IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1994] SGCA 59

CA 169/1993

Between

Chip Thye Enterprises Pte Ltd

… *Appellant*

And

Development Bank of Singapore Ltd

… *Respondent*

GROUNDS OF DECISION

Contract — Contractual terms — Implied terms; Contract — Discharge — Rescission; Contract — Remedies — Specific performance; Credit and Security — Lien — Equitable lien; Credit and Security — Mortgage of real property — Mortgagee's power of sale

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Chip Thye Enterprises Pte Ltd v Development Bank of Singapore Ltd

[1994] SGCA 59

CA 169/1993
Karthigesu JA; L P Thean JA; Yong Pung How CJ
21 April 1994

1 Cur Adv Vult

2 **The facts**

3 The material facts that gave rise to this appeal are as follows. One Quah Hong Guan (Quah) was at all material times the registered proprietor of the property known as No 10, Lornie Road, Singapore (the property). On 12 January 1983, Quah mortgaged the property to the respondent bank to secure the payment of all moneys owing by Guan Huat Hardware Pte Ltd (Guan Huat) to the bank. About three years later, on 15 July 1986, Quah entered into a sale agreement with a company, Goh Hock Choon Pte Ltd (GHC), whereby he agreed to sell the property to that company. Arising from such sale, GHC on 27 August 1986 lodged a caveat against the property claiming an interest therein as the purchaser. Apparently some dispute arose subsequently between Quah and GHC in relation to the sale, and, in consequence, GHC on 25 October 1986 initiated proceedings against Quah in Originating Summons No 1266 of 1986 claiming a declaration that the sale agreement had been rescinded and also claiming a refund of the deposit paid under the sale agreement. While these

proceedings were in progress, in early November 1986, Quah and the appellants entered into negotiations for the sale and purchase of the property, and soon thereafter a draft sale agreement was prepared by Quah`s solicitors and was forwarded to the appellants` solicitors for approval; amendments to the draft were then under discussion. On 27 November 1986, Quah wrote to the appellants, confirming that the property had been sold to the appellants for $830,000 and informing them that the transfer of the property would be effected `after the settlement with M/s Goh Hock Choon Pte Ltd`. There was no reply to this letter from the appellants. However, about a week later, on 4 December 1986, an agreement in writing between Quah and the appellants for the sale and purchase of the property was executed (the sale agreement).

4 At the time of the execution of the sale agreement, Quah had already obtained written planning permission for the development of two pairs of semi-detached bungalows on the property. In fact, the planning permission was given slightly more than one year before, that is, on 25 October 1985. It was obviously contemplated by the parties that the property was to be sold with the benefit of such planning permission. Thus, the sale agreement by cl 6 provided that the sale and purchase was subject to the appellants obtaining from the competent authority an extension of the written planning permission, and, if such extension was refused, the appellants should re-submit an application for fresh written permission for such development. However, no fixed period of time was prescribed for obtaining such extension or fresh permission. The sale agreement further provided by cl 8 that the sale and purchase should be treated as null and void if both the extension and fresh permission were refused by the competent authority. On or soon after the execution of the sale agreement, Quah authorized the appellants to apply to the competent authority for the extension, and on 11 December 1986, the appellants through their architects applied to the

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Development and Building Control Division (DBCD) for an extension of the written planning permission. On 6 January 1987, DBCD replied stating that an extension was not required as the planning permission would only lapse on 24 October 1987, if the development was not completed by that date. However, the appellants did not notify Quah or his solicitors of the content of this reply from DBCD.

5 On 16 March 1987, GHC lodged another caveat against the property claiming interest as holders of an equitable lien arising from the payment of the deposit under the agreement of 15 July 1986. On 8 June 1987, the appellants lodged a caveat claiming interest as the purchasers of the property.

6 At or about that time, presumably Guan Huat were in default in respect of payment of moneys owing to the respondents. On 25 July 1987, the respondents` solicitors served notices on Guan Huat and their guarantors, including Quah, demanding payment of the entire amount owing, which was then $732,046.69 plus interest thereon. On 28 July 1987, the solicitors for the appellants informed the solicitors for the respondents that the appellants had entered into an agreement with Quah to purchase the property at the price of $830,000. That letter appeared to request the respondents as mortgagees to enter into an agreement for the sale of the property to the appellants. About a week later, the appellants forwarded to the respondents a letter from Quah stating that he had no objection to the property being sold to the appellants by the respondents as mortgagees. It did not appear that the respondents responded to this request, and the matter was not taken any further. But, clearly by then the respondents were aware that the appellants had entered into an agreement to purchase the property from Quah.

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7 Nothing transpired over the next two months in relation to the property. Then on 13 October 1987, the appellants` solicitors wrote to Quah`s solicitors stating that they had received `confirmation of the extension` and that the agreement was from that time unconditional; they enclosed the engrossed transfer for execution and asked for a completion account. In response, Quah`s solicitors asked for production of documentary evidence of the confirmation and maintained the stand that as no such documentary evidence was produced the appellants were not in a position to complete the purchase. On 15 October 1987, the appellants` architect applied to the DBCD for `a temporary extension of three months for the written planning permission`. By a letter dated 23 October 1987, DBCD allowed the appellants to delay applying for a formal extension of the written planning permission until 24 January 1988. Again, neither Quah nor his solicitors were informed of this.

