IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1997] SGHC 266

Suit 1860/1992

Between

Tan Soo Leng David

… Plaintiff

And

Wee Satku & Kumar Pte Ltd
Another

… Defendant

GROUNDS OF DECISION

Land — Sale of land — Conditions of sale; Land — Restrictive covenants; Land — Restrictive covenants; Land — Sale of land; Civil Procedure — Third party proceedings; Land — Caveats — Wrongful lodgment

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

[1997] SGHC 266

Suit 1860/1992
Judith Prakash J
25 October 1997

Judgment:

JUDITH PRAKASH

Cur Adv Vult

This case involves an option which the first defendant gave to the plaintiff to purchase a unit which it owns in the Mount Elizabeth Medical Centre (`the medical centre`). The first defendant had purchased the unit from the second defendant and the proposed sale to the plaintiff did not go through because the second defendant did not consent to it. The plaintiff now wants, inter alia, specific performance from the first defendant and various declarations relating to the position and conduct of the second defendant.

2. **Background**

The plaintiff is an ophthalmic surgeon who has been in specialist practice since 1976. The second defendant, Mount Elizabeth Hospital Ltd (sometimes

hereafter `MEH`) is the owner of the Mount Elizabeth Hospital (`the hospital`) and was the developer of the medical centre. Sometime in 1988, MEH decided to redevelop the medical centre by building a new extension wing of medical consultant suites. Unit #11-11 Mount Elizabeth Medical Centre (`the property`) is located in the new wing and is the subject matter of this action.

3.The plaintiff wanted to purchase some units in the new wing. He wrote on 9 September 1988 to MEH to register his interest. Subsequently, his application was rejected. On the other hand, one Dr Satkunanantham s/o Kandiah, a specialist orthopaedic surgeon with the National University of Singapore who was considering going into private practice, successfully approached MEH for the purchase of a unit. Dr Satkunanantham together with Dr V Prem Kumar, another orthopaedic surgeon, and Dr Julian Wee, a plastic surgeon, set up the first defendant for the specific purpose of purchasing that unit.

4.The first defendant agreed to buy the property sometime in mid 1991 at a price of $910,000.44 and the sale and purchase agreement (`the principal agreement`) was dated 24 January 1992. The form of the principal agreement had been approved by the Controller of Housing. There were several restrictions on the property as set out in the third schedule to the principal agreement. One of these clauses, cl (f), has become a central issue in this action. It reads:

> *The Purchaser [ie the first defendant] shall not let or sub-let, sell or assign or transfer (otherwise than by way of security) the [property] without the prior written consent of the Vendor [ie the second defendant] which consent shall not be unreasonably withheld if the letting, sub-letting, sale or assignment or transfer is to a medical practitioner (which expression shall include a body corporate) engaged in the practice of specialist medicine.*

The covenants contained in the third schedule of the principal agreement were not executed between the first defendant and MEH until 4 September 1992. The

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Instrument of Restriction was only lodged with the Registry of Land Titles and Deeds on 9 September 1992.

5.The first defendant was aware of the restriction. It had been highlighted to the three doctor-shareholders by their solicitors at the time the principal agreement was negotiated and signed. There were two separate requirements for any proposed sale: the intended buyer had to be a specialist and the sale would be subject to the consent of MEH.

6.The three doctors had purchased the property with the intention of coming out into private practice and using it as their clinic. They later changed their minds. They then tried to rent out the property, but were unsuccessful. Dr Wee had difficulty paying his portion of the mortgage payments and, after considerable discussion, sometime in May 1992, the first defendant decided to sell the property. Dr Wee was asked to make the arrangements.

7.Dr Wee contacted estate agents and dealt with one Ms Magdalene Lam. The agents were informed by Dr Wee that when marketing the unit they should only approach medical specialists. In order to check the position, Ms Lam called and spoke to Mrs Theresa Poh, a senior officer in the property department of MEH. Mrs Poh informed her that the property could be sold to a specialist but that the sale was subject to the consent of MEH. From her conversation with Mrs Poh, Ms Lam understood that the first defendant would have to produce the sale agreement to the management of MEH for approval.

8.Ms Lam approached several doctors for the sale of the property. One of these was the plaintiff. He was very interested. Ms Lam informed him of the need for MEH`s consent to any proposed sale. The plaintiff was eager to go ahead. On 27 June 1992, he signed an offer to purchase the property and issued a cheque

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for $10,000 in favour of Dr Wee as option money/part deposit. At the back of his cheque, he wrote: `This deposit shall be refunded in full if the Property cannot be sold to the Purchaser, Dr David Tan Soo Leng because of any covenant with the developer, Mount Elizabeth Hospital`. He also dictated this wording to Ms Lam and made her write it into the offer to purchase. The cheque should have been made in favour of the first defendant and therefore the plaintiff subsequently replaced it with another cheque. He wrote similar wording on the back of the second cheque.

9.The plaintiff was so eager to finalise the sale that he bypassed the agents and contacted Dr Wee directly several times. As a result, the two met on 28 June 1992. They discussed the terms of the proposed sale. After they reached an agreement on these, the plaintiff immediately wrote out an agreement (`the private agreement`) setting out the terms of the proposed sale pending the issue of the option. Part of the private agreement read:

> *the sale of the [property] to Dr Tan Soo Leng, David [is] subject to the condition that the sale of the [property] is approved by the Developer (Mount Elizabeth Hospital Pte Ltd). The Deposit will be refunded in full if the Developer does not approve this transaction.*

In court, the plaintiff admitted that during this meeting, Dr Wee had informed him of the need to obtain MEH`s consent to the sale.

10.In the meantime, on 26 June 1992, the plaintiff had already spoken with his then lawyer, Mr VK Rajah, about the proposed sale. Mr Rajah advised him that in relation to units which had been sold by MEH before 1986, the plaintiff should look out for a `sell-back clause` which provided that any owner intending to sell his unit had to give MEH the first right of purchase. The property, however, was in the new wing and the first defendant had bought it in 1992. The `sell-back` clause would not have applied to it.

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11.After signing the private agreement, the plaintiff sought confirmation of his ability to buy it from Mrs Poh. He spoke with her on 29 June 1992. He claimed that she told him that if the purchaser was a specialist practitioner, then the requirement of consent would be a mere formality. Mrs Poh, however, was sure that she had informed the plaintiff of the consent requirement and that she had not told him that it was merely a formality. The plaintiff also showed the private agreement to Mr Rajah and sought his advice. Mr Rajah told him that the private agreement was conditional upon MEH`s consent to the sale.

12.The formal option was signed on 2 July 1992. It was stated to be open for acceptance until 4pm, 15 July 1992; it would be exercised by the plaintiff signing the duplicate copy attached to the option and making payment of $111,200 being ten per cent of the sale price of $1,212,000 less the option fee. The date fixed for completion was 20 September 1992. For the purpose of the action, the most important clause of the option is cl 6. It reads:

> *The sale shall also be subject to the consent of the Developers, which said consent to the sale is required under the terms of the principal agreement. In the event such consent is refused or not received by the Completion Date (as defined in Clause 7 below), the sale and purchase herein shall be deemed rescinded forthwith whereupon all moneys paid hereunder shall be refunded to you free of interest and subject thereto the sale and purchase herein shall be cancelled and of no effect and neither party shall have any claim or demand against the other for damages, costs, compensation or otherwise.*

13.On 1 July 1992, the first defendant`s solicitors, M/s Allen & Gledhill, wrote to MEH`s then solicitors, M/s Tan Rajah & Cheah, for their client`s consent to the proposed sale. On 8 July 1992, M/s Tan Rajah & Cheah wrote to MEH for instructions. The matter was considered by Mr James Robert Clapp who was then the chief executive officer of MEH and, after discussing the matter with Mrs Poh, he decided against giving consent. On 10 July 1992, MEH informed its solicitors of this decision.

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14.On 14 July 1992, M/s Tan Rajah & Cheah notified the first defendant`s solicitors of the refusal of consent. This notification was immediately passed on to the plaintiff`s then solicitors, M/s Rajah & Tann. M/s Allen & Gledhill had taken the view that since consent was refused, the sale was automatically rescinded and therefore, in their letter to the plaintiff`s solicitors, they stated that they were requesting the first defendant to return the option fee to the plaintiff.

15.The plaintiff did not accept the rescission of the sale. Not only did he refuse to take back his $10,000 but on 15 July 1992, he purported to exercise the option by forwarding M/s Allen & Gledhill the acceptance copy duly signed together with a cashier`s order for the balance of the ten per cent deposit. On the same day, he lodged a caveat against the property claiming an interest as purchaser by virtue of the option dated 2 July 1992 so exercised by him.

