IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1994] SGHC 259

OS 557/1991

Between

Ow Chor Seng

… Plaintiff

And

Tjinta Pte Ltd (in liquidation)

… Defendant

GROUNDS OF DECISION

Land — Caveats; Trusts — Constructive trusts

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

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Ow Chor Seng v Tjinta Pte Ltd (in liquidation)

[1994] SGHC 259

OS 557/1991
Amarjeet Singh JC
11 October 1994

1 Introduction

2 The plaintiff sought by the present originating summons:

> (1) to remove a caveat No CV/69496/A registered on 8 October 1988 and extended on 28 September 1993 by the defendants against the whole of lot 1227 of town sub-division 24 together with the building erected thereon and known as 14 Chatsworth Road, Singapore (the said property) comprised in Vol 258 Folio 122, of which he was the registered proprietor;
>
> (2) an order for an inquiry as to the damages costs and expenses sustained or incurred by the plaintiff as a result of the said caveat having been lodged and allowed to remain on the said property and payment of such sums or sum that may be found due as compensation to the plaintiff.

3 The defendants described their caveatable interest in the said property as beneficiary under a constructive trust of an estate in fee simple by virtue of:

> (i) the transfer of the said property to the registered proprietor (plaintiff) effected by the directors of the caveator in breach of their fiduciary duties to the caveator and
>
> (ii) the registered proprietor (plaintiff) receiving the said property with actual or constructive notice that the said

> property was trust property and that the transfer by the directors of the caveator was in breach of their fiduciary duties.

4 Having lodged the caveat, the defendants commenced an action against the plaintiffs on 27 October 1989 in Suit No 2003 of 1989 (where Tjinta Pte Ltd (in liquidation) are the plaintiffs and Ow Chor Seng is the defendant) for amongst other things a declaration that the plaintiffs` entire interest in the said property in question was held by them in trust for the defendants. The plaintiff applied for ***security of costs*** against the defendants in the said Suit but their application was ***dismissed*** by the Assistant Registrar on 3 August 1990. The defendants thereafter applied for ***summary judgment*** and their application was dismissed on 14 August 1992 and the plaintiffs were granted ***unconditional leave to defend*** the action which is now pending.

5 **Undisputed facts**

6 The undisputed facts as far as they can be gathered were as follows:

7 Tjinta Pte Ltd (Tjinta) was incorporated in Singapore in 1963 and was a family company run by patriarch Thio Tjing Thing (the deceased) until his death in 1980. Soon after his death, his son Thio Sin Bin, who was a director and shareholder of the company, took over the management of Tjinta as well as Toho Rubber Processing Co Pte Ltd (Toho Rubber) of which Tjinta was the majority shareholder. Thio Sin Bin had also been a director of Toho Rubber.

8 Tjinta was the registered owner of the property known as lot 45-57 of TS XXIV measuring 4610m2. The property was subdivided into three lots 1227, 1228 and 1229. Two houses stood on the same property. No 14, Chatsworth Road, stood on lot 1227 with an area of 3,030.9m2. No 14A, stood on lot 1228. Lot 1229 is a stretch of land measuring 181m2 adjacent to lot 1227. The

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deceased and his family had been resident at No 14 Chatsworth Road since 1961 and after the death of the deceased, the family continued to reside there. No 14A, Chatsworth Road, was occupied by Tjinta`s gardener and his family.

9 In 1982, Tjinta mortgaged the said property to the Indian Overseas Bank (IOB) to secure its liabilities to IOB, the liabilities arising from credit extended by IOB to Tjinta and in respect of a guarantee dated 17 July 1982 whereby Tjinta agreed to guarantee the liabilities of Toho Rubber to IOB in respect of facilities granted to Toho Rubber by IOB.

10 In or about April 1986, Tjinta was owing to IOB over $3m and approximately $50,000 to another creditor.

11 In the same month, No14A was sold ***with vacant possession*** by Tjinta to one Chung Kok Soo for $1,050,000.

12 Again, in April 1986, Tjinta obtained a valuation of the said property No 14 Chatsworth Road through a valuer appointed by IOB. The valuation was done by Michael Sim of M/s Michael Sim & Associates, Valuers, who stated in their report dated 7 April 1986 that amongst other things, they `understand that this property is let out to Mr Thio Kong Bin at $500 per month`. M/s Michael Sim & Associates then valued the property at $588,000 ***`subject to a controlled tenancy`*** .

13 An extraordinary general meeting of the company chaired by Thio Sin Bin was held on 19 May 1986 and at the meeting all its shareholders approved the sale of the property by resolution at a price of not less than $500,000.