8 On 23 October 1987, the respondents as mortgagees sold the property at an auction for $1,210,000. This came to the notice of the appellants. On 26 October 1987, the appellants instituted proceedings against Quah in Suit No 2794 of 1987, claiming repayment of the deposit of $83,000 and damages for breach of contract. Following that, the appellants` solicitors on 7 November 1987 informed the respondents` solicitors of the proceedings and enquired if the respondents would hold the balance of proceeds (after payment of the amount due to them) pending the outcome of the suit. The solicitors for the respondents did not appear to have replied to this letter. The appellants` solicitors therefore followed up with another letter on 15 December 1987 stating that, according to their information, there would be a surplus remaining after paying off the amount due to the respondents and that an application by the appellants for summary judgment against Quah had been fixed for hearing on 15 January 1988, and repeating their request to the respondents to hold the balance of the

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proceeds `pending the settlement of the conflicting claims against that sum`. However, the respondents` solicitors by telex informed the appellants that they were not agreeable to accede to the appellants` request.

9 On 4 January 1988, the respondents` sale of the property was completed, and on 6 January 1988 or thereabout, the transfer by the respondents to the purchasers was registered with the Registry of Titles and in consequence the interest of Quah was extinguished and the two caveats lodged by GHC and the caveat lodged by appellants were overreached and cancelled. After settling (i) the costs and expenses of the sale, including the legal costs, and (ii) the amount due to the respondents under the mortgage, there remained in the hands of the respondents a surplus of $415,778.41. On 7 January 1988, this surplus was paid to Quah by the respondents.

10 On 15 January 1988, the appellants obtained summary judgment against Quah but the judgment was reversed on appeal; the action was then set down for trial and the hearing was fixed for 29 May 1989. Prior to the date of hearing, on 31 March 1989, receiving and adjudication orders were made against Quah, and in view of Quah`s bankruptcy, the date fixed for the trial was vacated and the trial was adjourned sine die.

11 **Proceedings in the High Court**

12 On 21 July 1989, the appellants commenced proceedings against the respondents in the High Court claiming a declaration that, by virtue of s 68(1) of the Land Titles Act (Cap 157) (the Act) (presently s 74(1) of the Act, 1994 Ed), the respondents were trustees of the surplus of $415,778.41 which they had paid to Quah, and that the appellants were entitled to the money and other

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consequential reliefs. The crux of the appellants` case was that the respondents, by paying the surplus to Quah, had breached their duty under s 68(1) of the Act, and in consequence were liable to account for the loss suffered by the appellants.

13 The proceedings were heard before Goh Joon Seng J. In a reserved judgment, reported in [1994] 1 SLR 164 , he held that to be entitled to the surplus of the sale proceeds under s 68(1) of the Act, the appellants had to be a person who appeared `from the land-register to be entitled to the mortgaged property` and to be so entitled, the appellants must have become owners in equity under a contract of sale, which was capable of being specifically enforced. The learned judge found that the sale agreement was a conditional contract. Two conditions were identified. First, there was a condition in cl 6 relating to the written planning permission. The learned judge found that cl 6 was for the exclusive benefit of the appellants, and, as such, the appellants could and did waive this condition by their letter dated 13 October 1987 to Quah`s solicitors. Secondly, the learned judge found that, on the basis of the letter of 27 November 1986 written by Quah to the appellants, it was also a term of the contract that completion would be effected `after settlement` with GHC. Such a settlement had not been achieved at the date of the completion of the mortgagee sale by the respondents. Further, the learned judge found that the appellants had elected to rescind the sale agreement when they commenced the action against Quah in Suit No 2794 of 1987 claiming for repayment of their deposit and damages for breach of contract. He held that by this action the appellants had elected to rescind the sale agreement and were not entitled to specific performance thereafter. The learned judge concluded thus, at p 174:

> *As there was no specifically enforceable contract between Quah and the plaintiffs at the date when the defendants came into possession of the surplus funds on completion of the mortgagee sale, I hold that the plaintiffs were not persons who appeared `*

> ***from the land-register to be entitled to the mortgaged property`*** *under s 68(1) of the Act. Neither were they* ***` authorised to give receipts for the proceeds of the sale thereof`*** *thereunder.*

14 He further held that the appellants had no equitable lien for the deposit on the surplus of the sale proceeds as there was no contract capable of specific performance at the date of the completion of the mortgagee sale by the respondents.

15 **Appeal**

16 Against his decision, this appeal has been brought. Following the filing of the appeal, the respondents filed a respondent`s notice contending that the condition in cl 6 of the sale agreement operated as a condition precedent which was not for the exclusive benefit of the appellants and the appellants could not unilaterally waive that condition and in consequence the sale agreement remained a conditional contract and could not be specifically enforced. The appeal and the respondent`s notice raise the following issues for determination:

> (1) whether the letter of 27 November 1986 written by Quah to the appellants stating that the transfer of the property would be effected after the settlement with GHC was a term or condition of the sale, and, if it was, whether it operated as a condition to which completion of the sale and purchase was subject;
>
> (2) whether cl 6 of the sale agreement was a condition for the exclusive benefit of the appellants;
>
> (3) whether the appellants had by instituting an action against Quah rescinded the sale agreement;
>
> (4) whether the appellants had an equitable lien on the property for the deposit paid under the sale agreement; and
>
> (5) whether the respondents had committed a breach of their duty under s 68(1) of the Act.