16.In response to the plaintiff`s exercise of the option, the first defendant`s solicitors wrote to the plaintiff`s solicitors reiterating that the contract was no longer effective and returning the plaintiff`s cashier`s order for $112,200. The plaintiff`s response was to refuse to accept that the contract was no longer effective. His solicitors wrote to say that he would not accept the unilateral return of the cashier`s order. On 21 July 1992 the plaintiff`s new solicitors, M/s Wong Meng Meng & Partners, wrote to M/s Allen & Gledhill to state that by reason of the plaintiff`s valid exercise of the option on 15 July 1992 there existed a valid sale and purchase agreement between the plaintiff and the first defendant. M/s Wong Meng Meng & Partners took the opportunity to re-tender the cashier`s order.

17.In the meantime, on 16 July 1992, the plaintiff had been to see Mr Clapp to find out why consent had been refused. According to the plaintiff, Mr Clapp told him that his reasons for withholding the consent to the sale of the property

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were not personal to the plaintiff and that he would only approve the sale if it had been at the original price of $828 psf paid by the first defendant. This was because he did not want the first defendant to be profiteering by a 33.33% profit within a few months of purchasing the property. He also indicated that his objection to the price related to some negotiations which MEH was having with doctors owning units in the old wing at the medical centre regarding compensation payable for the re-development. Mr Clapp also said that he expected the property to be owner-occupied by one plastic surgeon and two orthopaedic surgeons. In court, the plaintiff confirmed that at the meeting, Mr Clapp was firm about his stand and that it was clear to the plaintiff that there was no possibility of his getting Mr Clapp to change his mind.

18.Mr Clapp had a different account of what was discussed at the meeting. In his affidavit of evidence-in-chief, he stated that the plaintiff had appeared very distraught and had told him that he was approaching Mr Clapp as he was concerned that MEH`s view of him may have been tainted because of an earlier instance involving a joint venture company in which MEH was a shareholder. Mr Clapp said that he told the plaintiff that the refusal of consent had nothing to do with the plaintiff himself personally ie the plaintiff personally as contrasted with the plaintiff as an ophthalmologist and in the context of his concern over the previous incident. He also told the plaintiff that MEH`s intention was to position the hospital with the highest quality and most efficacious mix of specialists in the hospital. The plaintiff told Mr Clapp that he was considering the possibility of renting a unit in the medical centre from a Dr Lim and his wife. Mr Clapp indicated that the plaintiff was welcome to make such an arrangement as he knew that under the sale and purchase agreement which MEH had with Dr Lim, Dr Lim was free to rent out the unit without seeking prior approval from MEH. Mr Clapp admitted that he expressed

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surprise at the price at which the property was being sold to the plaintiff. He asserted, however, that he had expressly told the plaintiff that the price was not a reason for refusing consent. Neither did he say that MEH would only consent if the property was sold at the original purchase price.

19.It should be noted that Mr Clapp`s account in his affidavit of what had happened was somewhat at variance with his oral testimony. In court he said that the issue of consent was not expressly brought up at the meeting with the plaintiff although he was aware by the end of the meeting that that was what was bothering the plaintiff, and that he himself had not been so forthright as to tell the plaintiff that MEH had refused consent. He also admitted that he had told the plaintiff during the meeting that MEH had not yet received any formal enquiry from the potential sellers and as such had not given any serious consideration to the matter. Mr Clapp was quick to agree that this statement was a lie. His explanation for the lie was that the plaintiff had been very agitated and Mr Clapp was very concerned about the nature of the plaintiff`s approach. Mr Clapp thought the plaintiff was trying to throw him off guard throughout the meeting and therefore he had done his best to shift the matter to the lawyers and avoid a direct confrontation with the plaintiff.

20.Dr Satkunanantham was away from Singapore from 12 July 1992 until the end of July or early August. After his return, he together with Dr Kumar and Dr Wee met with the first defendant`s solicitors. Although the first defendant had purported to rescind the contract, the three men wanted the sale to go through because they considered that the refusal of consent to be unfair to them. They wanted to find out the reasons why consent was withheld and to see if they could persuade Mr Clapp to change his mind.

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21.Around 20 August 1992, Mr Shanmugam, counsel for the first defendant, had a telephone conversation with Mrs Poh. According to Mrs Poh, he asked for the second defendant`s reasons for their refusal of consent. Mrs Poh, however, did not disclose the reasons to Mr Shanmugam. Subsequently, on 24 August 1992, a meeting was held between Mr Clapp and Mrs Poh on the one part and Dr Satkunanantham and Dr Wee on the other.

22.At the meeting, Dr Satkunanantham and Dr Wee asked why the plaintiff was not good enough to purchase the unit even though he was a specialist and had admitting privileges at the hospital. They were told that MEH had withheld its consent because at the time when the sale was made to the first defendant, MEH had considered the three doctors to be an appropriate mix of doctors for the medical centre and to have the specialities which MEH wanted to attract to private practice. Mr Clapp said that the plaintiff was not of the calibre that MEH wanted and that he did not or would not be in a position to use the hospital`s facilities.

23.When Dr Satkunanantham asked as to whom the first defendant could sell the unit to, Mr Clapp said that MEH had sold the property to them with the intention of having two orthopaedic surgeons and a plastic surgeon occupying it and that any sale by them should be to a similar mix of doctors. Dr Satkunanantham and Dr Wee were upset about this because they thought it an unreasonable demand which they would not be able to satisfy. According to Dr Satkunanantham, Mr Clapp also accused the three doctors of profiteering and suggested that they sell the property back to MEH at the original price. In court, Mr Clapp denied using the word `profiteering` though he did not deny having been angry that after only six months the first defendant had sold the property, which MEH had held for it at the original price, at a substantial profit. Both parties agree that Mr Clapp refused to accept Dr Satkunanantham`s explanation

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for the sale. The meeting became acrimonious and angry words were exchanged.

24.Having heard Mr Clapp`s position, the doctors were furious. According to Dr Satkunanantham, Dr Wee (who, unfortunately, has since died) in particular felt that first defendant had good ground for suing MEH for withholding its consent. He was sure that they could use the reasons Mr Clapp had given them for the refusal of consent and prove that MEH had been unreasonable and thereby be able to complete the sale to the plaintiff. All three considered it was unreasonable of MEH to insist on a sale to doctors of the exact mix of two orthopaedic surgeons and a plastic surgeon and to suggest that the first defendant re-sell the property to MEH at the original price.

25.The three doctors went to see their solicitors again and were persuaded that litigation was not the answer. A second meeting was then scheduled at the office of M/s Allen & Gledhill to see if Mr Clapp could be persuaded to change his mind about the proposed sale to the plaintiff. This meeting took place on 29 August 1992. On Mr Clapp`s insistence, it was held on a `without prejudice` basis. Dr Satkunanantham explained to Mr Clapp that the first defendant was in a difficult position because it could not hold the property. It wanted to sell and all three doctors thought it would be best for Mr Clapp to give them permission to sell it to the plaintiff. Mr Clapp`s response was to enumerate the reasons that the plaintiff did not meet the requirements of calibre and mix that he wanted. He made it clear that there was no way that Dr Satkunanantham was going to be able to convince him to give consent to that sale. Mr Clapp did, however, soften his position somewhat in that he indicated that he was prepared to consider a sale to other specialists.

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26.Mr Clapp`s own evidence was that between July and September 1992, he was very firm about his decision for refusing consent to the sale to the plaintiff. He testified that during the two meetings he had with the first defendant the three doctors tried hard to persuade him to change his mind on this point. He knew that they wanted very badly to sell the property to the plaintiff but he stood firm. He said that there was nothing that they could have done to make him change his mind.

27.The plaintiff knew nothing about the meetings that the first defendant had with Mr Clapp. On 28 August 1992, his solicitors wrote to M/s Allen & Gledhill stating his position on the validity of the sale and asked them for the first defendant`s confirmation by 10 September 1992 that they would be proceeding with the completion of the sale and purchase on 20 September 1992 as scheduled. On the same day, the plaintiff`s solicitors also wrote to M/s Tan Rajah & Cheah requesting MEH to furnish their consent to the sale and purchase of the property by 31 August 1992 as MEH`s withholding of the consent on 14 July 1992 was both unreasonable and unsustainable in law.

28.On 17 September 1992, M/s Lee & Lee, MEH`s new solicitors, wrote to M/s Allen & Gledhill stating the reasons for MEH`s refusal to give consent to the proposed sale. The reasons stated were: (a). neither the plaintiff nor his area of specialisation met with MEH`s objective of achieving the highest quality and most efficacious mix of specialists in the hospital; and

(b). neither the plaintiff nor his area of specialisation met MEH`s objectives regarding the extent to which the hospital`s services should be utilised by specialists.

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29.Obviously, by the time 20 September 1992 arrived, the consent of MEH to the sale to the plaintiff had not been received by the first defendant and therefore the sale did not proceed. Though notified of this position, the plaintiff did not remove the caveat which he had lodged against the property in the Registry of Land Titles. Instead, he proceeded with this action which he had commenced against both defendants on 11 September 1992. The first defendant has also filed a counterclaim in the action to recover damages for the plaintiff`s refusal to remove the caveat and its inability to rent out the property since the action started.

