IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1994] SGCA 26

CA 25/1993

Between

Tan Soo Leng David

… *Appellant*

And

Wee, Satku & Kumar Pte Ltd
Another

… *Respondent*

GROUNDS OF DECISION

Civil Procedure — Pleadings — Striking out; Civil Procedure — Summary judgment

Version No 1: 29 Oct 2026 (23:45 hrs)

This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

Tan Soo Leng David v Wee, Satku & Kumar Pte Ltd and Another

[1994] SGCA 26

CA 25/1993
Karthigesu JA; L P Thean JA; Yong Pung How CJ
22 February 1994

1 Cur Adv Vult

2 This appeal is solely against the striking out of the appellant`s statement of claim and the consequent dismissal of the appellant`s action against both respondents.

3 The appellant is an ophthalmic surgeon who has been in specialist private practice since 1976. On 2 July 1992 he secured an option in writing (the option) to purchase the leasehold estate in unit 11-11, Mount Elizabeth Centre, Singapore (the property) from the first respondents for $10,000, which was duly paid. The option was stated to be open for acceptance until 4pm, 15 July 1992; it would be exercised by the appellant signing the duplicate copy attached to the option and the payment of $111,200, being 10% of the sale price less the option fee. The date fixed for completion by the option was 20 September 1992. The first respondents themselves had purchased the property from the second respondents which purchase was evidenced by an agreement in writing dated 24 January 1992 (the principal agreement).

4 It is not in dispute that the second respondents had not, by 2 July 1992, conveyed the property to the first respondents. The property was still in the process of being developed by the second respondents and the principal agreement provided for the payment of the purchase price in stages as the development progressed. Clause 15 of the principal agreement provided that the sale and purchase of the property shall be completed 14 days after the receipt by the purchaser or his solicitors of the notice to complete which shall be given by the second respondents on or before 14 January 1993 or the expiry of three years from the date of issue of the temporary occupation permit, whichever is the earlier. The notice to complete was to be accompanied by the certificate of the architect that the approval of the competent authority for the sub-division of the building had been obtained. Clause 15 also provided that, on completion, the second respondents were to make and execute an assurance of the building unit, that is to say of the property, and unless the Registrar of Titles had directed that the land on which the property was erected shall be dealt with under the Registration of Deeds Act (Cap 269, 1989 Ed), 1988, the second respondents were to deliver to the purchaser the duplicate subsidiary strata certificate of title for the property.

5 The principal agreement further provided by cl 26 as follows:

> (1) The purchaser shall at the request of the vendor enter into the restrictive covenants specified in the third schedule hereto restricting the use of the building unit and prohibiting nuisance and pollution of any kind or in any form.
>
> (2) On completion of the sale and purchase of the building unit as in cl 15 hereinbefore provided, the purchaser shall execute an instrument of restriction containing such restrictive or other covenants and cause the same to be registered in the Registry of Title, Singapore.

Version No 1: 29 Oct 2026 (23:45 hrs)

6 The provision of the third schedule relevant to this appeal is para (f) thereof which reads as follows:

> (f)) The purchaser shall use the building unit(s) solely for his medical practice and shall not let or sublet, sell or assign or transfer (otherwise than by way of security) the same without the prior written consent of the vendor which consent shall not be unreasonably withheld if the intended letting or sub-letting, sale or assignment or transfer is to a medical practitioner (which expression shall include a body corporate) engaged in the practice of specialist medicine.

7 It is pertinent to note that as at 2 July 1992, or indeed when the appellant exercised the option on 15 July 1992, the first respondents had not entered into the restrictive covenants specified in the third schedule of the principal agreement. Be that so, it was the intention of the second respondents that the restrictive covenants should:

> *run with and be binding upon the building unit(s) sold into the hands of whomsoever the same may come, and shall enure for the benefit of the whole or any part or parts of the lands comprised in The Mount Elizabeth Project and so that such covenants and conditions shall so far as practicable be enforceable by the vendor [the second respondents] or the owners, occupiers for the time being of the land comprised in The Mount Elizabeth Project or any part or parts thereof ....*

8 In order to complement cl 26 of the principal agreement and the third schedule thereof, the option provided by cll 4 and 6 read as follows:

> *Clause 4*
>
> *The property is sold subject to the covenants and conditions set forth in the agreement for sale dated 24 January 1992 (hereinafter called the `principal agreement`) executed between the developers Mount Elizabeth Hospital Ltd (hereinafter called the `developers`) and us, and to all quit* ***and other rents (if any) and to all incidents of tenure, party wall rights, rights of way and other rights and easements (if any) and to any other restrictive or other covenants or conditions (if any) affecting the property and you shall be deemed to have full***

Version No 1: 29 Oct 2026 (23:45 hrs)

> ***knowledge and notice thereof***. *Subject to the foregoing, the property shall be sold free from encumbrances. [Emphasis added.]*
>
> *Clause 6*
>
> *The sale shall also be subject to the consent of the developers, which said consent to the sale is required under the terms of the principal agreement. In the event such consent is refused or not received by the completion date (as defined in cl 7 below), the sale and purchase herein shall be deemed rescinded forthwith whereupon all moneys paid hereunder shall be refunded to you free of interest and subject thereto the sale and purchase herein shall be cancelled and of no effect and neither party shall have any claim or demand against the other for damages, costs, compensation or otherwise.*

9 As stated earlier, the completion date fixed by cl 7 was 20 September 1992.

10 As it happened the first respondents` solicitors wrote to the second respondents` solicitors for their consent to sell the property to the appellant on 1 July 1992 vide cl 6 of the option. The granting of the option had been delayed by one day. The solicitors for the second respondents replied to the first respondents` solicitors on 14 July 1992. They said:

> *We regret to inform you that our client is withholding its consent under cl (f) of the third schedule.*

11 Despite this and being informed on 14 July itself that the option fee of $10,000 would be returned, the appellant exercised the option and his solicitors forwarded the acceptance copy of the option duly signed by the appellant, together with a cashier`s order for the balance 10% of the deposit in the sum of $111,200 to the first respondents` solicitors on 15 July 1992. On the same day, the solicitors for the first respondents returned the cashier`s order to the appellant`s solicitors stating that `the contract is no longer effective`, and that the option fee will be returned shortly. There, then, was an exchange of correspondence between the solicitors of all three parties but this came to

Version No 1: 29 Oct 2026 (23:45 hrs)

nothing as each held to their respective positions taken. The result was that the appellant commenced proceedings on 11 September 1992 against both respondents claiming, inter alia, against the first respondents specific performance of the sale and purchase agreement of the property, notwithstanding that the second respondents had withheld consent of the sale and, against the second respondents, a declaration and damages for unreasonably withholding consent. The appellant also lodged a caveat against the property.

12 On 26 September 1992, the appellant applied for summary judgment against both respondents. The immediate response of both respondents was to apply, severally, for the appellant`s statement of claim to be struck out on the grounds that it did not disclose a reasonable cause of action, or that it was frivolous or vexatious, or that it was otherwise an abuse of the process of the court and that the appellant`s action against the each of them be accordingly dismissed.

13 All three applications were heard together and, in a reserved judgment delivered on 11 February 1993, the learned judge dismissed the appellant`s application for summary judgment and granted the applications of both respondents. In the result the appellant`s action against both respondents was dismissed. The judgment of the learned judge is reported at [1993] 2 SLR 126 .

14 The learned judge in striking out the appellant`s statement of claim and dismissing the appellant`s action founded his judgment on the construction of cl 6 of the option. He said at p 130:

> *On the true construction of cl 6 of the agreement in the present case, I hold that it is a resolute condition - that is, it provides for*

> *the automatic termination of the agreement if the consent is refused or not received ... The only obligation of the vendor in respect of the consent is to seek it in good faith and good time. He is not obliged to argue, or let the purchaser argue, against the owner that the refusal of consent ... is unreasonable or unlawful. In view of the time limit for the completion of the agreement, the vendor cannot be expected to embark on an argument with the owner or prolong it indefinitely. The virtue of the automatic rescission clause in the agreement is that it affords the vendor a quick and placid solution without having to litigate with anyone. The issue whether a refusal of consent ... by the owner is unreasonable is, therefore, not a justiciable matter at the instance of the purchaser as it is not within the context of the agreement.*

15 He concluded his judgment at p 132 by saying:

> *The court has the power to dismiss an action in summary procedure if it is plain and obvious that the action will not lie. And `the court should order a statement of claim to be struck out if it is satisfied that the action is not maintainable even if there is no express decision of the court or a superior court to that effect`. See 36* ***Halsbury`s Laws of England*** *(4th Ed) paras 73-74.*