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17 **First issue: the letter of 27 November 1986**

18 The letter of 27 November 1986 was written by Quah to the appellants prior to the execution of the sale agreement. It stated as follows:

> *This is to confirm that the above property has been sold to your organization for the total sum value of $830,000.*

19 Transfer of title deeds and other relevant documents for the above property will be effected, after settlement with M/s Goh Hock Choon Pte Ltd. At the meantime [sic], please proceed with the architect approval.

20 It seems to us that, at the time the letter was written, the parties were at an advanced stage of negotiation and the draft of the sale agreement had already been prepared, and their respective solicitors were discussing various amendments to the draft. That letter was written by Quah himself, presumably without any consultation with his solicitors and, so far as he was concerned, was intended by him to confirm the agreement he and the appellants had reached on the sale and purchase of the property. However, there was no response to this letter by the appellants, and the term stated in para 2 of the letter was not incorporated in the sale agreement; in fact, the sale agreement made no reference to this letter. Nor was there any evidence that the parties had agreed that the letter, and in particular para 2, would form a supplemental term to or a variation of the sale agreement. It is not clear to us on what basis the learned judge found that para 2 of the letter was `a further stipulation` of the contract. In our judgment, the terms of the letter of 27 November 1986 and, in particular, para 2 thereof had not been agreed to by the parties as a supplemental term to or a variation of the sale agreement. Accordingly, para 2 was not a stipulation to which completion of the sale and purchase was subject. We are therefore unable to agree with the learned judge that this was a stipulation or condition

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which had yet to be fulfilled and rendered the sale agreement incapable of enforcement by specific performance.

21 **Second issue: cl 6 of the sale agreement**

22 The main contentions of the parties centred on the nature and effect of cl 6 of the sale agreement. Clause 6 reads as follows:

> *The sale and purchase is subject to the purchaser obtaining an extension of the written permission for planning approval for the development of two pairs of semi-detached bungalows on the property under reference No DC 576/83-85/C/110 dated 24 October 1985 in decision No 855006. In the event that the purchaser`s application for the extension of written permission for planning approval is rejected by the competent authority, the purchaser shall within fourteen (14) days after being notified of the said rejection re-submit plans for a fresh written permission for planning approval for the development of two pairs of semi-detached bungalows on the property.*

23 It is also relevant and helpful to set out cl 8 which is as follows:

> *The sale and purchase herein shall be treated as abortive null void and of no effect in the event that both the extension of written permission for planning approval and the application for fresh written permission for the development of two pairs of semi-detached bungalow on the property is rejected or refused by the competent authority.*

24 Counsel for the respondents submitted that cl 6 operated as a condition precedent and the effect of that clause was that while there was an immediate binding contract between the parties, which was capable of giving rise to an action for damages if no attempt was made to comply with or fulfil that condition within the time limit, there was no immediate contract for the sale of land. In consequence, no relationship of vendor and purchaser could or would have arisen until the condition was fulfilled, and until then Quah, as vendor, would not have disposed of any interest in land and did not become a

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constructive trustee of the property, the subject matter of the purchase; neither did the purchaser become in equity an owner of the land. In support, she relied mainly on the Privy Council`s decision in ***Aberfoyle Plantations Ltd v Khaw Bian Cheng*** and submitted that cl 6 was a condition precedent of the ***Aberfoyle*** type. This court has considered in some detail the decision in ***Aberfoyle*** in ***Chi Liung Holdings Sdn Bhd v A-G*** . It is not necessary for our purpose to reiterate what we have decided. Suffice it here to say that cl 6 is not of the nature and does not have the effect as contended on behalf of the respondents. It certainly does not operate as a condition precedent to the formation of a binding agreement for the sale and purchase of the property. It is a term or condition of the sale agreement and until that term or condition is fulfilled or waived, the parties are under no obligation to complete the sale and purchase of the property.

25 The true question before us is whether cl 6 was for the sole or exclusive benefit of the appellants such that they alone were at liberty to waive it and render the sale agreement unconditional. On this point, counsel for the respondents relied mainly on the case of ***Heron Garage Properties Ltd v Moss & Anor*** . In that case, the vendors agreed to sell to the purchasers the southern part of their property for the purpose of a petrol station while retaining the northern part as a future site for their motorcar showroom. The agreement made between them by cl 7 provided that it was conditional on the purchasers obtaining detailed town planning consent within a specified time for the redevelopment of the property (ie the southern part) as a petrol filling and service station together with a car-wash in accordance with plans and drawings to be submitted to the authority, and that if such consent was not obtained within the specified time, either party was at liberty to give notice in writing to the other to determine the agreement. The requisite consent was not obtained within the specified time, and the vendors by notice terminated the agreement. The