30. **Reliefs claimed and issues**

As against the first defendant, the plaintiff has claimed the following reliefs: (a). a declaration that the purported termination of the contract for sale and purchase by the first defendant is invalid and/or of no effect;

(b). a declaration that the first defendant is entitled to proceed with the completion of the sale and purchase of the property;

(c). a declaration that MEH has granted any consent necessary to the sale between the plaintiff and the first defendant;

(d). an injunction to restrain the first defendant from dealing with the property in a manner inconsistent with the first defendant`s obligations `under the Agreement`; and

(e). specific performance `of the Agreement dated 15 July 1992` and/or damages.

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31.As against the second defendant, MEH, the plaintiff wants, inter alia: (a). a declaration that any refusal of MEH to consent to the sale and purchase of the property by the first defendant to the plaintiff is unreasonable and/or unlawful; alternatively, a declaration that the first defendant is entitled to proceed with the completion of the sale and purchase of the property;

(b). a declaration that cl (f) of the third schedule to the principal agreement is void or unenforceable;

(c). a declaration that MEH has granted any consent necessary to the sale between the plaintiff and first defendant; and

(d). damages for the wrongful withholding of MEH`s consent.

32.The pleadings on the basis of which the above reliefs are claimed are prolix. In summary they set out the plaintiff`s case as follows. First, the plaintiff asserts that as cl 6 of the option provided that `the sale was subject to the consent of [MEH] which consent is required under the term of the principal agreement`, the following consequences ensue: (a). since the Instrument of Restriction (containing the covenants in the third schedule of the principal agreement) was not entered into at any time prior to `the institution of these proceedings`, there was no requirement to seek the consent of MEH to the proposed sale;

(b). cl (f) of the third schedule is invalid as a restraint as against alienation and therefore cl 6 of the option was automatically itself invalid. The first defendant was therefore obliged to proceed with the sale to the plaintiff;

(c). even if cl (f) of the third schedule is valid by virtue of its importation to cl 6 of the option, the withholding of the consent by MEH must be a reasonable

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act. Since MEH`s refusal of consent was `unreasonable, capricious or otherwise than in good faith` the first defendant must assign the property to the plaintiff.

33.Secondly, the plaintiff pleads that the first defendant is estopped from relying on the consent requirement in cl 6 of the option because of representations made by Dr Wee, Mrs Poh and Ms Lam. The third main assertion is that the first defendant did not make reasonable efforts to obtain the consent of MEH and therefore cannot rely on MEH`s refusal of consent to excuse its own non-performance.

34.The first defendant`s defence is as follows: (a). Clause 6 of the option made it a contractual requirement between the plaintiff and the first defendant that as a condition precedent to completion of the sale and purchase, MEH should consent to such sale. This condition existed of its own right and was not dependent on the principal agreement.

(b). The argument that cl 6 of the option is invalid because cl (f) of the third schedule is void as against alienation is wrong because, first, cl 6 is an independent contractual term and secondly, partial restraints against alienation are not void.

(c). The first defendant made all reasonable efforts to secure the consent of MEH to the sale.

(d). MEH would not have given consent to the sale to the plaintiff regardless of the efforts made by the first defendant.

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35.The second defendant`s position is as follows: (a). The plaintiff has no locus standi to seek the declarations concerning the validity of cl (f) of the third schedule and/or the necessity for or validity of MEH`s refusal of consent.

(b). In any event, the plaintiff`s claim against MEH must fail because (i) the first defendant has been able to establish both that it has taken all reasonable steps to obtain MEH`s consent and that, in any case, such efforts were futile because it was impossible for it to obtain such consent; (ii) the sale to the plaintiff is subject to MEH`s consent; and (iii) the refusal of consent by MEH was not unreasonable in law.

(c). There is no legal basis for the plaintiff`s claim for damages against MEH for wrongful refusal of consent.

36.In the closing submissions for the plaintiff, six main issues were specified. First, whether the plaintiff is entitled to the declarations he seeks against MEH. Secondly, whether cl (f) of the third schedule to the principal agreement was effective as of 2 July 1992 (ie, the date when the option was granted) or alternatively, on 15 July 1992 (ie, the date when the option was exercised) having regard to the fact that the covenants contained in the third schedule including cl (f) were only executed between the first and second defendants on 4 September 1992. Thirdly, whether cl (f) itself is void as a restraint against alienation and if so, whether, fourthly, cl 6 of the option is thereby also rendered void. Fifthly, whether the withholding of consent by MEH was reasonable and valid. Finally, whether the first defendant was under a duty to use its best endeavours to obtain the consent of MEH and if so, whether such best endeavours were used.

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37.The plaintiff approached the matter by addressing the issues relating to MEH first. This was on the basis that if the court found in favour of the plaintiff in relation to the issues involving MEH, then the plaintiff considered that the only issue that would be relevant between the first defendant and the plaintiff would be an issue of damages/specific performance. I do not agree with this approach. In my judgment, since the only direct contractual relationship which the plaintiff had with any party was with the first defendant, the issues between the plaintiff and the first defendant must be adjudicated first. Neither does it follow automatically that if the plaintiff is successful against MEH he will be entitled to judgment against the first defendant and the only question to be decided would be whether that judgment should be for specific performance or costs or both. The relationship between the plaintiff and the first defendant is governed by the contract between them and the liability of the first defendant to the plaintiff depends first, on the construction of that contract and secondly, on the behaviour of the first defendant. The liability of MEH to the plaintiff is a separate issue altogether and cannot of itself determine the first defendant`s liability to the plaintiff.

(A). **The plaintiff`s case against the first defendant**

The status of cl 6 of the option

38.The first defendant`s case is that on a plain reading of cl 6 of the option it imposes a condition precedent to completion of the sale of the property to the plaintiff. Mr Shanmugam argued that cl 6 exists of its own right and is independent of the principal agreement. The parties had decided, as they were entitled to, to provide contractually that the sale be subject to MEH`s consent.

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39.The plaintiff, on the other hand, submitted that as at 2 July 1992 or alternatively, 15 July 1992, there was no requirement for the first defendant to seek MEH`s consent to the sale of the property. There were two reasons for this. First, cl 26(1) of the principal agreement contemplated that the covenants in the third schedule including cl (f) would only come into effect when MEH requested the first defendant to enter into those covenants. This had not happened as of the two dates mentioned as the Instrument of Restriction containing the covenants was only executed on 4 September 1992 and lodged with the Registry of Titles and Deeds on 9 September 1992. The second ground was that in any event cl (f) was invalid as a restraint against alienation and therefore cl 6 of the option was equally invalid.

(1) Is cl 6 an independent contractual stipulation?

40.I accept the first defendant`s submission that cl 6 of the option is an independent contractual stipulation which does not derive its validity from the existence of the restrictive covenant in cl (f). The parties were entirely free to make their contract subject to any condition which they chose. In this case, they chose to make it subject to the consent of MEH. Although they were obviously acting under the belief that such consent was required in order to enable the first defendant to effect a valid sale, this does not mean that the contractual stipulation of consent was dependent on such belief being legally correct.

41.The court`s function is to interpret cl 6 by ascertaining the presumed intention of the parties by the application of objective criteria. See **Mount Elizabeth Medical Centre Pte Ltd v Mount Elizabeth Hospital Ltd** [1993] 1 SLR 1021 at 1043. In the present case, the objective intention of the parties was to subject the proposed sale to the consent of MEH. There was good reason for doing this in that the first defendant had been advised at the time of

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purchasing the property that there was a restriction on its sale and the plaintiff was advised of the same restriction during the period of negotiations for the purchase. It was in the interests of both parties that a solution be found for the potential problem posed by cl (f). As Mr Shanmugam submitted, cl 6 was drafted in an attempt to eliminate the litigation risks of cl (f). At the time of drafting the option, the most practical approach for the first defendant`s solicitors to adopt was that cl (f) was a valid restriction and to protect their client against any stand which MEH might take by subjecting the whole option to MEH`s consent. Thus cl 6 was a clause drafted to protect the first defendant as the seller and also to allow both parties to walk away from the contract without the risk of any claims being made by either.

42.It is also significant that as the evidence shows there was never any doubt in anyone`s mind that MEH`s consent to the sale was required. The plaintiff himself clearly knew about and accepted the need for such consent. At his own instigation (in all but one case) the words appear in every document signed by him relating to the proposed sale of the property as would be recalled from the account of the facts set out above. Before he exercised the option, his overriding concern was that he should get his $10,000 option money back if MEH refused consent.

