IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1993] SGHC 280

Suit 1137/1990

Between

Steven Chin Shoo Cheen
Tong Siew Hoon

… Plaintiff

And

Ocean Investments Pte Ltd
Ang Miah Khiang and Lai Wee Ngen, the respective administrator and co-administrator of the Estate of Betty Lai Yin Har deceased
William Lai Wee Ngen
Alan Wong Hoi Ping
Karen Gan Eng Moi

… Defendant

GROUNDS OF DECISION

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Steven Chin Shoo Cheen and Another v Ocean Investments Pte Ltd and Others

[1993] SGHC 280

Suit 1137/1990
Warren Khoo L H J
26 November 1993

1 **Judgment:**

2 Coram: Warren L H Khoo J

3 CAV

4 J u d g m e n t

5 This is a claim for damages for breach of contract for the sale and purchase of a property or alternatively for damages for wrongful revocation of an option to purchase the property. The second plaintiff is the first plaintiff's wife. At all material times, it was the first plaintiff who dealt with the first defendants. I shall use the word the plaintiff to refer to the first plaintiff, and in relation to those events after the wife was added as a party to the option, references to "the plaintiff" must be taken to be references to the first plaintiff acting for himself, and for his wife as well.

6 By letter dated 12 October 1988, the first defendants ("Ocean") in consideration of the payment of a sum of $10,000 granted an option to the plaintiff to purchase a three-storey semi-detached house at Lot 23-404 Mukim 28 Lengkong Dua Singapore ("property A") for the price of $770,000. The option provided for the payment of the balance of 10% of the purchase price (i.e. 10% of the purchase price less the initial $10,000 paid) on the signing of the sale and purchase agreement, and for the payment of other instalments at various stages of construction and completion of the building therein specified. It also provided :

7 "This option shall expire thirty (30) days from the date hereof and in this respect our solicitors shall forward to you or your solicitors the sale and purchase agreement together with copies of prior title deeds pertaining to the said property. In the event the said option is not exercised within the aforesaid period, the option money paid herein shall forthwith be forfeited by us and in such event neither party shall have any claim whatsoever against the other."

8 It is common ground that the exercise of the option was to be by the plaintiff signing the sale and purchase agreement and paying the balance of 10% of the purchase price.

9 At the time of the granting of the option, Ocean were in the process of negotiating for the purchase of a piece of land adjacent to lot 23-404, known as lot 23-403, for the purpose of developing a pair of semi-detached houses. The option between the plaintiff and Ocean provided that in the event that Ocean succeeded in purchasing and developing this adjacent land, the plaintiff would be entitled to take one of the semi-detached houses to be built on this land ("property B") in lieu of property A. The adjacent land belonged to the estate of

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a man who had died and the agreement for the sale of the land to Ocean, entered into on 26 October 1988, was conditional upon approval of the sale by the court. It was provided in that agreement that the order of court approving the sale should be obtained by the vendors within five months from the date of the agreement or within such extended time as the parties might agree.

10 It appears that, although the option had been granted in respect of property A, the parties were actively discussing the substitution of property B as the property to be sold to the plaintiff. But because the parties carried on these discussions direct rather than through their respective solicitors, some confusion was caused in the minds of the solicitors as to which property was the property to be sold at any point of time. The confusion was compounded by the fact that a third property, one at Lengkong Satu, also featured for a brief moment in the discussions directly between the parties. The confusion was finally sorted out by the plaintiff's solicitors' letter to Ocean's solicitors of 19 November 1988. It is common ground that, at the latest by that date, property B had become the subject of the option in place of property A.

11 The date for the exercise of the option of 12 October had in the meantime expired. However, by letter dated 23 November, Ocean confirmed that the expiry date had by mutual agreement been extended to 22 January 1989. The date was further extended by agreement, as shown in a telex dated 2 February, from Ocean's solicitors to the plaintiff's solicitors:-

12 " We are instructed that our clients have agreed to grant an extension of the option period to 30 June 1989 or earlier (as the case may be) to your clients to sign the sale and purchase agreement relating to < property B > . Of course, this is subject to our clients obtaining the order of court to have the said property

conveyed to them before they can do so. We are in the process of clearing the estate matters for the owners and shall revert to you in due course."