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14 On 30 May 1986, Thio Sin Bin, the managing director of Tjinta, and Thio Ai Koen, a director of Tjinta, procured Tjinta to enter into a written sale and Purchase agreement of even date (the agreement) with the plaintiff. Under the agreement, Tjinta agreed to sell and the plaintiff agreed to purchase the said property for $550,000 ***without vacant possession*** . Under the agreement it was stated that the purchase was to be completed within six weeks, ie by 15 July 1986. The Thio family retained possession of the property at a rental of $500 pm. It appears that the tenant was Thio Kwang Bin, Thio Sin Bin`s brother. At the time of the sale it is probable that the property was occupied by one or more of the directors of Tjinta. The sale was approved by IOB and the sale proceeds were to be paid to IOB in return for a discharge of the mortgage. Accordingly, upon completion of the sale, the sum of $550,000 was paid to IOB, the mortgage discharged and the title of the property transferred to the plaintiff.

15 Some six years ealier in 1980, Government Gazette Notification No S290 of 1980 (The Control of Rent (Exemption) Notification 1980) came into effect. Section 2(b) stated:

> *The following domestic premises are exempted from the provisions of the Act:*
>
> *...*
>
> (b) any domestic premises owned by a body corporate which at any time after the commencement of this Notification have for any period been occupied by or let to any director or employee of the body corporate.

16 A winding-up petition was filed by IOB on 23 January 1987 to wind up Tjinta on the grounds that Tjinta was indebted to IOB in the sum of $3,121,351.50 inclusive of interest on that date in respect of banking facilities granted to Tjinta and under the guarantee referred to earlier. By order of court dated 22 May 1987 Tjinta was wound up and a liquidator appointed.

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17 The liquidator carried out investigations which included an examination in court pursuant to order of court in the winding up of Thio Sin Bin on 5 October 1993 and the plaintiff on 27 October 1988, 31 January 1989 and 1 March 1989 (the examination). The caveat was lodged on 8 October 1988, ie after the examination of Thio Sin Bin and Suit 2003/89 was commenced by the defendants against the plaintiff as stated earlier.

18 **Removal of a caveat: principles and issues**

19 The principles applicable in the removal of a caveat under the Torrens System which has been likened to a statutory injunction were reconsidered and enunciated by the Privy Council by Lord Diplock in the Malaysian case of in interpreting s 327(1) of the Malaysian National Land Code, the provisions of which are very similar to s 111 of our Land Titles Act (Cap 156). Before Lord Diplock`s pronouncement, the traditional approach in respect of a removal of a caveat had been based on factors such as whether a caveator had a prima facie case and that his claim was not baseless or frivolous: per Raja Azlam Shah FJ, . Lord Diplock, however, in said:

> *So far their Lordships have deliberately refrained from speaking of `onus of proof`. It is an expression which, if it is used in relation to proceedings which are interlocutory in their legal character, is liable to lead to confusion. Their Lordships have already noted the analogy between the effect of a caveat and that of an interlocutory injunction obtained by the plaintiff in an action for specific performance of a contract for the sale of land restraining the vendor in whom the legal title is vested from entering into any disposition of the land pending the trial of the action. The court`s power to grant an interlocutory injunction in such an action is discretionary. It may be granted in all cases in which it appears to the court to be just and convenient to do so. Similarly in s 327 it is provided that `the court ... may make such order on the application as it may think just.` The guiding principle in granting an interlocutory injunction is the balance of convenience; there is no requirement that before an interlocutory injunction is granted the plaintiff should satisfy the court that there is a ``, a `case` or a `case` that if the action goes to trial he will succeed; but before*

> *any question of balance of convenience can arise the party seeking the injunction must satisfy the court that his claim is neither frivolous nor vexatious; in other words that the evidence before the court discloses that there is a serious question to be tried:*

20 This is the nature of the onus that lies upon the caveator in an application by the caveatee under s 327 for removal of a caveat; he must first satisfy the court that on the evidence presented to it his claim to an interest in the property does raise a serious question to be tried; and, having done so, he must go on to show that on the balance of convenience it would be better to maintain the until the trial of the action, by preventing the caveatee from disposing of his land to some third party.

21 The Privy Council`s decision has been applied in and in (per Chan Sek Keong J) and in , at p 826D-G (per Judith Prakash JC). Recently, in , Jemuri Serjan CJ (Borneo) applied both the traditional test which he said was a direct one and easy to apply as well as Lord Diplock`s new approach on the issue of whether the caveat should remain The new approach in my opinion was no doubt influenced by the case7 [] and the fact that the nature of the relief by caveat is closely related to that of an interlocutory injunction. The composite approach taken by the learned Chief Justice (Borneo) above may well be an appropriate one to take in Singapore in view of the scheme of the provisions on caveats in the Land Titles Act, particularly s 112(1) which provides that where a caveat is wrongfully or vexatiously or without a reasonable cause registered or allowed to so stand the caveatee in the event of suffering damage may recover compensation in respect of the same. Whilst the approaches may differ somewhat, the primary objective is the same, ie to ascertain whether a caveator has a claim to a title or interest in the land against which the caveat is lodged or any right to such title or interest.