43.The plaintiff realised the difficulties this understanding posed to his case as finally presented and he therefore tried to suggest in evidence that in fact his concern was with a `sell-back` clause rather than with consent. I am satisfied that this evidence given by the plaintiff is not true. The submissions of the first defendant point to many parts of the evidence which substantiate this conclusion. I refer here to the main points only. First, in cross-examination the plaintiff admitted that the `sell-back` clause only applied to the first few units which were sold and not units, like the property, which were located in the new

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wing. Mr Rajah`s evidence was adverse to the plaintiff on this point. He testified that he had told the plaintiff that it was the older units which had been sold with a clause reserving a right of first refusal to MEH. He agreed that there was no basis at all for the plaintiff to conclude, based on their telephone conversation, that the property was subject to such a right. It was also apparent from Mr Rajah`s evidence that, as far as he was concerned, under the principal agreement there was a need to obtain MEH`s consent to any proposed sale.

44.Further, the evidence of Ms Lam and Mrs Poh was that in talking to the plaintiff, they had referred only to the need to get MEH`s consent and had not brought up the issue of a `sell-back` clause at all. The plaintiff himself testified that Dr Wee had been quite clear in telling him of the need for MEH`s approval. There would seem to be no basis therefore for him having told me that at the material time he had in mind such a sell-back clause rather than a consent requirement. It is significant that the plaintiff never raised the sell-back clause in any of his many affidavits until he filed his affidavit of evidence-in-chief. On the contrary, in an affidavit he made on 29 March 1993, the plaintiff asserted that it was common knowledge in 1992 that units in the new wing were freely marketable. Before me, the plaintiff said that he was telling the truth in that affidavit. He must therefore have been lying subsequently when he said he was concerned about a sell-back clause.

45.In his affidavit of evidence-in-chief the plaintiff omitted the consent requirement altogether. When pressed during cross-examination, he could not explain himself. The omission in the affidavit is significant because it was apparent from the evidence that the plaintiff exercised an enormous amount of control over how the proceedings were conducted and took a painstaking interest in drafting of all legal documents and especially his affidavits. Even if the plaintiff was concerned with the `sell-back` clause, by his own admission in

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court and his actions at the material time, he was also concerned with the consent requirement. I find that the option was drafted to take into account both his concern and that of the first defendant on that issue.

46.It is material that for a substantial period of time all parties proceeded on the basis that consent of MEH was a valid contractual requirement. Shortly after this action was started, the defendants applied to have it struck out under O 18 r 19 of the Rules of the Supreme Court on the basis that it disclosed no reasonable cause of action against either of them. In a decision reported at [1993] 2 SLR 126, the High Court upheld the defendants` contentions. The plaintiff appealed and his appeal was allowed by the Court of Appeal whose decision is reported at [1994] 3 SLR 481. The Court of Appeal noted in its judgment that the parties had treated cl (f) as being valid. See judgment of Karthigesu JA at pp 484D to 485A.

(2) Is cl (f) invalid?

47.On the assumption that I may be wrong in my finding that cl 6 of the option can stand alone, I go on to consider the effectiveness of cl (f) of the third schedule. The plaintiff has made two submissions on this point. The first was that cl (f) was not in force in July 1992 since the Instrument of Restriction had not been executed. His counsel, relying on s139 (1) of the Land Titles Act (Cap 157), argues that there must be an instrument of restriction notified at the Registry of Land Titles and Deeds in order for that restriction to bind the assigns of the land affected by the restriction.

48.Section 139(1) states:

> *Any proprietor entitled to burden registered land with restrictio* ***may*** *do so by an instrument in the approved form and, subject to this section, the Registrar shall enter a notification of the*

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> *restrictions on the folio comprising the servient land. Unless so notified a restriction shall not* ***bind assigns*** *of the land affected thereby. [Emphasis mine.]*

49.I find nothing in s139(1) as quoted above to assist the plaintiff. This section permits but does not mandate registration of a restriction. It allows a proprietor to register such restriction in order to notify prospective purchasers (ie assigns) from the direct assigns of the proprietor of its existence. Unless so notified, such prospective purchaser will not be bound by the restriction. However, nothing in the section affects the immediate parties to the covenant or prevents the proprietor from imposing such a restriction on any one who purchases directly from him. The failure to register does not per se defeat the validity of the restriction. It means a subsequent purchaser from the assignee of the original proprietor would not be bound by them but this is not the case of a subsequent purchaser who had purchased the property without notice of the restrictions.

50.The other submission, that the restrictions were not binding on the first defendant in July 1992, is equally unsustainable. As the Court of Appeal in this case itself noted, it was at all times the intention of MEH that the restrictive covenants in the third schedule should `run with and be binding upon the building unit(s) sold into hands of whomsoever the same may come`. To effect that intention, under cl 26 of the principal agreement, the first defendant had agreed to enter into the restrictive covenants whenever requested by MEH. This was an obligation that had to be immediately complied with on MEH`s request which could be made at any time, whether before or even after the first defendant had asked MEH to consent to a proposed sale. As far as the first defendant was concerned therefore, once it executed the principal agreement, the covenants were as binding as they would have been had MEH immediately thereafter requested the first defendant to sign the Instrument of Restriction. As it turned out, the Instrument of Restriction was signed on 4 September 1992 and

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it cannot be denied that, at that date, the first defendant had to get MEH`s consent in order to be able to complete the sale to the plaintiff on 20 September 1992, the scheduled completion date. The plaintiff`s submission that the covenant was not binding in July 1992, if accepted, would lead to the ridiculous situation that the legal ability of the first defendant to sell the property changed during the option period due to circumstances entirely out of its control ie its ability to sell depended entirely on when it occurred to MEH to ask the first defendant to formally enter the covenants. This cannot be the case.

51.The argument which the plaintiff has put forward most strongly in relation to cl (f) is that it is void and illegal as it is a restraint on the first defendant`s right to alienate its interest in the property to the plaintiff or any other prospective purchaser. The plaintiff contends that this is the consequence of the first defendant`s purchase on 24 January 1992 of the entire interest in the leasehold estate pertaining to the property from MEH. MEH thereafter did not retain any reversionary interest in the property. Having acquired the entire interest in the property, the first defendant also acquired an indefeasible right to alienate it.

52.The plaintiff submitted that cl (f) in seeking to fetter the first defendant`s right to sell the property is repugnant to the estate sold by MEH to the first defendant. It is void because it offends public policy as it is repugnant to the very concept of ownership. The plaintiff relies on various academic and judicial authorities to support this proposition. Among the texts cited by the plaintiff are ***Elements of Land Law*** by Kevin Gray, ***Cheshire and Burn`s Modern Law of Real Property*** (15th Ed) and the article Restraints on Alienations by Charles Sweet at 53 LQR 236. These authorities establish beyond argument that a total restriction on an owner`s power of alienation of his property is void as being against public policy. As ***Cheshire and Burn`s*** put it (pp 343-344):

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> *In accordance with the cardinal principal that the power of alienation is necessarily and inseparably incidental to ownership, it has been held in a long line of decisions that if an absolute interest is given to a donee - whether it be a fee simple, a fee tail, a life interest or any other interest, or whether it be in possession or in futuro -any restriction which substantially takes that power away is void as being repugnant to the very conception of ownership. Therefore, a condition that the donee:*
>
> shall not alienate at all; or
>
> shall not alienate during a particular time, such as the life of a certain person, or during his own life; or
>
> shall alienate only to one particular person, or to a small and diminishing class of persons, such as to one of his three brothers;
>
> or shall not adopt some particular mode of assurance such as a mortgage, or shall not bar an entail,is void.

53.The same academic authorities recognise, however, that there are exceptions to the rule and that certain types of restraints are valid. Mr Sweet, for example, stated at p 246 of his article:

> *A restraint on alienation may be good, if it is imposed, not for the purpose of making the property inalienable, but in order to effect an object which is in itself lawful.*

And ***Cheshire and Burn`s*** qualify the passage that I have quoted in extenso above by stating immediately thereafter (at p 344):

> *A restraint that is partial, however, and which therefore does not substantially deprive the owner in fee of his power of alienation, is valid. Thus it has been held that a condition is valid which restrains the owner from alienating to a specified person, or to anyone except a particular class of persons, provided, however, that the class is not too restricted.*

54.In an English decision, **Caldy Manor Estate Ltd v Farrell** [1974] 1 WLR 1303 the Court of Appeal accepted the validity of restraints which do not result in a forfeiture of the estate created or render the assignment void. The court had to determine the validity of a restrictive covenant which purported to prevent

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the purchaser of a piece of land from on-selling it separately from a piece of adjoining land and the house erected thereon which also belonged to the purchaser. In delivering the judgment of the court Russell LJ first construed the clause to determine to whom it referred and then went on (at p 1306)

> *This leaves the question whether the covenant in cl 2(e) is of no effect on the ground that it is repugnant to the estate conveyed. Both below and in this court the argument in favour of repugnancy was based on authorities relating to conditions restrictive of alienation attached to a ground of fee simple or absolute interest [his Lordship specified the authorities and went on]*
>
> *In our judgment, this line of cases and authority is not relevant to a case such as this of the covenant by Lord Fairfield. There is most important distinction to be drawn between two matters different in kind: on the one hand, an attempt to attach to a grant of an absolute interest a condition which, if valid, would upon a purported alienation in breach of the condition confer a right of re-entry or result in cesser of the absolute interest, and so destroy the very thing granted, and, on the other hand, a covenant against alienation which would have no such operation; for, if the covenant be broken, the alienation would operate, the covenantee having at law no more than a right to damages, which might well be nominal; and the covenantee could only prevent a threatened alienation in breach of covenant by obtaining an injunction, which relief might or might not be granted. In this connection, we note that in Coke`s comments to Littleton`s s 334 in* ***Coke upon Littleton****, Vol II, p 206b, it is stated that though a condition against alienation on a feoffment in fee be repugnant and against the law and therefore inoperative, nevertheless a bond not to alienate is effective and enforceable in the sense that it will be forfeit if the feoffee alien.*

55.The effect of the authorities quoted and others cited is that certain restraints on alienation are valid. Restraints for the purpose of effecting a collateral purpose which is not unlawful are valid. Restraints which are not total restraints on alienation are valid. Contractual restraints, the breach of which would only result in damages are valid.