13 The matter was thus held in abeyance pending the obtaining of the court order. As the date of 30 June stated in the telex was approaching, the plaintiff's solicitors wrote to Ocean's solicitors on 16 June asking whether the court order had been obtained and also asking for a sale and purchase agreement for the plaintiff's execution as soon as possible. On 21 June, Ocean's solicitors replied, saying that the application for court's approval would be heard on 21 July. On 30 August, Ocean's solicitors told the plaintiff's solicitors that the application had been adjourned to 15 September. They also faxed a draft sale and purchase agreement for the plaintiff's solicitors' perusal.

14 The turning point

15 So far, the events had taken a rather prosaic course. But they took a sudden turn when on 2 September Ocean's solicitors wrote to the plaintiff's solicitors in the following terms:

16 " We have been instructed that your clients shall sign the sale and purchase agreement by 5 September 1989 and to pay the balance 20% (sic.) of the purchase price under cl 3(1) (a) of the agreement. In the premises, please let us have your comments on our draft sale and purchase agreement by 4 September 1989."

17 I say sudden turn because, up to this point of time, the parties had been proceeding on the basis that the sale and purchase agreement would not, and could not, be signed unless and until the court order had been obtained. It is also clear from the evidence (as I shall indicate later) that the several extensions of

time for the exercise of the option had been due to the delays in obtaining the court order. The letter, however, did not indicate that the court order had been obtained.

18 How did the letter come to be written? Mr Teo, the managing director of Ocean, was singularly unhelpful on this point and generally. The solicitor who wrote it, Miss Betty Lai, has since died. However, Mr Yeo Kee Chin, the solicitor acting for the plaintiff, has been most helpful. He gave evidence in a manner befitting an officer of the court, and I have no hesitation in accepting everything that he told me from the witness box relating to this letter and to the events in the following days and weeks which culminated in Ocean refusing to proceed with the sale.

19 Mr Yeo Kee Chin said that when he received the letter, he thought that Ocean must have got their court order, and that the application must have been brought forward. He also realised that if the plaintiff was to proceed with the purchase he would have to sign the agreement and pay the amount due. Mr Yeo phoned Betty Lai. He asked her if the court order had been obtained. She told him no; in fact the hearing scheduled for 15 September would be adjourned, probably to some time later in the month. Mr Yeo told her that in that case her clients were in no position to require the plaintiff to exercise the option by the 5 September date stipulated in her letter. He told her that nevertheless since she was confident of obtaining the court order by the end of the month, he would suggest that the agreement be signed and that the balance of the 10% be held by her firm as stakeholders. In reply, Betty Lai said that she would take clients' instructions.

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20 The plaintiff, having been told about the letter of 2 September from Ocean's solicitors, faxed a note to Mr Teo saying he wanted to discuss certain points about the draft sale and purchase agreement. They concerned a variation of the timing and amount of some of the instalment payments towards the purchase price. Ocean rejected these proposals, and by their solicitors' telex dated 6 September they required the plaintiff to sign the sale and purchase agreement by 5 pm 7 September, failing which "our clients' offer will be treated as withdrawn."

21 This threat was in the event not carried out. At that time, Ocean's solicitors had not sent any engrossed sale and purchase agreement. It is not disputed that it was for Ocean's, rather than the plaintiff's, solicitors to prepare the engrossment for execution.

22 Ocean's solicitors sent the engrossment on 13 September, with a covering letter demanding that it be signed and returned on or before the 15th together with a cheque for $67,000, the balance of 10% of the purchase price. The plaintiff signed the agreement without amendments on the 14th and gave Mr Yeo a cheque made out in favour of Ocean's solicitors (rather than in favour of Ocean themselves). Mr Yeo spoke to Betty Lai. According to Mr Yeo, Betty Lai told him that she had taken instructions, and that it was in order for the money to be paid to her firm to be held by them as stakeholders pending the issue of the court order and the conveyance of the land to Ocean.

23 It is Mr Yeo's evidence that since the court order had not been obtained, in order that his client's interest should be sufficiently protected he took the view that the money to be paid over should be held as stake. It is also his evidence

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that if Betty Lai had not agreed to the stakeholding proposal, he would not have advised the plaintiff to part with his money.