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purchasers brought an action for specific performance of the agreement claiming that that condition was for their exclusive benefit and they could waive that condition. It was held that cl 7 was not on the face of the agreement for the exclusive benefit of the purchasers but was a condition fundamental to the enforceability of the agreement as a whole. Brightman J in his judgment said, at p 153:

> *The town planning consent is expressed in cl 7 of the sale agreement as a condition fundamental to the enforceability of the sale agreement as a whole. It is not expressed as a condition which is precedent only to the liability of the purchaser. Clause 7 is not a clause which is expressed only to confer rights on Heron. It is expressed to confer a right also on the vendors.*

26 On the facts of that case, it is clear that the town planning consent required was not intended for the exclusive benefit of the purchasers, as the vendors retained the adjoining property which would be affected by the grant or refusal of such consent. Brightman J was of the opinion that the land retained would be vitally affected by the absence of the planning consent for the development as such consent would be important to the maintenance of the value of the land retained by the vendors. He said, at pp 153-154:

> *Looking at the matter more broadly, even if I were allowed to travel outside the terms of the sale agreement, I would not conclude that the condition of town planning consent benefited the purchaser alone. A vendor who retains land may be vitally affected by the grant of planning consent for the development of the adjoining land which he is selling off. Such consent may well be important to the maintenance of the value of the land retained. In the present case the redevelopment of the southern part of the site as a petrol filling and service station and car wash might attract motorists to the vicinity of the land upon which the vendors proposed to establish their showroom for the sale of cars. The possible advantage to the vendors of such redevelopment of the adjoining land is obvious. If Mr Finlay`s argument is right, then Heron could have made the contract unconditional the day after it was signed and, subject I suppose to planning consent, have erected a block of offices totally*

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> *concealing the vendors` proposed showroom from the road frontage.*

27 The case at hand is clearly distinguishable. Quah was selling the entire property and did not own any adjoining property which might be affected by the proposed development or the absence of such development on the property. At the date of the sale, written planning permission for the development of two pairs of semi-detached bungalows had already been granted and was in force; it was granted on 24 October 1985. It must have been intended by both parties that the sale and purchase of the property was to be made with the benefit of such planning permission. As the planning permission would expire in 1987, it is obvious that the appellants would want the planning permission to be extended. Hence, to protect themselves against a refusal by the competent authority to extend the written planning permission or to grant a fresh planning permission, cl 6 was inserted, and following that cl 8 was also inserted to provide that in the event that the extension was not obtained or fresh permission was refused the sale agreement would come to an end. It was of no moment or concern to Quah whether or not the appellants would proceed with the development as approved in the planning permission. Such development or the absence of such development would not affect him in any way financially or otherwise. He had agreed to sell the property, and his sole interest was the purchase price of the property which was to be paid on completion. In our opinion, it is plain on the face of the agreement that cl 6 was exclusively for the benefit of the appellants.

28 We now turn to the question whether this condition had been waived. Goh Joon Seng J held that the appellants had waived this condition by their solicitors` letter of 13 October 1987 written to the solicitors for Quah. We agree. The letter stated thus:

> *Our clients have received confirmation of the extension. As such, the agreement is now unconditional. We enclose the engrossed transfer for execution by your clients. Please forward us your completion account urgently to enable us to arrange for completion.*

29 Counsel for the respondents contended that the appellants had erroneously represented to Quah that the planning permission had been extended, when in fact it had not, and therefore they had not waived condition 6. It is true that both the letter of 6 January 1987 and that of 23 October 1987 from DBCD did not grant an extension of the written planning permission. It is also true that no extension had been obtained by the appellants and that the statement of fact in that letter was in error. However, in our opinion, the subjective views or beliefs of the appellants with reference to the extension of written planning permission, and the erroneous representations they made to Quah were not material in determining whether there was in fact a waiver by them of the condition in cl 6. Of importance are the words used by the appellants and their conduct. The appellants had unequivocally stated that they treated the agreement as unconditional and they enclosed the engrossed transfer for execution by Quah and asked for the completion account.

30 In this connection, it is helpful to refer to the Privy Council`s decision in ***Lancelot St Elmo Balbosa v Ayoub Ali*** , which was an appeal from the Court of Appeal of Trinidad and Tobago. In that case, the vendor agreed to sell one of the buildings and a parcel of land to the purchaser. The agreement by cl 6 provided that the sale should be subject to obtaining from the Town and County Planning Division of the Ministry of Planning and Development all necessary approvals for the transfer. The vendor died and the defendant obtained a grant of representation. The defendant then applied for outline permission to subdivide the land and the application was refused. In an action by the

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purchaser, the judge at first instance ordered specific performance of the sale agreement. On appeal, the Court of Appeal affirmed his decision. On further appeal, the Privy Council dismissed the appeal on two grounds. First, it was held that on the facts no planning permission was ever necessary, notwithstanding the views or beliefs of the defendant. On this issue, Lord Oliver of Aylmerton who delivered the judgment of the Board said, at pp 918-919:

> *There are, in their Lordships` view, at least two conclusive answers to the defendant`s contentions, either of which is fatal to the argument. In the first place, it seems entirely clear on the undisputed facts that no planning permission ever was necessary for the sale to take place. Even assuming for the moment that `subdivision` is apt to describe the simple transfer or lease by the owner of part of his land to another person, on no analysis could the Ordinance apply to a subdivision which had already taken place before the appointed day. ... Clause 6 of the agreement in terms refers to `necessary approvals` and since no approval was necessary the clause never operated at all.*