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56.In the present case, it is apparent that cl (f) does not operate as a total restraint on the right of the owner of the property to dispose of it. As a restraint against alienation, it can be no more than partial. The question is one of degree since the effect of the clause is that MEH`s consent to a proposed sale is required and MEH cannot unreasonably withhold such consent in the case of a sale to a medical specialist. Unquestionably, as between the first defendant and MEH, the reasonableness of MEH`s refusal of consent is subject to review by the court. If it was found to be unreasonable in such an action, the first defendant would be free to proceed with the intended sale without any further reference to MEH.

57.Further, the restraint imposed by cl (f) was imposed for the purpose of effecting a collateral purpose which is not unlawful. MEH is, and was at all material times, running a hospital as well as running and managing a medical centre. The purpose of cl (f) cannot be considered repugnant to the interest of owners of consulting suites in the medical centre. On the contrary, it is positively in their interest that there is some control over the mix and calibre of the medical specialists in a centre such as the one in question. It would not enhance the reputation of the medical centre as such if any one whatever his business could buy a unit and operate from there. There are two valid collateral objects achieved by cl (f). First is the user of the property in the context of the medical centre to assist in maintaining the right mix of areas of specialisation and calibre of doctors. Secondly, the economic benefit in running the hospital derived by MEH from having well respected specialists affiliated to it who also make good use of the hospital`s facilities.

58.The evidence supported this. The plaintiff, Dr Satkunanantham, and a Dr Khoo who practises at the medical centre and who was called as a witness for the plaintiff, all accepted that it made economic sense to regulate the type of doctors practising at the medical centre. The plaintiff agreed, under cross-

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examination, that from the hospital`s point of view, it was a reasonable approach for MEH in respect to its sales of units in the medical centre to try and ensure a mix of specialists from different disciplines at the hospital. He also agreed that from an economic point of view this would be a sensible and reasonable approach for MEH to take in respect of sub-sales of the units. Finally, he agreed, although rather grudgingly, that as a doctor with admission rights at the hospital it was sensible for MEH to ensure a balanced mix of specialists when it decided to give its consent to a sub-sale of a unit in the medical centre

59.Additionally, cl (f) would be valid under the rule enunciated in the ***Caldy Manor Estate*** case. There was nothing in the principal agreement which allowed MEH to re-enter or re-claim the property by reason of a breach or threatened breach of cl (f). Thus the only remedy of MEH for such a breach would be the right to claim damages. If the first defendant had ignored that covenant and had gone ahead to assign the property to the plaintiff, that assignment would have been valid and the estate granted to the plaintiff would not have been destroyed by the breach of covenant. Of course if MEH had learnt of the proposed breach of the covenant prior to the execution of the assignment, it could have attempted to injunct the completion of the sale. But if it did not do so, the assignment once completed, would be legally effective to vest the first defendant`s estate in the property in the plaintiff and MEH would have been limited to an action for damages against the first defendant.

60.All in all, I am satisfied that the validity of cl (f) cannot be impugned.

(B).The legal effect of cl 6: (1) what was the first defendant obliged to do?

61.It is established law that where a contractual provision provides that performance by one party is subject to the consent of a third party, the first party

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cannot say that having asked for such consent thereafter the matter is completely out of his hands so that if the consent is not forthcoming he is released from further performance. Rather, as the Court of Appeal put it in this case, to avail himself of the right to rescind, such party has a duty to show that he has taken all reasonable steps to obtain the consent of the third party or that it was useless for him to pursue the matter with the third party after the initial withholding of consent because it would have been quite impossible for him to obtain the consent of the third party. See p 489 of the Court of Appeal`s judgment.

62.Clause 6 provides that the proposed sale to the plaintiff is subject to the consent of MEH and that `in the event such consent is refused or not received by the Completion Date the sale and purchase herein shall be deemed rescinded forthwith`. The natural and ordinary meaning of the foregoing language would be that the sale and purchase would be rescinded in two instances. First, immediately MEH refused to give its consent there would be a rescission. Secondly, if MEH did not respond to the request for consent for such a long period that by the completion date of 20 September 1992 its consent had not been received, then the sale would be rescinded on that date. These are the meanings that the first defendant has argued for. In view of the legal position on the obligations of the party asking for consent, it appears to me that the first defendant cannot contend that the sale was rescinded on 14 July 1992, ie the date of MEH`s refusal to give consent unless it can show that as of such date, it had used all reasonable efforts to get the consent or that it was useless to make such efforts. It is clear too that even if the first defendant could not succeed in establishing either of those two situations, it would still be entitled to say that on 20 September 1992 it was not obliged to complete because it can show that by that date despite all reasonable efforts having been made to obtain the consent, the consent was not forthcoming

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(2) Were reasonable endeavours used?

63.First, I turn to examine the situation as of 14 July 1992. Up till then, all that the first defendant had done was to write to MEH stating that it proposed to sell the property to the plaintiff who was `an eye specialist`. It had made no other effort to persuade MEH that the sale should be approved. The first defendant submits that all that was required of it was to take the step of applying for MEH`s consent. The rescission of the sale immediately on refusal of the consent relieved the first defendant from taking further steps to obtain the consent and there was no requirement that it should press MEH for reasons or persuade MEH to change its mind. This, the first defendant says, accords with the rationale for having clauses such as cl 6 so that parties can know immediately where they stand in the transaction.

64.To support the above submissions, the first defendant relies on **Bickel v Courtenay Investments (Nominees) Ltd** [1984] 1 WLR 795, **Lipmans Wallpaper Ltd v Mason & Hodghton, Ltd** [1969] 1 Ch 20 and **Lehmann v McArthur** [1868] 3 AC 464. In ***Lehmann v McArthur*** the court considered an assignment of a lease which was `subject to the landlord`s approval`. Page Wood LJ held at p 501 that:

> *looking at the agreement itself, I think McArthur was only bound to try to get the landlord`s consent without going into the question of whether the refusal was reasonable or unreasonable, and without taking the risk of legal proceedings to enforce his consent.*

The above proposition was accepted by Goff J in ***Lipmans Wallpaper Ltd v Mason*** . He said at p 1128:

> *It is conceded, and in my view rightly conceded, that Masons could not escape that duty by rescinding on the ground that consent was not obtainable, without first using their best endeavours to get it. However, they applied and were met with*

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> *the refusal on grounds not obviously unreasonable; and even if they were, Page Wood, JL said that they were only bound to try without going into the question whether the refusal was reasonable or unreasonable.*

65.The Court of Appeal, however, in this case took the view that ***Lehmann v McArthur*** did not decide that, as a matter of law, a vendor is bound to do no more than seek a consent and accept at face value any refusal. As Karthigesu JA stated (at p 487):

> *What it did decide was that `having used all reasonable efforts to induce the lessor to consent`, the vendor (lessee) had no duty to file legal proceedings to oblige the lessor to give his consent.*

His Honour went on to discuss the facts and to state that it appeared from the affidavits filed that the first defendant had made no efforts to persuade MEH to give its consent having regard to the fact that the plaintiff was an ophthalmic surgeon who had been in specialist practice since 1976. It is clear that what the Court of Appeal was saying is that reasonable efforts to obtain consent do not consist simply of asking for that consent without more. Either at the time of applying for consent or thereafter, the applicant must make some effort to obtain a favourable result. In this case, all that the first defendant did before 14 July 1992 was to notify MEH of the proposed sale and gave them the name of the plaintiff and a bare description of him as an eye surgeon. There was no other information on the plaintiff which would assist MEH in coming to the conclusion that it would not be reasonable to withhold consent to a purchase by him. I hold that as of 14 July 1992 the first defendant had not made all reasonable efforts to obtain MEH`s consent.