24 Mr Yeo gave instruction to his conveyancing clerk to draft a letter to Ocean's solicitors recording the conversation and forwarding the agreement and the cheque. He himself was engaged in court on the 15th, and the letter was signed by a legal assistant, who obviously was not too particular about the proof-reading. The letter, dated 15 September, has been the subject of attention in this suit, and I reproduce the relevant parts of it, warts and all, below:

25 We thank you for your letter of the 13th instant together with enclosures.

26 We also refer to the subsequent telephone conversation between your Miss Betty Lai and our Mr Yeo whereby you have confirmed that the balance of the 10% deposit is to be held by you as stakeholders pending finalised of the above property be conveyed to your clients.

27 We are now instructed by our clients to enclose herewith the Sale Agreement in triplicate duly signed together with their cheque for the sum of $67,000-00 drawn in your favour being the balance of the 10% deposit to be held by you as stakeholders.

28 Nothing was heard from Ocean's solicitors until 6 October, some three weeks later. In their letter of that date, they said:

29 Your letter of 15th September 1989 refers. Our clients do not agree that the 10% deposit is to be held by us as stakeholders.

30 In the circumstances, your clients' cheque for $67,000.00 is returned herewith together with our clients' cheque for $10,000.00 being the Option fees paid earlier.

31 Mr William Lai, a partner of the firm of solicitors for Ocean, gave evidence. He took over the file when difficulties arose in getting Ocean's agreement for the $67,000 to be held as stake. Betty Lai told him that she had agreed on the stakeholding suggestion but that it was subject to Ocean's consent and Ocean would not agree. Mr Lai was asked by plaintiff's counsel to explain why, although his letter was in answer to Mr Yeo's letter of 15 September, he did not state his firm's understanding that the agreement on stakeholding was subject to Ocean's consent. He said it was because he did not wish to engage in allegations and counter-allegations with a fellow solicitor.

32 After receipt of Mr Lai's letter of 6 October, Mr Yeo spoke to Mr Lai. On Mr Lai's suggestion, Mr Yeo on 13 October returned the two cheques for Mr Lai to see what could be done. On 1 December, Mr Lai returned the two cheques and indicated finally that his clients had no intention of selling the property to the plaintiff.

33 The court order had in fact been obtained on 29 September 1989. That was before Ocean's solicitors' letter of 6 October. Ocean could have told the plaintiff of the fact, and had they done so, the argument about whether Betty Lai had agreed to the proposal and whether she had Ocean's authority to do so would have been entirely academic. The money could have been released to Ocean outright. However, the plaintiff and his solicitors were not told of this. Although Mr Lai's firm was responsible for obtaining the court order, he said in evidence,

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strangely it might be thought, that he was not aware that the court order had been obtained.

34 When it became clear that Ocean was not going to sell the property to him, the plaintiff looked for other properties in the neighbourhood to buy. He eventually bought a bungalow for $1.38m. He was not able to give the date when he bought it.

35 The plaintiff's claim

36 In these circumstances, the plaintiff claims that the option originally granted by Ocean's letter of 12 October 1988 had been varied by subsequent agreements reached between the parties. In particular, the date for the exercise of the option was extended to such a time as Ocean had obtained a court order for the sale to Ocean by the owners of the adjacent land, Ocean to give reasonable notice after obtaining the court order. The plaintiff also claims that the original option had been varied by agreement between the parties' solicitors to provide for the exercise of the option on or before 15 September as required by Ocean notwithstanding that Ocean had yet to obtain the court's approval, but with the added provision that the sum of $67,000 should be held by Ocean's solicitors as stakeholders pending the obtaining of the court order. The plaintiff claims that upon the exercise of the option by the plaintiff and his wife signing the sale and purchase agreement on the 15 September and paying the $67,000, a binding contract came into being, even though Ocean did not sign it, and that Ocean was in breach of the contract by refusing to proceed with the sale.