31 Secondly, it was held that cl 6 in the agreement was not a condition precedent and was inserted for the benefit of the purchaser, was capable of being waived and was waived by him. His Lordship further said, at p 919:

> *Secondly, however, even if the defendant could surmount this hurdle, it is entirely clear that the clause is not, as a matter of construction of the agreement, a condition precedent. At the highest it is simply a term of the agreement and, if properly categorized as a condition, is clearly one inserted for the benefit of the purchaser and capable of being waived by him. Even if the validity of the defendant`s construction of the Ordinance is assumed, the only effect of a conveyance without permission could be the service of an enforcement notice on the purchaser, as the owner and occupier. At the highest this could result in his being fined and whether he is prepared to take a conveyance subject to that peril is entirely a matter for him. If and so far, therefore, as the absence of a permission entitled him to refuse to complete, the condition was one which he could waive. If proof of waiver were needed, it is conclusively furnished by the letters calling on the defendant to complete and by the subsequent issue of a writ claiming specific performance.*

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32 We therefore agree with Goh Joon Seng J that although cl 6 rendered the sale agreement conditional, it was wholly for the appellants` benefit and the appellants had by their letter dated 13 October 1987 and their conduct waived that condition. Accordingly, as of that date, the sale agreement became unconditional.

33 **Third issue: rescission of the sale agreement**

34 The learned judge held that by commencing proceedings against Quah on 26 October 1987 in Suit No 2794 of 1987, and claiming the repayment of the deposit of $83,000 and damages for breach of contract, the appellants had elected to rescind the sale agreement and were not entitled to specific performance thereafter. Before us, the appellants challenged this conclusion. The issue must be considered against the background of the events occurring at the material time. On 13 October 1987 the appellants by their solicitors` letter declared the sale agreement unconditional and pressed for completion. Quah did not agree and insisted on production of documentary evidence confirming the extension of the written planning permission. On 23 October 1987 the respondents as mortgagees sold the property at a public auction and this came to the notice of the appellants. At that stage, Quah was in no position to complete the sale of the property to the appellants, even if he had wished to do so. The sale made by the respondents as mortgagees was binding on Quah and barred his right to redeem the property so long as that contract of sale subsisted: see ***Waring (Lord) v London And Manchester Assurance Co Ltd & Ors,*** at pp 317-318, and ***Property & Bloodstock Ltd v Emerton*** . It was in those circumstances that the appellants commenced their action against Quah. In their statement of claim they did not allege that Quah had repudiated the sale

agreement or, if there was a repudiation by Quah, they had accepted it. By para 7 they alleged:

> *The plaintiff has at all material times been and is ready and willing to fulfil all his obligations under the agreement.*

35 They therefore continued to assert that the sale agreement was in existence and that they were willing to complete the purchase of the property. True it is that in the statement of claim they claimed only a refund of the deposit and damages for breach of contract. But in those circumstances those were the proper and appropriate reliefs sought; it is idle to suggest that they should have claimed specific performance. If, at or about that time, the respondents` contract with their purchaser was terminated or rescinded, the appellants would be in a position to seek specific performance. Surely, should that happen, it would be open to them to amend the statement of claim by adding a claim for specific performance. It seems to us that the question is not whether the appellants had claimed the relief of specific performance in their action against Quah. The real question is whether the appellants had elected to treat the sale agreement as repudiated by Quah and had rescinded the agreement. On the facts before us, the appellants clearly had not. Accordingly, in our judgment, the appellants had not rescinded the sale agreement.

36 **Fourth issue: equitable lien**

37 In the court below, it was held that since the appellants had lost their right to specific performance against Quah by the time the mortgagee sale was completed, the appellants had no equitable lien on the surplus proceeds for the deposit paid to Quah. A passage from ch 26 para 1332 of ***Stonham`s Law of Vendor and Purchaser*** was relied upon for the proposition that there would not be an equitable lien unless there was a specifically enforceable contract and

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the authority cited by the learned author in support was ***Sainsbury v Jones*** . A close examination of that case shows that it does not support the conclusion of the learned author. In that case, C purportedly acting as agent for A and B entered into a contract to sell an estate to D and received a deposit. C had no authority from A and B to do so, and both A and B denied C`s agency. D filed a bill in the Court of Chancery against A, B and C praying for specific performance and in the alternative for the return of the deposit and damages. The bill was dismissed by the Master of the Rolls as C had no authority from A and B. With regard to the claim against C for the return of deposit and damages, it was held that the Court of Chancery would not grant any relief by way of damages which was the province of the court of law: see 2 Beav 462 at pp 465-466; 48 ER 1260 at pp 1261-1262. D appealed against only the dismissal of his claim against C for the return of the deposit and damages. The appeal was dismissed on the ground that the Court of Chancery had no jurisdiction to award such damages sought by D as the claim was one at law and not in equity. It was certainly not decided that as D could not obtain specific performance against the owners of the estate, he was not entitled to the return of his deposit. There was no discussion at all of a purchaser`s lien arising from the deposit paid to C. It should be noted that the case was decided in 1839 which was prior to the Chancery Amendment Act 1858 (Lord Cairns Act) which conferred on the Court of Chancery powers to award damages in lieu of or in addition to specific performance.