66.I now turn to the question of whether between 14 July and 20 September 1992 the first defendant made such reasonable endeavours. The evidence showed that at the time when the first defendant was informed of the refusal of

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consent by MEH, Dr Satkunanantham was not in Singapore. Upon his return, he and his partners met with solicitors on 18 August 1992 to decide how best to resolve matter as he was eager to have the matter resolved quickly so that the sale could proceed. Two days later, Mr Shanmugam telephoned Mrs Poh and asked for the reasons for the refusal. Next, Drs Satkunanantham and Wee met Mr Clapp on 24 August 1992. At that meeting Mr Clapp refused to give his consent on the basis that the plaintiff was not of the calibre of doctors whom he wanted at the hospital nor was his speciality one that the hospital was encouraging since it resulted in very few admissions.

67.The two doctors were not happy with the result of the meeting or with the way that Mr Clapp had dealt with them. They considered his requirement that they either sell to doctors having exactly the same mix or re-sell the property to MEH to be unreasonable. Dr Wee wanted to sue MEH for withholding consent unreasonably. He was, however, persuaded that litigation was not a good solution and therefore the doctors decided to see Mr Clapp again. The purpose of this meeting was to try and persuade MEH to change its mind about the sale. This was confirmed by both Mr Clapp and Dr Satkunanantham. However, Mr Clapp was adamant. His refusal in regard to a sale to the plaintiff was final though he did soften his attitude regarding other prospective purchasers of the property.

68.The first defendant`s submission was that the two meetings that they had with Mr Clapp and their attempts to persuade him to change his mind are sufficient to constitute the reasonable endeavours which the law requires. The plaintiff disagreed. While he conceded that the first defendant was not obliged to commence legal proceedings against MEH for a declaration that its consent had been unreasonably withheld, as he had to in view of ***Lehmann v McArthur***

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and the Court of Appeal`s holding herein, he submitted that there were no such efforts in this case.

69.His first argument was that the meetings of 24 and 29 August 1992 did not amount to efforts made by the first defendant. Instead these meetings were for the purpose of trying to persuade MEH to permit it to sell the property to any person other than the mix insisted upon by Mr Clapp at the 24th August meeting. I do not accept this submission. I am satisfied that, at both meetings, the primary intention of the first defendant was to obtain consent for the proposed sale to the plaintiff which would have been the speediest way of disposing of the property. It was also a profitable sale and there was no reason why the first defendant would want to sell to anyone else if that sale could go through. Mr Clapp confirmed the first defendant was keen on the sale and the plaintiff himself agreed that Dr Wee was sincere about it.

70.The plaintiff pointed out that the first defendant`s position was entrenched on 14 July 1992 when it rescinded the option. The correspondence did indicate quite adamantly that the sale could not go on unless MEH consented and that the first defendant was not willing to breach the principal agreement. In order to protect itself and on the advice of its solicitors, the first defendant took the view, vis--vis the plaintiff that the sale was automatically rescinded after the consent was refused. But the first defendant itself was still keen on proceeding with the sale. It may have taken steps earlier had it not been for Dr Satkunanantham`s absence and a letter dated 16 July 1992 from the plaintiff`s solicitors to the first defendant`s solicitors. In it, the plaintiff`s lawyers said:

> *Our client instructs us that he has spoken today to Dr Julian Wee and Dr Julian Wee has informed him that he is prepared to proceed with the sale subject to Mount Elizabeth Hospital`s consent. Dr Wee informed our client that he wants the sale to go through and that he is sincere about it.*

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> *Our client will therefore be liaising with Mount Elizabeth Hospital directly on the question of consent. We shall revert soon.*

71.At that stage therefore, the plaintiff himself wanted to make the efforts to obtain consent and had indicated so thus excusing the first defendant from taking other steps to obtain consent until it received further word from him or his solicitors. During cross-examination the plaintiff was not happy to acknowledge the implications of this letter. After being rather evasive, he finally conceded that someone receiving the letter would understand that he was taking the necessary steps and that the first defendant was to wait to hear further from him. Having made the concession, he insisted on adding that such an understanding did not mean that the first defendant was completely discharged from its responsibility.

72.The plaintiff also complained that he was not informed nor was he invited to attend the first meeting between the first defendant and Mr Clapp. Neither did the first defendant make any efforts to solicit his views so as to present a collective submission to MEH on why the sale should be allowed to proceed. There is no authority for this suggestion that the first defendant was obliged to give the plaintiff an opportunity to persuade MEH to change its mind. In fact, on the evidence the plaintiff would not have been able to do so. His own meeting with Mr Clapp was singularly fruitless and he came out of it with the conviction that Mr Clapp was standing firm and would not change his mind. It is therefore somewhat absurd for him to suggest that the first defendant should have taken him along to the meeting or put up a joint effort with him.

73.The plaintiff complained that the first defendant did not make any efforts to persuade MEH to give its consent to the sale to the plaintiff on certain conditions, for instance, that the plaintiff would, if he was considering a re-sale of the property sell it back to MEH. There is, however, no legal requirement

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that the first defendant should have proposed alternatives to MEH in order to secure its consent. See ***Lipmans Wallpaper v Mason*** .

74.The plaintiff relied on a Canadian case, **Gateway Realty v Arton Holdings Ltd and Lehave Development (No 3)** [1992] 288 Atlantic Provinces Reports 180 for the proposition that `best efforts` meant not second best efforts but rather required the requisite party to leave no reasonable stone unturned to discharge its duty. I have two comments. First, the case is distinguishable on the facts. It was not a case of a party being required to seek the licence of a third party to assign. It was a case where the defendant department store had covenanted to use its `best efforts` to sublease certain premises in the plaintiffs` shopping centre so that the same would not be vacant. Since the defendant there had refused to negotiate with other department stores that could compete with it and made insignificant efforts to lease to prospective tenants who were not department stores, it had hardly used any efforts let alone best ones. Secondly, whatever leaving no reasonable stone unturned meant to the judge in that case, I am satisfied that the extra efforts which the plaintiff has in this case suggested the first defendant should have made, go well above and beyond what can be described as the turning of reasonable stones. I am fortified in this conclusion by ***Bickel v Courtenay Investments*** where the judge held that letters written by one party`s solicitors to the other whereby they tried repeatedly to persuade the other to give their clients the necessary consent, in themselves amounted to best endeavours to obtain such consent.

75.Having considered the submissions and all the evidence, I am satisfied that in the circumstances of this case, the first defendant did make all reasonable efforts to persuade MEH to change its mind and grant its consent. It should be noted that employing reasonable endeavours need not involve the expenditure of too much energy by the vendor. See ***Contract and Conveyance*** by JT

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Farrand p 140. This statement of the law relies on Goff J`s holding in the ***Lipmans Wallpaper Ltd*** case where his Lordship says that a vendor may properly give up if his application for consent be `met with a refusal on grounds not obviously unreasonable` and, as ***Lehmann v McArthur*** makes clear, even if the reasons were unreasonable the first defendant was only required to try without going into whether the refusal was reasonable or not. This must be so since the first defendant was not obliged at any time, and even if the reasons were absolutely unreasonable, to take legal action against MEH to obtain the consent.

76.Accordingly, the contract was rescinded on 20 September 1992 because the first defendant having made all reasonable efforts did not receive MEH`s consent by that date.

(3) Would the efforts have been useless?

77.The other limb of the defence of the first defendant is that even as at 14 July 1992, it was useless to make any endeavours to obtain MEH`s consent as there was no possibility of MEH changing its mind. The plaintiff contended that this defence was untenable because it was introduced by way of amendment on 18 February 1997 after four previous amendments had been made to the defence. His counsel submitted that the fact that MEH would not have given its consent in any case was known to the first defendant from the 24th August 1992 meeting but was not made known to the plaintiff and therefore the plea was an afterthought.

78.I did not find any merit in those submissions. The amendment to the first defendant`s defence which was sought in February 1997 was in response to the plaintiff`s amendment of his statement of claim and, strictly speaking, since the

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point was a point of law, it need not have been pleaded even then. The fact that it was pleaded cannot adversely affect the first defendant`s case. In any case, it was not correct for the plaintiff to say that the fact that MEH would have refused consent no matter what the first defendant did was not known to him. He had conceded that when he met Mr Clapp, the latter had been firm and the plaintiff had realised that there was no possibility of getting Mr Clapp to change his mind.

79.At the material time, Mr Clapp was the chief executive officer of MEH. He was the person who made the ultimate decision of whether to give consent to a sale to the plaintiff. He testified that he would not have given consent to the sale no matter what the first defendant did. There was nothing it could have done to persuade him to change his mind.

80.The reasons for refusing consent set out in M/s Lee & Lee`s letter to the first defendant`s solicitors dated 17 September 1992. These were: (a). the plaintiff was not of the calibre acceptable to MEH;

(b). he did not have the right speciality;

(c). he did not support the hospital in terms of admission rates and the use of ancillary facilities.