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22 The issues therefore raised in respect of the plaintiff`s application to remove the caveat in the face of the defendants` claim to their interest in the said property at the hearing were:

> (1) Whether there was a ***serious question*** to be tried in regard to:
>
> (i) the agreement being entered into by mutual mistake of the parties in that both Tjinta and the plaintiff erroneously believed that the said property was rent controlled, when in truth and in fact, the said property was not, at the time of the agreement, rent controlled.
>
> ***Alternatively*** , whether there was a breach of fiduciary duty by the directors of Tjinta in respect to the transfer of the property to the plaintiff.
>
> (ii) whether the plaintiff had the requisite knowledge that the property was trust property and of the breach of trust (fiduciary duty).
>
> (iii) whether there had been ratification of the breach, if any.

23 (In determining these matters considerations of ***frivolity and vexatiousness*** in respect of the defendants` claim to a right or title in the plaintiff`s property would no doubt have to be borne in mind.)

> (2) Whether the balance of convenience lay in favour of the caveat being allowed to remain.
>
> (3) Whether there should be an undertaking in damages if the caveat was allowed to remain.
>
> (4) Whether the caveat was defective.
>
> (1) ***The existence of a serious question***
>
> (i) Mutual mistake

24 It has already been stated that on 30 May 1986 when Thio Sin Bin, the managing director of Tjinta, and Thio Ai Koean, a director of Tjinta, procured Tjinta to enter into the agreement with the plaintiff to sell the said property to

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him without vacant possession, the said property was no longer rent controlled by virtue of a notification of exemption in 1980 concerning domestic premises owned by a body corporate which had then been occupied by or let to any director or employee of the body corporate. The defendants` counsel referred to the evidence at the examination of Thio Sin Bin into the companies winding up, which began on 5 October 1993, which showed he was, and consequently the shareholders were, mistaken as to the status of the said property. The evidence referred to is in the plaintiff`s affidavit filed on 8 November 1991, being the notes of evidence (NE) of the examination and states as follows:

> *Thio Sin Bin: No legal advice on rent control ... No advice that property might not be rent controlled because I stayed in it as director. (NE p 48)*
>
> ... No one else in family involved in negotiations. (NE p 52)
>
> ... If known not rent controlled, would have sold higher in company`s interest ... . (NE p 53)

25 As to the plaintiff`s state of the mind under which he bought the said property believing that it was rent controlled, counsel for the defendants referred to his averments in his affidavit filed on 8 November 1991 the relevant extracts of which are:

> *At all material times, I was under the belief that the property was occupied by the Thio family under a rent-controlled tenancy ... and that the company would not have been in a position to obtain vacant possession thereof. (para 18)*
>
> *... I relied upon the valuation ... showing the sale property to be subject to a controlled tenancy in favour of Thio Kong Bin at $500 per month. (para 19)*
>
> *After the sale of the property, the rent controlled tenancy which I at all material times believed to exist in favour of Thio Kong Bin at a rent of $500 per month continued. (para 22)*

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26 Defendants` counsel further referred to the evidence of Ow Chor Seng at the examination in the companies winding up as to his state of mind when he purchased the property:

> *I never knew that a law was passed in 1980, ie the Control of Rent Gazette Notification at that time. Only recently I was aware of de-control ... But I did not know about the exemption which was passed in 1980. (NE p 63)*

27 The defendants` counsel submitted that they had written several letters to the plaintiff`s solicitors requesting clarification as to whether the sale of the said property was entered into by common mistake but there was no response from the plaintiff`s solicitors and that, further, the plaintiff had filed in Suit 2003/89 an amended defence in which the various references to the word `mistake` in the said amended defence were deleted, which defendants` solicitors believed was done to prevent the defendants from obtaining a judgment based on an admission.

28 The defendants` counsel also submitted, as stated in paras 17, 18 and 19 of the amended defence, that the said mistake rendered the subject matter of the contract essentially and radically different from the subject matter which the parties perceived to be at the material time in that the said property was worth substantially more and would have been sold for a substantially higher consideration than $550,000 had the parties not been under the erroneous belief that it was rent controlled and therefore could not be sold without vacant possession and by reason of that the agreement was void ab initio. Counsel further submitted as stated in para 19 of the same defence that the misconception or mistake was fundamental that Tjinta would not have sold the said property for $550,000 if Tjinta knew that it was rent controlled and it would in the ordinary course of dealings have fetched a higher price if sold with vacant possession.

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29 Defence counsel referred to ***Cope on Constructive Trusts*** (1992 Ed) pp 488- 492 for the proposition that a mistake can give rise to a constructive trust. ***Cope*** in his monograph, whilst referring to the absence of adequate and appropriate authority in England and Australia establishing guidelines and rules for the imposition of a constructive trust in cases of mistake other than money paid under a mistake of fact, nevertheless goes on to state that in Canada there is some authority in respect of the proposition that a person who makes a payment to another or transfers a property to another under a mistake of fact or law can in equity recover it and that a court may impose a constructive trust upon the transferee and also that there is the availability of academic and judicial authorities as establishing a scheme for specific restitution of property received under a mistake. He suggested that English and Australian courts should in future cases be guided by the more well-developed American rules. Cope then referred to Goulding J`s decision in the as providing some encouragement for doing this as he expressed the opinion that the constructive trust and its application to cases of mistake set out in the American text ***The Law of Trusts*** by AW Scott is in accord with the general principles of equity as they apply in England and furthermore in the absence of English authority. The learned judge went on to say he was prepared to follow the law as stated in Scott`s text of which he provided a resume.