16 The plaintiffs` claim is plainly and obviously unsustainable because he does not have a justiciable issue to take with the defendants. The decided cases are abundantly clear on the point. The following statement of Fletcher Moulton LJ in ***Dyson v Attorney General*** [1911] 1 KB 410 at p 418 clearly applies to this case:

> *`to permit the action to go through its ordinary stages up to trial would be to allow the defendant to be vexed under the form of legal process when there could not at any stage be any doubt that the action was baseless.`*

17 Before us, Mr Gyles, for the appellant, sought to advance arguments not advanced before the learned judge below. It was contended that the learned judge had exercised the jurisdiction under O 18 r 19 of the Rules of the Supreme Court 1990 of striking out the appellant`s statement of claim as he was persuaded to exercise that jurisdiction to dismiss the appellant`s action against

Version No 1: 29 Oct 2026 (23:45 hrs)

both respondents based upon a line of English cases discussed in his judgment. It was pointed out that in none of those cases were there clauses like cll 4 and 6 of the option which incorporated a clause in the underlying instrument by reference (cl 26 of the principal agreement) and where the underlying instrument contained an express proviso that consent should not unreasonably be withheld in particular circumstances (para (f) of the third schedule to the principal agreement). It was further contended that, although all the cases relied on by the learned judge in his judgment were all concerned with whether a vendor had used his best endeavours to obtain consent, none related to a situation where the consent which was contemplated was that of a head lessor pursuant to the terms of the leasehold estate being assigned, not, as here, where the consent was that of the head lessor (the second respondents) who in relation to the first respondents were the assignors of their leasehold estate in the property. Lastly, it was contended that in all these cases, the decisions were on the facts of each particular case after trial and that they did not purport to lay down any proposition of law.

18 Mr Gyles submitted that it was evident that appellant`s counsel in the court below was primarily concerned to achieve summary judgment and had accordingly put his case on the basis that the first respondents had evinced an intention not to complete on 20 September 1992 and had thus committed anticipatory breach or repudiation. He had sought to side step the best endeavours issue which could have given rise to a triable issue and so might have prevented summary judgment being obtained. That should not, as Mr Gyles contended, bar the appellant from now raising the best endeavours issue since the facts in evidence below (albeit in the several affidavits of the parties) clearly raise an issue for trial on best endeavours.

Version No 1: 29 Oct 2026 (23:45 hrs)

19 The pleaded case of the appellant is manifest from para 14 of the statement of claim. It reads:

> *Notwithstanding that the plaintiff`s [appellant`s] solicitors had on or about 28 August 1992 requested the first defendants [the first respondents] to confirm by 10 September 1992 that the first defendants will complete on 20 September 1992 as scheduled and that the plaintiff has at all material times been and remains ready, willing and able to complete the agreement [option], the first defendants` solicitors did not on 10 September 1992 confirm or respond. The plaintiff say [sic] that the first defendants` failure to reply by 10 September 1992 evince [sic] an intention to refuse to proceed with the completion, such refusal being wrongful and/or in breach of the agreement.*

20 However, in the numerous affidavits filed by the parties before the hearing below, and without going into detail or expressing an opinion one way or the other, it seems to us that there is a case, on the facts that were before the learned judge below, for an issue to be tried as to whether the first respondents had used their best endeavours to obtain the consent of the second respondents for the assignment of their leasehold estate in the property to the appellant.

21 Since this appeal arises from an interlocutory application and the appeal itself is against an order striking out the appellant`s statement of claim and dismissing his action, we allowed Mr Gyles to raise the best endeavours argument which was an argument that could have been raised on the material which was before the learned judge below. It will be noted that O 18 r 19 gives the judge a discretionary jurisdiction and permits an amendment of the statement of claim as an alternative. As this court said in ***Ko Teck Siang v Low Fong Mei & Anor and other actions*** , the discretion for striking out under O 18 r 19 should be exercised sparingly. See also ***Manuel Misa v Raikes Currie, G Grenfell Glyn & Ors*** , at p 559, where the House of Lords allowed a new argument to be taken since it did not require any new material to be introduced into the case. The failure to plead the want of best endeavours on the part of the

Version No 1: 29 Oct 2026 (23:45 hrs)

first respondents is not necessarily fatal to the appellant at this stage of the proceedings since that deficiency can be made good by an amendment to the statement of claim before the trial.