38 A purchaser who has paid money as deposit or to account of the purchase price has a lien on the property in the hands of the vendor. In ***Middleton v Magnay*** , a bill was filed by the plaintiff in the Court of Chancery for specific performance of a contract to grant a lease or alternatively for a lien for the money paid or expenditure incurred in respect of the property in question.

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Specific performance was not granted on the ground of want of title on the part of the defendant, but the court declared that the plaintiff had a lien on the property to the extent of the expenditure incurred thereon. Sir W Page Wood V-C said, at pp 236-237, 453:

> *Where a plaintiff comes to the court for the specific performance of a contract which cannot be performed at all, there damages cannot be given in lieu of specific performance. So, again, there can be no relief in this court where a bill is filed for damages and damages only. But in this case, the plaintiff has a clear right to a lien upon the vendor`s interest for the money expended by him on the property. There is an implied contract in every case between vendor and purchaser, that the purchaser shall have a lien on the property to the extent of the purchase-money he has paid, and here there is an express stipulation that the money expended shall be repaid. This right will sustain a claim for damages just as much as the right to specific performance of the contract to grant a lease which has dropped by reason of the impossibility of performance.*

39 In ***Rose v Watson*** , the contract for the sale of an estate went off because of the default of the vendor in fulfilling certain representations made to the purchaser. It was held that the purchaser was entitled to a lien on the moneys paid to account of the purchase price. Lord Westbury LC said, at p 676:

> *When the owner of an estate contracts with a purchaser for the immediate sale of it, the ownership of the estate is, in equity, transferred by that contract. Where the contract undoubtedly is an executory contract, in this sense, namely, that the ownership of the estate is transferred, subject to the payment of the purchase money, every portion of the purchase money paid in pursuance of that contract is a part performance and execution of the contract, and, to the extent of the purchase money so paid, does, in equity, finally transfer to the purchaser the ownership of a corresponding portion of the estate.*

40 ... They were bona fide payments made by the respondent, in conformity with the contract which required such payments to be made in part of the purchase money; and they were accepted by the vendor as portions of that purchase money. In conformity, therefore, with every principle, the purchaser

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paying the money acquired an interest in the estate by force of the contract and of that part performance of the contract, namely, the payment of that portion of the purchase-money.

41 Similar pronouncement was made by Lord Cranworth at p 683:

> *There can be no doubt, I apprehend, that when a purchaser has paid his purchase money, though he has got no conveyance, the vendor becomes a trustee for him of the legal estate, and he is, in equity, considered as the owner of the estate. When, instead of paying the whole of his purchase money, he pays a part of it, it would seem to follow, as a necessary corollary, that, to the extent to which he has paid his purchase money, to that extent the vendor is a trustee for him; in other words, that he acquires a lien, exactly in the same way as if upon the payment of part of the purchase money the vendor had executed a mortgage to him of the estate to that extent.*

42 In ***Levy v Stogdon*** , the claim for specific performance of a contract for the sale of a reversion was denied but nevertheless the assignee of the purchaser was held to be entitled to a lien for the deposit paid. Stirling J said, at p 485:

> *It appears from the evidence that the deposit was paid. Now, the deposit is not merely a part payment of the purchase-money, but constitutes a security for the completion of the purchase, so that if the purchaser fails to perform his part the vendor may retain it. On the other hand, if the vendor fails to perform the contract on his part, and there is no default on the part of the purchaser, the latter may, in the absence of a stipulation to the contrary, recover the deposit from the vendor. And further than that, he is entitled to a lien on the subject-matter of the contract. That was settled by the case of* ***Rose v Watson*** *10 HLC 683.*

43 We next come to the case of ***Whitbread & Co Ltd v Watt*** , which bore some similarity to the instant case. There, the vendor contracted to sell to the purchaser a plot of land in a housing estate. The purchase was to be completed when 300 houses had been built on the estate. Subsequently the vendor mortgaged the land to C who sold it under a power of sale to D. The houses were not built and the purchaser gave notice to D to cancel the contract. Farwell

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J held that the purchaser as against D had a lien on the land for the deposit he paid to the original vendor. He said, at p 915:

> *The lien is created by the contract under which the money is paid as part of the purchase-money, and on the faith that the contract will be carried out, and not by the default of the vendor. The default gives rise to the necessity for enforcing the lien, but the lien arises from the contract.*

44 His decision was approved by the Court of Appeal. Vaughan-Williams LJ said at the commencement of his judgment, at p 838:

> *The lien which a purchaser has for his deposit is not the result of any express contract; it is a right which may be said to have been invented for the purpose of doing justice. It is a fiction of a kind which is sometimes resorted to at law as well as in equity. For instance, when an action is brought for money had and received to the use of the plaintiff, it is not true that the money has been so received, but that is the way in which the law states the case in order to do justice. When Lord Westbury in* ***Rose v Watson*** *speaks of `a transfer to the purchaser of the ownership of a part of the estate corresponding to the purchase-money paid,` and Lord Cranworth speaks of the purchaser being exactly in the position of a mortgagee of the estate to the extent of the purchase money which he has paid, those expressions are merely verbal vehicles to carry the right which justice demands that the purchaser should have.*