30 Counsel for the plaintiff, on the other hand, submitting on mistake stated that the case of provided a striking similarity to the facts of the present case and should be applied instead. In that case, the executors and trustees of a testator`s estate sold his assets to a fellow executor of the estate. The executor being a fiduciary was precluded in equity from purchasing the property. However, prior to the sale, the executor/purchaser renounced probate in writing. A beneficiary had acquiesced in the sale of the property to the said executor/purchaser. It later

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transpired that the renunciation by the executor/purchaser was bad and hence ineffective in law. The beneficiary made an application to court to have the sale rescinded on the ground that the executor/purchaser was therefore still an executor despite his renunciation and hence was precluded from purchasing the property. The court held that notwithstanding the mistake and the effect of renunciation in law, the beneficiary having acquiesced, he was prevented from rescinding the transaction. Counsel drew the analogy in the instant case that all parties, namely, the plaintiff, the shareholders of Tjinta and IOB who approved the sale of the said property, all appeared to be acting under the impression that the property was subject to rent control and that if it subsequently transpired that the said property was not rent controlled, that could not change the fact that all the aforesaid relevant parties, especially IOB, all approved and acquiesced in the sale. Counsel went on to submit that this was a case in which all the parties were on equal footing and IOB could not now be heard to say that they were all ignorant of the law when they consented to and approved of the sale of the said property to the plaintiff.

31 Counsel for the defendants joined issue and distinguished the facts in ***Holder*** and this case on a number of points, such as, in ***Holder`s*** case9, the executor who purchased the property had not interferred in the administration of the estate; he had not partaken in organizing the auction; there was no conflict of interest and duty; the beneficiaries were not looking towards the executor concerned to protect their interest and that the plaintiff beneficiary had truly acquiesced in the sale. Defendants` counsel submitted that in the instant case the negative features not present in ***Holder*** were present in this case, particularly, IOB was misled into acquiescing and it was not a genuine acquiesance having regard to the evidence of Thio Sin Bin at the inquiry, ie of his misperception and the evidence that he arranged the tenancy in the name of

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Thio Kong Bin, his brother, and that Michael Sim, the valuer, had also no doubt obtained this information from him which was the basis of his valuation (that it was a controlled tenancy) for IOB. In any case, Thio Sin Bin had admitted that he himself might have told IOB that the property was rent controlled.

32 I considered all the relevant evidence and submissions. All that I had to be satisfied at this stage was that the plaintiff`s claim of constructive trusteeship based on mistake was a serious issue and that the claim was not frivolous or vexatious. Although constructive trusteeship based on common or mutual mistake was not an established and clear branch of law yet the concept was not a non-existing one but a developing one and there was nothing to prevent the defendants from expounding their claim grounded on that concept. It was an issue of law and it was for the trial judge to decide that issue affirmatively. The defendants had also shown by an adequate matrix of evidence that their claim of constructive trusteeship based on common or mutual mistake as to the status of the property as a rent controlled one and which affected its price drastically had sufficient substance to raise a serious issue on the matter canvassed.

33 Therefore, the defendants had, in my opinion, on the question of common or mutual mistake as affecting the validity or the extent of the validity of the agreement raised both an issue of fact and law of sufficient strength and seriousness to be sent for trial. There was nothing vexatious or frivolous in this issue.

(ii) Alternatively, breach of fiduciary duty by directors and the question of knowledge of Ow

34 This aspect of the defendants` claim was based on the premise that Tjinta entered into the said agreement for $550,000 and that it was entered in return

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for a request to stay at the said property for an indefinite period of time; that the directors of Tjinta had breached their fiduciary duties to Tjinta to act in its best interests which allegation the defendants supported with particulars, namely, that at the time of the said agreement, Tjinta was insolvent as it was unable to meet its liabilites to IOB; that the said property was not, at the time of the agreement, rent controlled by reason of the fact that it was occupied by one or more directors of Tjinta; that in any event, it was within the power and control of the Thio family to vacate the said property and if they had done so, the said property would have fetched a higher price but instead the said property was sold without vacant possession to enable the Thio family to continue to reside there; that no attempt was made to look for other purchasers for the said property apart from the defendant and in procuring Tjinta to sell the said property without vacant possession, the directors placed their interests and the interests of their family members above the interests of Tjinta.