22 The learned judge relied on a line of cases commencing with ***Lehmann v McArthur*** for the legal proposition that `the lessee is not required to remonstrate with the owner over the refusal or to take upon himself the expense and risk of litigation to force the owner to consent` (see p 129 of the report of the learned judge`s judgment). With respect to the learned judge, the way in which he put the legal proposition was too wide. ***Lehmann v McArthur*** did not decide that, as a matter of law, a vendor is bound to do no more than seek consent and accept at face value any refusal. What it did decide was that `having used all reasonable efforts to induce the lessor to consent`, the vendor (lessee) had no duty to file legal proceedings to oblige the lessor to give his consent. The emphasis which Mr Gyles sought to place was the duty to use all reasonable efforts to induce the lessor to consent and this, he contended on the facts before the court below, the first respondents had not done. What the facts disclosed were that the first respondents` solicitors, having written to the second respondents` solicitors for the second respondents` consent, received a letter from the second respondents` solicitors by facsimile transmission on 14 July 1992 at about 3.36pm that the second respondents were withholding consent and on the same day purported to rescind the option, notwithstanding that completion was not until 20 September 1992. The first respondents made no efforts, or so it appeared from the several affidavits, to persuade the second respondents to give their consent having regard to the fact that the appellant was an ophthalmic surgeon who had been in specialist practice since 1976. Our attention was also drawn to other evidence which highlighted the unsatisfactoriness of the affidavit evidence and the need to have that evidence

Version No 1: 29 Oct 2026 (23:45 hrs)

tested by cross-examination in a full trial. This has a direct bearing on the first respondents` conduct as to whether the first respondents had used their best endeavours or whether they had used reasonable endeavours to obtain the second respondents` consent before they took the precipitate step of rescinding the option.

23 The appellant deposed that, at two meetings with Dr Julian Wee of the first respondents, Dr Julian Wee informed the appellant that he was prepared to proceed with the sale subject to the second respondents` consent and that in fact he wanted the sale to go through; yet this was denied by the first respondents` solicitors whose stand on behalf of the first respondents was that the `consent (of the second respondents) has not been forthcoming and accordingly the sale is not on`. No sooner had the first respondents rescinded the option on 14 July 1992 and despite the appellant`s repeated requests to the first respondents to approach the second respondents for their reasons for withholding consent, the first respondents proceeded to advertise the sale or rental of the property without apparently referring to the restriction of user imposed by para (f) of the third schedule to the principal agreement. It was only on 20 or 21 August 1992 that the first respondents approached the second respondents for their reasons for withholding their consent. Mr James Robert Clapp Jr, the chief executive of the second respondents, deposed in an affidavit of his meeting with the appellant on 16 July 1992. This is what he said:

> (2) The plaintiff [the appellant] also stated that he was approaching me because he was concerned that the second defendants` [second respondents] view of him may have been tainted because of an earlier incident in which the plaintiff had changed his mind and decided not to take up a share option offered to him in a joint venture company of which the second defendants are shareholders, after having already agreed to do so.

Version No 1: 29 Oct 2026 (23:45 hrs)

> (3) I told the plaintiff that the second defendants` initial view was not favourable to him and that the second defendants were not inclined to allow the purchase by him. I also emphasized that the second defendants` refusal of consent had nothing to do with the plaintiff himself personally, ie:
>
> (a) the plaintiff personally as contrasted to the plaintiff as an ophthalmologist; and
>
> (b)) in the context of the plaintiff`s concern as stated in para (2) above.
>
> (4) I also told the plaintiff that the second defendants` intention was to position the hospital with the highest quality and most efficacious mix of specialists in the hospital. Reference was also made to the fact that a lot of thought has been put into the calibre of specialist and mix of specialists that the second defendants were going to sell to, and that the second defendants were operating in a continuously changing environment. Great importance had been placed on selling to a certain mix of doctors at the time of sale.