45 Cozens-Hardy LJ stated the position more succinctly thus, at pp 840-841:

> *I think the lien for the deposit exists so long as, and in every case in which, the right to recover the deposit has not been lost by reason of the misconduct of the purchaser. In other words, when the contract goes off either by reason of the default of the vendor, or without any default on the part of the purchaser, the lien becomes operative. It would be shocking injustice if the purchaser`s lien were to be lost in the ordinary case of a rescission by the vendor under the common form condition. Such a rescission is not unlawful, is not a breach of contract, and is not any default on the part of the vendor. It would, I think, be equally unjust that the purchaser`s lien should be lost when he rescinds the contract under a power to do so reserved to him by the contract itself.*

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46 In the instant case, the sale agreement was capable of specific performance. It went off, not because of any default on the part of the appellants as purchasers, but because of the default on the part of Quah in suffering the respondents as mortgagees to sell the property which precluded Quah from redeeming it and the appellants from completing the purchase. In these circumstances, clearly the appellants as the purchasers were entitled to a lien for the deposit they had paid for the property. In our judgment, irrespective of whether the sale agreement was specifically enforceable or not, when the mortgagee sale was completed, the appellants had an equitable lien for their deposit on the surplus proceeds of sale.

47 **Fifth issue: whether the respondents had breached s 68(1)**

48 We now turn to the last issue: whether the respondents had committed a breach of duty under s 68(1) of the Land Titles Act. That subsection provides as follows:

> *The money received by a mortgagee who has exercised his power of sale, after discharge of prior encumbrances to which the sale is not made subject (if any), or after payment into court under the Conveyancing and Law of Property Act of a sum to meet any prior encumbrances,* ***shall be held by him in trust to be applied****, firstly in payment of all costs and expenses properly incurred as incidental to the sale or any attempted sale, or otherwise; secondly in discharge of the mortgage money, interest and costs, and other money (if any) due under the mortgage; thirdly in payment of subsequent mortgages and charges (if any) in the order of their priority; and* ***the residue of the money so received shall be paid to the person who appears from the land-register to be entitled to the mortgaged property or to be authorised to give receipts for the proceeds of the sale thereof****. [Emphasis added.]*

49 The contention made on behalf of the respondents was that the appellants were not persons who appeared from the land-register to be entitled

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to the property or to be authorized to give receipts for the proceeds of sale within the meaning of that subsection. Only persons who are shown on the land-register to have a registered interest in the property come with s 68(1). The appellants did not have a registered interest in the property and the caveat lodged by them merely gave notice or warning of their interest as purchasers of the property. The land-register only showed that the appellants were claiming an interest in the property as the purchasers. As such, the appellants could not be said to be persons who appeared from the land-register to be entitled to the property. Hence, s 68(1) cannot apply to the appellants. We are unable to accept this contention. It is true that the land-register did not show that the appellants had a registered interest in the property but only that they claimed an interest therein as purchasers. But s 68(1) does not make any reference to a person who has a `registered interest` in the mortgaged property. The relevant part thereof merely provides: `the person who appears from the land-register to be entitled to the mortgaged property`.

50 The Act recognizes and gives protection to non-registrable interests in land. Under s 104 of the Act any person claiming an interest in land, or any person otherwise authorized by any Act to do so, may lodge with the Registrar of Titles a caveat in a prescribed form to protect such interest, and a notification of such caveat is then entered in the land-register. In ***Abigail v Lapin & Anor*** , a decision of the Privy Council on appeal from the High Court of Australia, where it was held that a beneficial owner`s interest in land, in respect of which no caveat had been lodged, should be postponed to that of a subsequent encumbrancer whose interest had been registered, Lord Wright in delivering the judgment of the Board said, at p 500:

> *The Real Property Act 1900 of New South Wales, embodies what has been called, after the name of its originator, the Torrens*

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> *system of the registration of title to land. ... No notice of trusts may be entered in the register book, but it has long been held that equitable claims and interests in land are recognized under the Real Property Acts. ... [F]or the protection of such equitable interests or estates, the Act provides that a caveat may be lodged with the registrar by any person claiming as cestui que trust, or under any unregistered instrument or any other estate or interest; the effect of the caveat is that no instrument will be registered while the caveat is in force affecting the land, estate or interest until after a certain notice to the person lodging the caveat. Thus, though the legal interest is in general determined by the registered transfer, and is in law subject only to registered mortgages or other charges, the register may bear on its face a notice of equitable claims, so as to warn persons dealing in respect of the land and to enable the equitable claimant to protect his claim by enabling him to bring an action if his claim be disputed.*

51 On this point, it is also helpful to refer to ***Baalman on The Singapore Torrens System*** which has the following commentary on caveats, at p 193:

> *A purchaser takes his land subject only to interests which are ascertainable from the land-register, regardless of any notice which he might otherwise have had. In the doctrine of notification, caveats play an important part. The owner of an equity who would be protected under the general law by the doctrine of notice must, under the Torrens System, protect himself by having his interest notified on the land-register.*

52 In this case, the appellants had lodged a caveat protecting their equitable interest in the property. The land-register, at the material time, bore `on its face` a notice of their equitable claim. In our opinion, a caveator, such as the appellants, who has duly lodged a caveat claiming an interest in the mortgaged property as the purchaser and whose caveat has been notified in the land-register, is one `who appears from the land-register to be entitled to the mortgaged property`.