35 Further, in para 21 of their amended statement of claim, the defendants alleged that the plaintiff ***knew*** that the directors of Tjinta had procured Tjinta to enter into the agreement in return for a purported oral tenancy of the said property in breach of their fiduciary duties to Tjinta; alternatively the plaintiff had wilfully shut his eyes to the obvious or wilfully and recklessly failed to make enquiries which, if made, would have disclosed to the plaintiff the said breach. These allegations were supported by the ***particulars*** and relevant aspects of the evidence in the examination referred to earlier of Thio Sin Bin and the plaintiff as follows:

> *Particulars*
>
> *[Para 20 of amended statement of claim (Suit No 2003 of 1991, where Tjinta (in liquidation) are the plaintiffs and Ow Chor Seng is the defendant.]*

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> *(1) The defendant is a property developer. He has been in the business of property development and property investment since well befroe 1972.*
>
> (2) The defendant knew, before the date of the agreement, that
>
> (a) Tjinta was owned and controlled by the Thio family, and that Thio Sin Bin effectively ran Tjinta;
>
> (b) Tjinta was insolvent;
>
> (c) 14 Chatsworth Road was occupied by the Thio family, and that it was within their power to vacate the premises; and
>
> (d) The Thio family intended to continue to reside at 14 Chatsworth Road for an indefinite duration after the agreement and the sale of 14 Chatsworth Road.
>
> *(3) The defendant knew that 14 Chatsworth Road would have fetched a substantially higher price if it had been sold with vacant possession.*
>
> (4) The defendant knew that 14A Chatsworth Road was sold at a price of $1m by Thio Sin Bin in 1983. The defendant knew that 14 Chatsworth Road or the sale property was more than twice the size of 14A Chatsworth Road.
>
> (5) The defendant knew that directors must act in the best interests of the company of which they are officers and that consequently, it was dishonest and could not have been in the best interests of Tjinta for the sale property to be sold on the terms of the agreement and in consideration of the purported oral tenancy referred to in para 17 20 above.

36 It was the defendants` case that from all the above, the plaintiff`s entire interest in the said property was held by him as a constructive trustee for Tjinta. To this end the defendants relied substantially on the evidence of Thio Sin Bin and that of the plaintiff contained in the notes of evidence of the examination as set out in the affidavit of the plaintiff filed on 8 November 1991.

37 **Relevant evidence of the examination in winding up**

38 (a) Thio Sin Bin

> *I alone responsible for running company since father died ... Also managing director. Others sleeping directors including Ai Koean*

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sign documents at my request without querying me. Shareholders sign resolution at my request. Rely on me to run company. (p 44)

Tenant of company was me and my family. Pay $500 per month. (p 46)

If we moved out, property would not be rent controlled. Value would go up. (p 48)

... About $3m indebtedness. (p 49)

Within my control and family`s control to move out. (p 50)

If 14 sold for higher price, eg $2m, entire difference would have to go to IOB. So the more the benefit to IOB. (p 50)

I informed bank rent was $500. (p 50)

Within my control and family control to move out. Did not move out. (p 50)

It was in the best interest to sell at higher price without rent control. But in the interest of the family to sell rent controlled; no one else in family involved in negotiations. (p 51)

Ow Chor Seng [plaintiff] is my father`s friend... Knew him in 1980... Property developer... Also in 1983 he approached about 14A. But he didn`t like it. (p 51)

Youngest brother`s name used as tenant... Just said Kong Bin ... Kong Bin did not have liability exposure ... I was facing problems so I didn`t want to use my name. (p 52)

Might have told IOB premises rent controlled. (p 53)

I didn`t move out because of family. Sacrifice company`s interest for family. (p 53)

Ow aware I was having problems with bank. (p 55)

Wanted to sell fast. (p 55)

Selected Kong Bin because he was not director and not liable. (p 6)

For convenience put in Kong Bin Leng. (p 57)

Trust Ow ... He said he worked for my father ... sale of property kept me in touch with him. Told Ow about personal problems because he might have connection with IOB ... Bank didn`t know I was going to show valuation to purchaser. Decided Ow would buy property... Also decided I would stay. (p 57/58)

39 (b) Ow Chor Seng (plaintiff)

40 In his examination by counsel for the defendants, the plaintiff stated that he had been a qualified accountant since 1968 and that he had a few companies mainly in property development and property investment. Amongst the companies, was 3 Top Holdings Pte Ltd. He also stated that as a property investor, he kept abreast of development of the general law regarding property and also had legal advisers on the said matters.

41 In so far as the said property was concerned, it was a pre-war house and before 1986 he never knew about it. Neither his company nor he were ever interested in the property. There was no dealings with Thio`s father`s company and his father`s company. Defendants` counsel then showed the plaintiff a letter from 3 Top Holdings Pte Ltd dated 3 December 1979 with a signature. He then admitted that the signature looked like his signature and that the letter indicated an offer from 3 Top Holdings Pte Ltd to Tjinta purchasing the property.

