proprietors of the Park property and is a legal claim which can be pursued without any reference at all to the intended illegality. It was the defendant who needed to rely on the supposed illegality of the transaction to escape liability. Illegality is an issue which most often arises in a contractual context such as the present. It is,

Version No 1: 11 Sep 2026 (01:05 hrs)

however, an established principle that if, in such a context, one of the parties to the contract is able to bring an action against the other party without having to rely on the illegal contract in any way he may be able to obtain relief despite being embroiled in an illegality. This principle was affirmed by the House of Lords in ***Tinsley v Milligan*** , the latest decision on the effect of the illegality defence.

57 The defendant relied on ***Saunders v Edwards*** , as support for the proposition that for the plaintiffs to succeed in their claim for damages they must be able to show that they had no moral culpability. A closer examination of the case, however, shows that rather than assisting the defendant, it is in fact an example of the principle set out above. The plaintiffs in that case purchased a flat and certain chattels from the defendant for a total price of Â£45,000. In order to save stamp duty it was agreed to apportion Â£5,000 to the chattels, though they were worth far less, and Â£40,000 to the flat. Subsequently the plaintiffs sued the defendant for fraudulent misrepresentation in connection with certain access rights. The trial judge found in favour of the plaintiffs and awarded them damages. On appeal, the defendant did not contest the finding of fraudulent misrepresentation but contested the plaintiffs` entitlement to damages, which he submitted necessarily involved reliance upon illegal conduct on their part. It was held by the majority of the Court of Appeal that although the plaintiffs` performance of the contract was possibly tainted with illegality by their inflation of the value of the chattels to avoid stamp duty, as the possible illegality was wholly unconnected with their cause of action, the plaintiffs were entitled to succeed.

58 Here, the most that can be said against the plaintiffs is that at one stage they had agreed to an illegality. That illegal purpose was never effected. If it had been this action would never have been brought. If the plaintiffs in

Version No 1: 11 Sep 2026 (01:05 hrs)

Saunders , who had in fact been party to a completed illegality and thus had some degree of moral culpability, were able to recover on the basis that their cause of action was completely distinct from the illegality, a fortiori, the plaintiffs here have a viable claim which cannot be undercut by the defendant`s carping on an unrelated and incomplete illegality.

59 The defendant acted wrongfully in placing his caveat in the first instance and compounded that wrong by refusing to withdraw it despite the absence of any basis for its continued existence. If the transaction was illegal, as the defendant himself contended he could not have reasonably believed that he had obtained any interest in the Park property by virtue of the option. His actions in placing the caveat and refusing to withdraw it were not only wrongful in a negative sense, ie the absence of a legal right, but were wrongful in the positive sense, ie he knew he had no basis for his actions, and were, in fact, vexatious. This vexatious conduct gained for the defendant a profit to which he was not entitled. It does not lie in his mouth to refuse to compensate the plaintiffs for the damage this same conduct caused them.

60 **Conclusion**

61 Accordingly I grant the plaintiffs the following orders:

> (1) a declaration that the plaintiffs` forfeiture of the option money of $10,000 paid by the defendant pursuant to the option dated 3 August 1989 was valid; and
>
> (2) judgment against the defendant for $145,000 and costs.

62 Plaintiffs` claim allowed.

Version No 1: 11 Sep 2026 (01:05 hrs)

Judith Prakash JC

Harry Lee Wee (Braddell Brothers) for the plaintiffs
Peter Yap and Sim Eu Jin (Peter Yap & Co) for the defendant

Version No 1: 11 Sep 2026 (01:05 hrs)