These same reasons were among the matters mentioned at the two meetings in August 1992. The underlying rationale was the economic viability and the reputation of the hospital.

81.The evidence adduced supported the three reasons given by MEH. First, although the plaintiff was a specialist, he was not a high ranking specialist. He

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admitted that other ophthalmologists who owned or were allotted units at the medical centre had more impressive credentials than he did. In terms of admission rates also, their figures were more impressive than the plaintiff`s. The plaintiff had only 16 admissions to the hospital for the period 1989 to 1992 and in the last two of those years, he admitted only two patients annually. The plaintiff`s explanation was that he had admitted patients to other hospitals. He said that in 1992 he admitted about 20 to 50 patients to Mount Alvernia. This evidence turned out to be untrue. His admissions to Mount Alvernia in 1992 numbered four and over the 18 years between 1978 and 1996, the plaintiff admitted only 223 patients to Mount Alvernia. Obviously, in 1992, his practice did not involve heavy hospital utilisation.

82.The plaintiff accepted that it was a matter of common knowledge that MEH took into account calibre and perceived ability to admit patients in deciding whether or not to allocate units to the doctors in the medical centre. Dr Khoo who practises at the medical centre and was called as a witness for the plaintiff, confirmed that it was a matter of common knowledge that MEH had the criteria of admission rates and calibre and that it was generally known that certain specialities were not favoured. Dr Khoo had also told the plaintiff at that time that it was logical from the hospital`s point of view that it wanted to fill up the wards.

83.As the above evidence and other facts establish, there were reasonable grounds on which MEH could have refused to give consent to the sale. Whether its refusal was in fact predicated on those reasonable grounds is not relevant at this juncture. From the point of view of the first defendant, the burden on it is simply to establish that it could not have got MEH`s consent on 14 July 1992 no matter how hard it tried. I am satisfied that the first defendant has discharged this burden. Mr Clapp was firm on his stand whether for good reasons or for

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bad. He did not waiver when met with the anger of Dr Satkunanantham and Dr Wee nor when he was faced with the plaintiff`s own agitation. The plaintiff had been refused a unit in the medical centre when it was first marketed and Mr Clapp in refusing consent to the sub-sale some three years later was maintaining a position which MEH had previously adopted vis--vis the plaintiff. It is noteworthy that when Mrs Poh was first told who the prospective purchaser of the property was, her `heart dropped`.

84.In this connection, the plaintiff has argued that the first defendant was contractually bound to assign the property to the plaintiff because the withholding of consent was `unreasonable, capricious or otherwise than in good faith`. Even if this was so, the submission begs the question. Until the issue of whether the refusal of consent was reasonable had been fully litigated, the first defendant would not know as a fact whether that refusal was reasonable or not. The plaintiff accepted that the first defendant was not required to issue proceedings against MEH. Neither was the first defendant required to run the risk of being sued by MEH for breach of the covenant. It was precisely to protect the first defendant from such risk that cl 6 was drafted.

85.The plaintiff alleged that the first defendant was estopped from relying on the consent requirement because of representations made by Ms Lam, Mrs Poh and Dr Wee that the consent was a matter of mere formality or that there would be no problem since the only requirement was that the purchaser be a medical specialist and he fulfilled that requirement. On the evidence, however, no such estoppel arose. First, the plaintiff himself did not rely on any of the alleged representations made to him. He said that he placed more faith on the representation of Mr Rajah than on anything these three persons had told him.

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86.The evidence also showed that Ms Lam, Mrs Poh and Dr Wee all told the plaintiff that consent was required. None of them told him that it would be a mere formality or that the unit was freely marketable to a medical specialist. In this connection, I should state that where there is a conflict on this issue between the plaintiff`s evidence and that of Ms Lam and Mrs Poh, I accept the testimony of the two ladies. The plaintiff told many lies in the witness box. He was frequently evasive and not forthright, tending to make semantic points and fine distinctions. Parts of his evidence did not reflect well on his character. Instead they illustrated how far he was willing to go to get his way even to the extent of trying to influence the testimony of other witnesses.

87.The only person who assumed that consent would probably be given was the plaintiff`s own solicitor, Mr Rajah. Mr Rajah accepted in the witness box that he had no basis for making that assumption. He agreed that when he told the plaintiff that there would be no difficulty in getting MEH`s consent, he was unaware of the hospital`s criteria for granting consent since neither he nor his firm had ever acted for MEH in the sale of any units. Neither did he speak to anyone from MEH in connection with the plaintiff`s purchase.

(C).Conclusion

88.In the circumstances, I hold that the first defendant has a good defence to this action. The option was rescinded on 14 July 1992, or at the latest, 20 September 1992 and the first defendant was thereafter released from the contract. Accordingly, the plaintiff`s claim against the first defendant must be dismissed with costs. I will consider the first defendant`s counterclaim after dealing with the plaintiff`s claim against the second defendant.

89. **The plaintiff`s case against the second defendant**

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The main submission made on behalf of MEH was that the plaintiff has no locus standi to seek the declarations he wants concerning the validity of cl (f) of the third schedule and/or the necessity for or the validity of the refusal of consent by MEH.

90.The plaintiff raised a preliminary point on this question. He contended that the issue regarding the plaintiff`s locus standi vis--vis MEH was raised by MEH both at first instance in the striking out application and again on appeal. He submitted, by inference from the Court of Appeal decision, that the Court of Appeal did not find in favour of MEH in relation to this argument. Had they done so, they would not have allowed the plaintiff`s appeal against MEH. The plaintiff therefore concluded that MEH was precluded from raising the point before me.

91.The inference the plaintiff seeks to draw is not supported. As stated, the appeal was from an interlocutory application relating to striking out. In sending the matter to trial, the Court of Appeal did not have to make a ruling on the issue of the plaintiff`s locus standi. Having read the judgment of the Court of Appeal very carefully, I am satisfied that the court did not make any decision on this issue. The court`s main concern was whether there was a serious issue to be tried such that the plaintiff deserved a day in court to establish the facts. In relation to that concern, the court found that serious questions arose on whether MEH had categorically refused its consent and whether the withholding of consent came within the words of cl (f). They also considered the question of whether cl (f) was void as a prohibition against the alienation of the property to be an important one. As there was no finding on the question of locus standi, issue estoppel cannot arise.

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92.The basis of the submissions of MEH that the plaintiff does not have locus standi for declaratory relief against it is that as a matter of law the plaintiff`s claim against MEH cannot succeed regardless of the outcome of his case against the first defendant since: (i). if the first defendant is unable to establish the conditions necessary for the rescission of the option, then the option is not rescinded in which case no issue arises between the plaintiff and MEH;

(ii). if the first defendant is able to show that the conditions for rescission existed at the material time then the option is rescinded, and again no issue arises between the plaintiff and MEH;

(iii). there is neither privity of estate nor of contract between the plaintiff and MEH; and

(iv). no contested right arises between the plaintiff and MEH over the principal agreement.

It can be seen from the above that the contention is that none of the normal pegs on which a plaintiff would hang his right to take legal action against a defendant is available to the plaintiff in this case. The last point relates to the ability of an individual to ask for declaratory relief. Under our Rules of Court, such relief may be available even though no other remedy is because of an absence of a legal relationship. It should be noted, however, that the basic consideration is whether there is a real contest of legal rights between the plaintiff and MEH. If there is not the court will decline to make a declaration. See **Salijah bte Abdul Latef v Mohd Irwan bin Abdullah Teo** [1996] 2 SLR 201 at 213.

93.The first point is whether there is any issue between the plaintiff and MEH. There does not appear to be such an issue. If I had found that the first defendant

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had failed to carry out its obligations under cl 6, the consequence would have been that the option was not rescinded and the first defendant would have had to convey the property to the plaintiff notwithstanding any claim that MEH might have made against it. The plaintiff in that circumstance would not have needed the declarations which he has sought against MEH.

94.I have found that the first defendant had carried out its obligations under cl 6. The consequence of this finding is that the option is rescinded. Both parties are released. Nothing further needs to be done and there is no issue to be decided between the plaintiff and MEH since in any event the plaintiff has no further right against the first defendant to insist on completion of the sale. Even if it appeared that MEH had acted unreasonably in withholding its consent, that would be an issue between MEH and the first defendant solely since MEH was under a legal duty to the first defendant to act reasonably. It would only be an issue between MEH and the plaintiff if there was a privity of contract or a privity of estate between them.

95.There is obviously no contract. Is there, however, a privity of estate? The authorities are clear that no privity of estate would come into existence until the legal estate in the property was vested in the assignee. The first defendant did not make a legal assignment in favour of the plaintiff. At best, that is assuming the option is valid, the plaintiff would be an equitable assign of the first defendant`s interest. No privity of estate exists between a lessor and an equitable assign of the lessee`s term. See **Friary Holroyd & Healey`s Breweries Ltd v Singleton** [1899] 1 Ch 86,90; **Purchase v Lichfield Brewery Co** [1915] 1 KB 184, 187-8; ***Robinson v Rosher*** 1 Y & CCC 7 at 11; ***Cox v Bishop*** 8 DM & G 815, 824 and ***Moore v Greg*** [1848] 2 De G & Sm 304.