42 In answering questions, the plaintiff then went to say that in May 1986, Thio Sin Bin explained something to the effect that his company was facing pressure from his bank and that the bank wanted him to sell the property. He bought the property after the bank gave permission for the property to be sold for $550,000 without vacant possession. When questioned on the tenancy and its terms, he stated that the tenant was Thio Kong Bin. The rent payable was $500 monthly to him. There was however, no tenancy agreement. Although the tenancy was to Thio Kong Bin, the monthly rental was paid by Thio Sin Bin who used to go to his house to pay the rent. When asked how long the tenant was going to stay there, his answer was that it depended on when the market would turn around. He had also added that if the tenant would be there for a long time, it may not make sense to buy it. Further, since buying the property,

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he had never spoken to Thio Sin Bin or to Thio Kong Bin and had never gone to see the said property to check if Thio Kong Bin lived there. When questioned further as to what he would do if other people were instead staying there, he said that in the said circumstances, the property would not be rent controlled in his view. When asked if after seeing the valuation report, he had checked with Thio Sin Bin as to whether there was a controlled tenancy, his answer briefly was that he might have casually asked for a tenancy agreement. On questions as to what type of compensation he would have had in mind to pay the tenants to get vacant possession or what the fair value of the property was on the basis of vacant possession he could give no answer although he was a developer.

43 On the question of property tax, the plaintiff gave conflicting answers. His first answer was that he did not discuss the matter with Thio Sin Bin. When pressed as to who paid the property tax, he stated, `They pay.` When asked again, `between tenant and you, who pay the property tax?` his answer was, `Not discussed at that point of time.` It had been stated earlier that the plaintiff had stated that he did not know that the property was rent controlled until lately. Defence counsel showed the plaintiff a letter dated 2 May 1987 from Inland Revenue Department who had informed him that the property had been ***de-controlled*** and when asked whether this was a surprise to him, he said it was not clear to him at first and he therefore took legal advice. He did not explain further. His answer when asked whether he spoke to Thio Sin Bin on the matter when he should have been expected to in view of the very important revelation by the Inland Revenue to him was that he could not remember. He also stated that he did not challenge the contents of the letter from the Inland Revenue Dept. He then went on to admit that the annual value of the property had been $49,500 and the property tax was 23% amounting to $12,000. The following relevant questions and answers may now be set out:

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> *Q: Who paid the $12,000?*
>
> A: I paid it.

44 (This answer was in contradiction to his earlier two answers, `They pay,` and `Not discussed at that point of time.`)

> *Q: From May 1987 you pay $1,000 property tax but only take $500 rental?*
>
> A: Could I check please [on consideration not says yes] [sic].

45 Finally, he was asked if he needed to compensate the Thio family today if he wanted vacant possession, his answer was he wasn`t sure of the position.

46 Defendants` counsel submitted that the results of the respective examinations of Thio Sin Bin and the plaintiff established a case of action against the plaintiff in that his interest in No 14 rendered him a constructive trustee for Tjinta as far as the property was concerned. The constructive trusteeship fell within a category commonly described as `knowing receipt or dealing` which included the head `knowing assistance.`

47 Generally, `knowing receipt or dealing` covers receipt of trust property by a person with notice that it is trust property transferred in breach of trust or where the receipt of the trust property by a person is such that he has notice of the trust but without notice of any breach of trust because there be none, but thereafter deals with the property in a manner inconsistent with the trust or finally where there is a receipt by a person of the trust property without notice that it is a trust property transferred in breach of trust (not a bona fide purchase of a legal interest for value without notice) but thereafter acquires notice and yet deals with the property in a way inconsistent with the trust. `Knowing assistance` on the other hand invariably covers a person who knowingly assists in a dishonest design that a trustee or trustees may have.

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48 Counsel for the defendants relied on , where Gibson J dealing with `knowing receipt or dealing` and `knowing assistance`, held that the knowledge sufficient to impose constructive trusteeship in both types of situations can comprise the following mental states amongst others:

> (a) actual knowledge;
>
> (b) wilfully shutting one`s eyes to the obvious described as `Nelsonian` knowledge by Megarry V-C in 11
>
> (c) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make described as `naughty knowledge` by Megarry V-C in .11

49 Plaintiff`s counsel on the other hand submitted that, on the authority of , Megarry V-C decided that imputed knowledge was insufficient to make a person liable for knowing receipt. Counsel further submitted that the present transaction was at arm`s length as there was a valuation report, approval by IOB and approval or ratification by the shareholders (which raised another issue of law).

50 The submission on the tests to be applied on the question of knowledge on the part of a constructive trustee was to my mind as can be seen a substantial question of law as was the question of ratification (which is dealt separately below) which should properly be raised and determined at a trial.

51 On considering the allegations of the defendants in the light of the evidence of Thio Sin Bin and that of the plaintiff at the examination and the inferences that may be drawn therefrom I was of the opinion that the liquidator`s affidavits supported by the evidence at the examination of the above persons tended to raise and support the issues as set out earlier, all of which put into

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question the disposition of the said property, an asset of Tjinta which was available for distribution to its creditors but the true market value on a vacant possession basis was put beyond their reach as a result of the matters raised by the defendants.