24 In the same affidavit, Mr James Robert Clapp Jr also said:

> *I emphasized to him [the appellant] that the second defendants had not received any formal inquiry from the potential sellers [the first respondents] and as such the second defendants had not given any serious consideration of the matter [ie to giving the second respondents` consent to the sale of the property by the first respondents to the appellant].*

25 This evidence being brought to our notice, it was clear that a serious question to be tried arose on whether the second respondents had categorically refused their consent and also whether the withholding of consent previously communicated to the first respondents, as a question of fact, came within the words of para (f) of the third schedule to the principal agreement - `which consent shall not be unreasonably withheld if the intended ... sale ... is to a medical practitioner ... engaged in the practice of specialist medicine`.

26 It was pointed out to us that Goff J in deciding a question such as this described the issue as a question of fact in ***Lipmans Wallpaper Ltd v Mason & Hodghton Ltd*** at p 33. Our attention was also drawn to the case of ***Brauer &***

Co (Great Britain) Ltd v James Clark (Brush Materials) Ltd , at p 501, where Denning LJ, in a case involving a sale contract expressed to be subject to the granting of an export licence where the contract would only be binding on the sellers if a Brazilian export licence could be obtained, described that clause as `a special exemption inserted in favour of the sellers` went on to say that, `in order to enable them [the sellers] to take advantage of it they must show that, notwithstanding that all reasonable steps were taken by them, they could not obtain a licence to export during any part of the shipment period, or, alternatively, that it was useless for them to take any such steps, or any further steps, because it was quite impossible for them to obtain a licence`. So also, in our view, there was a duty on the first respondents to show that they had taken all reasonable steps to obtain the second respondents` consent or that it was useless for them to pursue the matter with the second respondents after the initial withholding of consent because it would have been quite impossible for them to obtain the second respondents` consent. This is a question of fact which could not be decided on the affidavit evidence, such as it was, and the matter has to go to a full trial for this question to be decided as well as the question of whether the second respondents had acted reasonably within the meaning of para (f) of the third schedule to the principal agreement in withholding their consent.

27 This apart, Mr Gyles, by his new arguments raised a number of other issues of law of fundamental importance which we do not propose to go into in this judgment. Suffice it to say that it was conceded by Mr Hwang that the question raised by Mr Gyles, as to whether the requirement of the second respondents` consent as provided by cl 6 of the option fetters the first respondents` rights to alienate the property for an indefinite period and thus renders it void, traverses a difficult area of the law on which there is conflicting authority. Furthermore, it is evident that what the second respondents clearly

Version No 1: 29 Oct 2026 (23:45 hrs)

intend to achieve by and through cl 26(2) of the principal agreement is a sort of common building scheme. Whether this object can be achieved is not without difficulty and it is a question which needs to be addressed.

28 In our view these issues and other issues which have arisen cannot be disposed of summarily. In the result, we will set aside the order of the learned judge appealed against, that is to say, his order striking out the statement of claim and dismissing the action, give leave to the appellant to amend his statement of claim and consequentially to the two respondents to amend their defences and direct that the claim of the appellant against the two respondents proceed in the normal way to trial.

29 Since the appellant has succeeded in this appeal only because of the new arguments put before us, with our leave, the appellant should not be entitled to the costs of this appeal. Accordingly, we make no order for costs on this appeal. We also set aside the order for costs made by the learned judge below. Although this appeal has succeeded on new arguments which were not before the judge below, we are, nevertheless, of the view that the applications to strike out the appellant`s statement of claim and the dismissal of his action should not have been made and, in any event, the striking out orders ought not to have been made by the learned judge. The appellant`s claim, in our view, is by no means frivolous, vexatious or an abuse of the process of court. It was not adequately pleaded and such inadequacies could have been cured by amendment (see O18 r 19). Accordingly, we order that the appellant be entitled to one set of costs in respect of the applications of the first and second repondents, to be borne by each of the respondents as to one-half thereof. The appellant is entitled to the refund of the security deposit for the appeal and we so order.

30 ***Appeal allowed.***

Version No 1: 29 Oct 2026 (23:45 hrs)

Karthigesu JA
L P Thean JA
Yong Pung How CJ

Roger Vincent Gyles QC, KS Chung and Michael Moey (Harry Elias & Pnrs) for the appellant
Michael Hwang and Maria Ho (Allen & Gledhill) for the first respondents
Chua Lee Meng (Lee & Lee) for the second respondents

Version No 1: 29 Oct 2026 (23:45 hrs)