37 The Defence and my views

38 The defence raised two issues. Firstly, it is said that the stakeholding arrangement, if agreed to by Betty Lai, amounted to a variation of a term of the contract from one requiring the balance of the 10% to be paid to Ocean beneficially to one requiring it to be paid to Ocean's solicitors as stakeholders. It is argued that Betty Lai had no actual authority to agree to such a variation of the contract; neither did she have ostensible authority, i e authority created by Ocean's conduct, to agree to such a variation. The fact that Mr Yeo considered it necessary to ask Betty Lai whether the proposal was acceptable also shows that Mr Yeo himself accepted that solicitors do not have authority to agree to such a variation. It follows, so defence counsel submits, that the option was exercised in accordance with a purported but unauthorised variation of the terms of the option, and it was therefore not a proper exercise of the option.

39 I propose to deal with these submissions as follows. The evidence clearly establishes in my view that the parties had agreed to vary the terms of the option so that it was not exercisable unless and until the order of court had been obtained. No point has been raised about this variation. I find that the delays in obtaining the court order were the reason for the repeated extensions agreed between the parties of the date for the exercise of the option. I reject altogether the defence evidence that the extensions were granted by Ocean at and because of the plaintiff's request and not because of the delays in obtaining the court order. Mr Teo was not even able to tell the court what reason the plaintiff had given for the requests which he said the plaintiff had made.

40 This being the case, it seems to me that when Ocean made the demand on any of the three dates (i e 2, 6 and 13 September 1989) that the plaintiff sign the sale and purchase agreement, they were in breach of the terms of the option, varied in the way I have indicated, for the simple reason that as of any of those

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three dates the court order had not yet been obtained. The suggestion of Mr Yeo that the balance of the 10% should be held as stake was a way of meeting this unjustified demand made by Ocean on the plaintiff. It was an eminently sensible and reasonable response to a situation created by Ocean themselves. If in fact Ocean did not give authority to Betty Lai to agree to this proposal or if Ocean did not agree to this proposal, the fault clearly lies with them, and the consequences clearly cannot be laid at the door of the plaintiff. It is not necessary for me to enter into any discussion about the question of authority which counsel has posed. There is no need for me to determine whether Betty Lai agreed to the proposal with or without Ocean's authority. I accept for present purposes that, as contended by Ocean, they did not give her such authority and that in any event they did not agree to have the money held as stake.

41 The second issue raised by the defence is that if there was an oral agreement (reached by the telephone conversations between Yeo and Betty Lai) for the balance of the 10% to be held as stake, s 4 of the Statute of Frauds applies, and there being no memorandum of such an oral agreement signed by or on behalf of Ocean, the plaintiff cannot rely on the oral agreement. It is part of the argument that the plaintiff's solicitors' letter of 15 September, purporting to record the oral agreement, cannot be a sufficient memorandum as it was not signed on behalf of Ocean. One cannot, it is argued, construct a sufficient memorandum by reading that letter together with Ocean's solicitors' letter of 6 October, particularly as the latter document does not acknowledge such an agreement.

42 Again, I go back to the basic fact, as I have stated above, that the difficulties in regard to the stakeholding matter had all been created by Ocean themselves. The Statute of Frauds should not be allowed to be used to assist a

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party to profit from his own wrong. This would clearly be the position if one were to accept these defence submissions.

43 The defence also raises the question of issue estoppel. It arises in this way. The suit was originally taken out against Ocean, but partners of the firm of solicitors acting for Ocean were added and a claim for breach of authority was pleaded against them. In September 1993, an application was taken out to strike out the claim against the solicitors on the ground that the claim and allegations were frivolous, vexatious and an abuse of the process of court. The application, disallowed by the Registrar, was allowed on appeal by the learned judicial commissioner Mr T Q Lim, on the ground, I am told, that the two letters I have mentioned above do not constitute a sufficient memorandum for the purpose of s 4 of the Statute of Frauds. It was urged before me that that being so, the decision created an issue estoppel, even though the parties before the learned judicial commissioner and those before me are different. Counsel for Ocean cited Wall v. Radford < 1991 > 2 All E R 741. Plaintiff's counsel, however, submitted that a decision on an interlocutory application cannot create an issue estoppel so as to bind a court hearing a case on its substantive merits, with all the evidence presented. In my view, it is not necessary for me to decide these questions. Accepting but without deciding that the correspondence does not constitute a sufficient memorandum for the purpose of the statute, I do not think that that concludes the matter before me. What I have decided essentially is that Ocean should not be allowed to plead the statute so as to take advantage of their own wrong.