53 Counsel for the respondents relied on the decision of this Court in ***Official Assignee of the Property of Lim Chiak Khim v United Overseas Bank***

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Ltd . There, a judgment creditor by way of execution under the then O 50 r 1 of the Rules of the Supreme Court obtained a charging order against the property of the judgment debtor and thereafter lodged a caveat on the property claiming interest therein by way of the charging order. It was held that the charging order created a charge on the property but that it was not a `charge` within the meaning of the third limb of s 68(1), ie `thirdly in payment of subsequent mortgages and ***charges*** (if any) in the order of their priority`. The court after reviewing s 68 and the preceding provisions said, at p 194:

> *In the context of these provisions it seems to us clear that the expression `charge` in s 68(1) means a charge created under s 63(2) of the Act and does not include any other kinds of charge, such as a charge created by the charging order absolute in the instant case.*

54 It was argued by counsel for the respondents that it was implicit in that case that such a judgment creditor with the charging order would also not have been a `person who appears from the land-register to be entitled to the mortgaged property` under s 68(1). We are unable to agree. In that case, in so far as s 68(1) was concerned, the argument of counsel was that the charge was a charge falling within the third limb of s 68(1) and this court decided that it was not. It was never argued, nor was it decided, whether the judgment creditor was a person who appeared from the land-register to be entitled to the mortgaged property. In other words, the fourth and last limb of s 68(1) was not argued and considered. It was immaterial in that case whether the judgment creditor fell within the third limb or the last limb of s 68(1), as it was held that the process of taking out a charging order under O 50 r 1 was a form of execution, that execution was not completed at the time when the judgment creditor received notice of the act of bankruptcy of the proprietor of the land, and that accordingly the judgment creditor was not entitled to retain the benefit

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of the charge. ***Lim Chiak Khim*** therefore does not assist the case of the respondents.

55 It was further submitted that if the relevant part of the last limb of s 68(1) was referable to caveators, the respondents would have been in the invidious position of having to determine the validity of the rights claimed by the caveators or in the absurd position of having to pay the surplus proceeds to those caveators who may not be entitled to such surplus. We are unable to accept this argument. If there are several caveats entered in the land-register or, for that matter, if there is only one caveat, and it appears to the mortgagee that there are competing claims to the surplus proceeds, the obvious and correct course for him to take is to apply to court under O 17 r 1 of the Rules of the Supreme Court for interpleader reliefs. Even if there are no competing claims but the mortgagee wishes to ensure that he pays the surplus proceeds to the person entitled thereto, he is at liberty to apply to court for directions and pay the surplus into court: s 65 of the Trustees Act (Cap 337). We therefore see no difficulty on the part of a mortgagee in dealing with a claim made by caveator whose caveat has been notified in the land-register.

56 Reverting to the undisputed facts in this case, at the time of the mortgagee sale of the property and also at the time of completion, there was entered in the land-register the appellants` caveat in which the appellants claimed an interest in the property as purchasers; they were persons who appeared from the land-register to be entitled to the property. In our judgment, the respondents ought to have paid the surplus of the proceeds of sale to the appellants, and by paying the surplus to Quah they acted in breach of their duty under s 68(1) and are liable to account to the appellants.

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57 **Remedies available to the appellants**

58 In our judgment, for the reasons we have given, the appellants, at the time of the mortgagee sale were persons who appeared from the land-register to be entitled to the property. In equity, they were the owners of the property subject to payment of the balance of the purchase price. As such owners, they would be entitled to any gain in the appreciation in the value of the property. The difference between the sale price under the sale agreement and the price at which it was sold by the respondents at the auction amounted to $380,000. The appellants are entitled to this amount plus the deposit of $83,000 paid to Quah, making a total of $463,000. Theoretically, that represented their interest in the property at the time of the mortgagee sale. However, as the surplus proceeds in the hands of the respondents amounted to only $415,778.41, the appellants were entitled to receive the whole of this amount from the respondents.

59 In the result we allow the appeal and set aside the judgment below. We grant the declarations to the appellants as claimed, and there will be judgment to the appellants in the sum of $415,778.41 with interest at 6% from the date of the writ to the date hereof. The appellants are entitled to costs here and below, and we so order.

60 There will be the usual consequential order for repayment to the appellants of the deposit in court as security for costs.

61 ***Appeal allowed.***

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Chip Thye Enterprises Pte Ltd v Development Bank of Singapore Ltd [1994] SGCA 59

Karthigesu JA
L P Thean JA
Yong Pung How CJ

Harry Lee Wee and Tan Ching Chern (Bee See & Tay) for the appellants
Deborah Barker and James Lau Oon Beng (Khattar Wong & Pnrs) for the respondents

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