52 Thio Sin Bin`s evidence tended to support the issue that the property could have been deliberately sold at an undervalue in return for an indefinite right from the Thio family to stay at the property as it was within Thio Sin Bin`s control and the control of his family to move out, which they did not do. Further, the tenancy nominally in favour of Thio Kong Bin appears to have been tailored to meet the circumstances as he was said not to be a director of Tjinta and not pressed by any creditor. It appears he did not personally pay any rent to the plaintiff, who admittedly received it from Thio Sin Bin who came to his house to pay it and he had not even checked if Thio Kong Bin occupied the said property. It can also be seen that the quality of the plaintiff`s answers and the inconsistencies at the examination raised serious questions as to his role and state of knowledge as to the various matters in the sale of the said property. The evidence marshalled by the defendants therefore had in my opinion sufficient plausibility that merited further investigation as to the truth of the defendants` claims and that could only be done at the trial of Suit No 2003/89.

(iii)

53 **Ratification**

54 Plaintiff`s counsel had submitted that the said property was sold pursuant to a resolution passed by the shareholders of Tjinta approving the sale and further, IOB, Tjinta`s major creditor also approved the sale after engaging its own valuers, M/s Michael Sim & Associates whose valuation report was the

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basis of the sale and purchase. Counsel further stated that it was therefore not a case where the directors disposed of the trust property to a third party stranger without letting the beneficaries know of the sale. Counsel relied on the principle that the approval in general meeting will defeat any allegation that there was any breach of trust: . Even if Tjinta`s solvency was doubtful at the time when the agreement was entered into, the approval by IOB, the major creditor would have ratified any breach: .13

55 As against the above, counsel for the defendants submitted that Thio Sin Bin who managed Tjinta single handedly was also chairman of the general meeting held on 19 May 1986 which purportedly `ratified` his own act to sell the property to the plaintiff after putting up a tenancy in the name of his brother and the decision made at the general meeting had to be viewed in that light. Counsel interpreted ***Kinsela*** as holding that where the creditors` interests are affected, the shareholders cannot ratify the directors` breach of fiduciary duties to the company - in other words, sharehodlers at a general meeting do not have the power or authority to absolve directors from a breach of their duties. Counsel`s main thrust on the issue was that, according to the evidence, IOB consented to the sale of the property based in all probability on Thio Sin Bin`s information given to the valuers and to the bank that the said property was rent controlled and that therefore IOB was misled by Thio Sin Bin. The suggestion therefore that IOB had approved the transaction was misconceived. Further, IOB was not the only creditor. There was at least another creditor. It was irrelevant if the sum owed to him was not large.

56 Having considered the submissions of both counsel, I accepted the submission of defendants` counsel and I was satisfied again that the above matters raised a serious issue as to the facts and the application of the law on

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the issue of the determination of whether there was a good and valid ratification by the shareholders of Tjinta or similarly of the approval given by IOB.

57 In respect of issue (1), I would finally observe that plaintiff`s counsel when defending against the defendants` application for summary judgment in Suit 2003/89, especially on the issue of common mistake raised by the evidence in the examination, had submitted before the assistant registrar as follows:

> *Hee: Unconditional leave should be given on the grounds: (1) triable issue in law; (2) triable issue in fact; and (3) merits for the defence.*

58 The assistant registrar had consequently granted unconditional leave to the plaintiff to defend. The position as to the facts and the law - that there were triable issues - had not, in my opinion, changed since that hearing.

59 **Balance of convenience and provision of damages**

60 Notwithstanding that there was a serious question to be tried, I had to proceed to determine and decide whether the balance of convenience lay in favour of the caveat being removed. Plaintiff`s counsel submitted that the caveat ought to be removed as the plaintiff had suffered and continued to suffer losses by being unable to deal freely with the property. Further, that if the caveat is not removed and it is later adjudged to have been improperly lodged, the company, being in liquidation, will be unable to meet any order for damages. In any event, if the liquidator in Suit 2003/89 was successful in their action, the court could always award damages which would be an adequate remedy and that Tjinta would suffer no further hardship having already been wound up. Counsel continued that considering all these factors, on a balance of convenience, the status quo should not be allowed to remain as damages would be an adequate

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remedy for the liquidators. Counsel went on to rely on the decision of Chan Sek Keong J in where the learned judge said:

> *...in this case damages would probably be an adequate remedy. Land may be owned for personal enjoyment (eg for dwelling or as gardens, etc) or they may be owned as investment, ie for profit ... the main object of owning land is not the personal enjoyment thereof but the profit derivable therefrom, it would be unrealistic to believe that damages would not be an adequate remedy to the owner for the loss of the mortgaged property.*

61 Counsel for the defendants distinguished the above case from the present facts and submitted that in ***Good Property*** , the mortgagors had defaulted in repaying their loan. They had applied for an interlocutory injunction to restrain the mortgagee bank from selling the mortgaged property at an undervalue. The mortgagors alleged that the sale was in bad faith. The case had nothing to do with the removal of caveats. The court had held that the mortgagee bank could pay the damages if the court so ordered and that damages was an adequate remedy and had therefore refused an injunction in that case. Counsel for the defendants further countered the submission by the plaintiff`s counsel by stating that it was desirable to maintain the status quo pending trial. If the caveat was removed, Tjinta would suffer irreparable hardship in the event that the plaintiff sold the property and in that event damages would not be an adequate remedy for Tjinta as Tjinta claimed that the property belonged to it.