44 In the result, I find that Ocean was in breach of the terms of the option of 22 October 1988 as varied by the subsequent agreement of the parties.

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45 Damages

46 The plaintiff is to be placed as far as money can do so in the same position as if the contract had been performed. In Johnson v Agnew < 1980 > L R 367 at 400, Lord Wilberforce said that in the case of a contract of sale, this principle normally leads to assessment of damages as at the date of the breach. He says, however, that this is not an absolute rule; if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances. In the circumstances of this case, I think the date when the plaintiff succeeded in buying the alternative property would be more appropriate as a reference date than the date of breach. If property price went up after Ocean repudiated the contract, it seems to me there is no reason to deprive the plaintiff of the benefit of the capital gain which he would have got, had Ocean performed the contract, up to the time he bought his alternative property. What the plaintiff lost by Ocean's breach was the opportunity of making capital gains, an opportunity he regained, albeit from a different source, only when he bought his alternative property. Counsel for the plaintiff indicated that the alternative purchase was in August 1990, although the plaintiff himself said he was not sure exactly. I would accept what counsel said for present purposes.

47 There were two valuation reports produced, one by Mr Philip Leow of Jones Lang Wootton commissioned by the plaintiff and the other by Mr Teo Yik Weng of Allied Appraisal Consultants Pte Ltd commissioned by Ocean. There is also evidence of the sale of the subject property (No 44) and its pair (44A) as well as another pair of semi-detached houses (42 and 42A) next to them. House 42, which is actually the property A which the plaintiff had originally been interested in, was sold to a contractor in March 1989 for

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$560,000 without any interior finishing. It is of no help as a comparable. House 42A was sold in October 1990 for $900,000. Mr Teo, the managing director of Ocean, said that this high price was due to about $150,000 worth of extras like granite flooring, ceramic tiles, and air-conditioning. Property B (No 44) itself was sold in November 1989 for $770,000 and sub-sold in March 1990 for the same price. Then there is No 44A, sold in September 1989 for $750,000. Except for No 42, these transactions in my view provide good evidence of value. Mr Leow, on the basis of the sale of 42A and other properties further afield in the general area concluded that the market value of the subject property would be $860,000 in November 1989, $900,000 in June 1990 and $1.45m in June 1993. He does not think that the extras which were added to 42A would be responsible for enhancing the value of it, at least not to the extent of the expenditure. One man's dream home might be another man's aesthetic nightmare, so to say. Mr Teo, on the other hand, using a smaller number of valuables (including the subject property) gave a figure of $750,000 for November 1989 and $770,000 for March 1990.

48 Having regard to all the evidence, in particular the evidence of sales of the subject property and others in the immediate vicinity, I think that a reasonable figure for August 1990 for the subject property would not be more than, say, $820,000. I would fix that as its value as of that date. The amount of the damages I would award the plaintiff is the difference between that and the original contract price of $770,000, that is to say, $50,000.

49 I understand that the cheque for $10,000 which was returned to the plaintiff with the cheque for $67,000 on 1 December 1989, was never encashed. So Ocean still has the $10,000 paid to them on 12 October 1988. That sum should be returned to the plaintiff.

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50 Although interest has not been pleaded, I am inclined to award it, following the Court of Appeal's decision in Ng Swee Kin v. Ng Tian Hock < 1992 > 1 SLR 701.

51 I award interest at 6% per annum on the sum of $50,000 from date of writ, and on the sum of $10,000 from 12 October 1988.

52 The plaintiff should have the costs of this action. In view of the amount of the damages, the case could have been brought in the subordinate courts. However, having regard to the nature of the defences raised, I do not think it just to award costs on the subordinate courts scale. I therefore allow costs on the High Court scale.

Warren Khoo L H J

Teo Guan Teck and Simon Lee for the plaintiffs
Y H Cheong and Alina Sim for the first defendants

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