62 Having considered these submissions, I was of the opinion, that as there was a real dispute between the parties and as it was probable that the plaintiff could sell the said property if I were to remove the caveat and dispose of the funds, the defendants would be left with a paper judgment. There was also no evidence before me of the financial standing of the plaintiff. In all the circumstances, it was desirable, in my opinion, that the status quo be preserved pending the disposal of the suit.

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63 **Undertaking as to damages**

64 It was further submitted on behalf of the plaintiff that if the caveat is allowed to remain, the plaintiff be entitled to an undertaking as to damages from the defendants. Counsel for the defendants submitted that since the plaintiff purportedly purchased the landed property which was over 3,000m2 in May 1986 for $550,000, the said property, had appreciated in recent years and as must be evident to all, had a considerable value. The plaintiff apart from not showing on his affidavits that he had suffered any damage, would be hard put to show that he is likely to suffer any damage as the property was continuing to appreciate. On the affidavit evidence before me, I found no evidence that the plaintiff had suffered any damage as a result of the caveat being lodged against the property. On the other hand, the irony of the situation was that the property had appreciated to its considerable value and the caveat had perhaps forestalled any earlier sale by the plaintiff if he had that intention in mind. Had he sold the property earlier, he would have got a much lower price than the current price levels. I make these observations without the benefit of any valuation as the price appreciation of landed property in Singapore is all too evident. All the more so in respect of the said property which is in district 10, one of the prime districts.

65 In any event, if the plaintiff was to suffer any damage, he is provided, contrary to the submission of the plaintiff`s counsel, with an adequate remedy, in my opinion, under the wide provision of s 112(1) of the Land Titles Act (Cap 157) which reads as follows:

> *Any person who has sustained damage, or who has incurred costs or expenses, by reason of a caveat having been lodged, or having been allowed to remain, wrongfully or vexatiously or without reasonable cause, may bring an action against the caveator or his personal representatives for compensation, or*

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> *may claim compensation in any suit between the caveator and caveatee, and the court may award such sum as seems just.*

66 I was not prepared, in the circumstances, to accede to the submission of counsel for the plaintiff and exercise my discretion on certain dicta expressed in and in in interpreting s 56(3) of the English Law Reform Act, which is similarly but not as widely worded as s 112(1) of the Land Titles Act, that notwithstanding that the court may find a triable issue, it could still order the caveat removed if the defendants made an application for interlocutory injunction subject to the furnishing of an undertaking of damages. This submission not only had practical difficulties but was was little more than a devise to extract an undertaking in damages either from the defendants or the liquidators who were, in all probability, in view of their predicament, unable to give one if so ordered resulting in their claim being stiffled and/or was an attempt to obtain the same undertaking from IOB against whom I was not persuaded that I could make an order as it was not a party to the action.

67 **Was the caveat defective?**

68 Counsel for the plaintiff finally submitted that the caveat was defective as the description of the caveator was `Tjinta Pte Ltd` the status prior to its liquidation and as the caveat was registered after its liquidation, the description was defective and its solicitors could not propertly have certified it to be correct under s 54 of the Land Titles Act.

69 Counsel for the defendants submitted that there was no law to compel a company in liquidation to be described as such and that the plaintiff`s counsel whilst submitting that the caveat was defective was unable to explain why it was so defective.

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70 I was of the opinion that the caveat in the name of Tjinta Pte Ltd was properly lodged as the winding-up had no immediate effect upon the corporate personalities and powers of the company. A winding-up did not transfer the property in the company to the liquidators, whose duty is merely to take into custody and take control of all the property to which the company is entitled.

71 Finally, I would like to reiterate the observation made by the Court of Appeal in , where Warren LH Khoo J in holding that it was the substance of the caveat which matters and not its form stated:

> *... The court should guard against the harm of striking out a caveat for some minor defect of form where the underlying basis for the claim is unimpeachable.*

72 For all the reasons given, I dismissed the application of the plaintiff with costs to be agreed or taxed and further ordered an early trial be held in respect of Suit 2003/89.

73 ***Plaintiff`s application dismissed.***

Amarjeet Singh JC

Hee Theng Fong and Christina Teay (Hee Theng Fong & Co) for the plaintiff
Davinder Singh and Bonnie Lo (Drew & Napier) for the defendants

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