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96.The plaintiff relied on **Theodorou v Bloom** [1964] 3 All ER 399. The plaintiff in that case had taken an assignment of a lease. He sought a declaration against the landlords that the landlords` refusal of consent to the assignment did not invalidate the actual assignment as the consent had been unreasonably withheld. The landlords argued that the plaintiff was not the proper person to seek the declaration and that it was the assignor (ie the previous lessee) who had to get the declaration. The assignor was not a party to the action. The court held that it could make a declaration and that the absence of the assignor as a party did not affect its ability to do so. This was despite the fact that there was no direct contractual relationship between the plaintiff and the landlords. As can be seen from the foregoing account, the facts of ***Theodorou*** are clearly distinguishable in that the lease had been assigned before action was taken. Ungoed-Thomas J held that the lease was properly vested in the plaintiff and that he was entitled to have a dispute between himself and the landlords resolved. The privity of estate between the parties had thereby been established. This is not so in the present case.

97.The main basis on which the plaintiff contended that he had the necessary locus standi to ask the court for declaratory relief was that the principal agreement between the first defendant and MEH, in particular cl (f), was such that it affected the plaintiff`s right under his agreement with the first defendant, that is his right to proceed with the purchase of the property. The plaintiff stated that the exercise of the option on 15 July 1992 gave rise to a binding sale and purchase agreement between him and the first defendant and he acquired an equitable interest in the property. This meant he had a right to buy it and he would accordingly be entitled to get declaratory relief in respect of this right. In view of my finding that the option was validly rescinded, any right which the

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plaintiff had under it terminated at the time of rescission. This submission of a right being affected therefore cannot succeed.

98.However, I will go on to consider it on the assumption that the option was not validly rescinded. The plaintiff founded himself on O 15 r 16 of the RSC which states:

> *No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.*

It should be noted, however, that the phrase `declarations of right` is not quite as wide as it might appear. It is well established that the jurisdiction of the court under this order is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it. See ***Salijah bte Latef*** `s case and also ***Meadows Indemnity Co Ltd v Insurance Corporation of Ireland*** [1989] 2 Lloyd`s Rep 298.

99.The plaintiff`s contention that all that he has to do is to show that cl (f) of the third schedule affects his rights under his agreement with the first defendant in order to obtain an injunction does not seem to be correct. In Theodorou, the decision was based on the actual completion of the assignment so that the lease vested in the plaintiff. The consensus on that case is that if there had been no vesting, the plaintiff would not have been able to sue. In the discussion in **Woodfall on Landlord & Tenant** [1994] Vol 1 on the case, the opinion is that `an intending assignee, even one who has contracted to acquire the lease, probably does not have locus standi to seek a declaration until the assignment has been completed` (at footnote p 11/67). In **Hill and Redman`s Law of Landlord and Tenant** [1996] Vol 1, it is also pointed out that when `the

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declaration is sought prior to the assignment, as will normally be the case, the proposed assignor is normally the appropriate plaintiff` (see note 6 p A1182).

100.One has also to consider the exact effect of the declarations that the plaintiff is seeking against MEH. He wants declarations that: (1). MEH`s refusal of consent under the principal agreement is unreasonable/ unlawful;

(2). MEH is entitled to proceed with the sale to the plaintiff;

(3). cl (f) of the third schedule is void; and

(4). MEH has granted any consent necessary to the sale to the plaintiff.

The declarations sought, properly analysed are in truth declarations aimed at establishing that the first defendant would not be liable to MEH under the principal agreement if the sale to the plaintiff were to be completed. Even if the plaintiff`s right against the first defendant under the option would be affected by the legal position between MEH and the first defendant, the plaintiff is not entitled to declarations which in essence decide the legal position of someone else. This was established by ***Meadows Indemnity Co Ltd*** .

101.In ***Meadows Indemnity Co Ltd*** , the first defendants issued guarantee insurance in respect of a loan; the plaintiffs were reinsurers. Following a default on the loan, the lending bank (second defendants) called on the guarantee insurance. The demand was not met and the bank commenced action against the first defendants under the policy. The plaintiffs then commenced action against the first defendants, claiming declarations that the plaintiffs were not liable to the first defendants under the reinsurance policy. The plaintiffs also sued the

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bank, claiming declarations that the first defendants were not liable to the bank under the guarantee insurance.

102.The English Court of Appeal struck out the plaintiffs` claim for declaratory relief against the bank. It held that the plaintiffs had no locus standi to obtain the declaration against the bank in respect of the first defendants` liability to the bank under the guarantee insurance. Neill LJ was of the view that although the plaintiffs had a direct interest in the validity of the bank`s case against the first defendants, there was no contested issue between the plaintiffs and the bank. He concluded that the plaintiffs could not create an issue by seeking a declaration of non-liability on the part of the first defendants vis--vis the bank.

103.Another member of the court, May LJ, was of the view that as a general principle, a person not a party to a contract has no locus, save perhaps in exceptional circumstances, to obtain a declaration in respect of the rights of other parties to that particular contract, and that it would be contrary to the whole principle of privity to allow such a person to obtain such a declaration. His Lordship further emphasised that although there was a connection between the contract of insurance and the contract of reinsurance, the plaintiffs` rights were in no way involved in the dispute between the bank and the first defendants.

104.To show that a plaintiff may have the right to seek declaratory relief even though there is no contractual relationship, the plaintiff relied on **Eastham v Newcastle United Football Club** [1964] Ch 413. There a footballer, Mr Eastham was affected by an elaborate transfer system implemented by his club Newcastle United pursuant to an agreement between the latter and the Football Association. He was also bound by rules implemented by the Football League. As a result of this, Mr Eastham could not be engaged by any other football club.

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He then sought declarations against, inter alia, his club, the Association and the League that his agreement with the club and the rules/ regulations of the Association and the League were invalid for being in restraint of trade therefore against public policy. The defendants argued, inter alia, that the court could not grant the declaration because Eastham was not a party to the contracts which the club had made. The court disagreed. The passage of the judgment of Wilberforce J which the plaintiff relied on reads as follows:

> *is it open to an employee to bring an action for declaration that the contract between the employers is in restraint of trade? To my mind it would seem unjust if this were not so. The employees are just as much affected and, indeed, aimed at by the employers` agreement as the employers themselves. Their liberty of action in seeking employment is threatened just as much as the liberty of the employers to give them employment, and their liberty to seek employment is considered by the law to be an important public interest. Is the defence of that interest to be left exclusively in the hands of the employers themselves, who have set up the ring against the employees and who have (as here) shown every intention of maintaining it as long as they can; left to the chance that one day there may be a blackleg among the employers who will challenge it? In my judgment to grant a remedy by way of declaration to the persons whose interest are vitally affected would be well within the spirit and intent of the rule as to declaratory judgment`*

105.However, the ***Eastham*** case does not support the plaintiff`s submission because of the difference in the factual situation. The reason why Eastham was decided as it was was explained by Neill LJ in ***Meadows Indemnity Co Ltd*** as follows (at pp 304-305):

> *The **Boulting** case and the **Eastham** case can be readily reconciled with the principle laid down in **Gouriet** by Lord Diplock because in both cases the plaintiffs were seeking declarations as to their legal rights which were in effect being contested by the defendants despite the absence of any direct contractual link. The declarations were being sought to resolve an issue between the plaintiffs and each of the defendants.*
>
> *In the present case it is argued on behalf of Meadows that they have a direct interest in the validity of ICB`s case against ICI.*

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> *This is true but there is no contested issue between Meadows and ICB.*

The reason why there was a contested issue between Mr Eastham and the Football Association and the Football League was because their rules were binding on him by virtue of his registration as a professional player with his club and also by virtue of his contract with his club. Such rules continued to be binding on Mr Eastham as a registered professional player. Further, the Association pleaded in their defence to the action that Mr Eastham was at all times subject to their rules. Both the League and the Association sought to maintain the validity of their rules and their binding effect on the plaintiff. So, altogether, Mr Eastham was in a situation where there was a direct contest of his rights and those of the Association/the League. The issue which the court had to determine was whether he was bound by such regulations.

106.This is not the situation here. There is no issue between the plaintiff and MEH as regards cl (f) since it does not bind the plaintiff before the interest in the property has been assigned to him. MEH never sought to assert any right against the plaintiff or to regulate any of his activities. It asserted rights only against the first defendant with whom it was in contractual privity. Its position has always been that it and the plaintiff are strangers and neither has any obligation or right vis--vis the other.

107.There is one other case cited by the plaintiff in this connection which I should deal with, that of **Vienit Ltd v W Williams & Son (Bread Street) Ltd** [1958] 3 All ER 621. There, a sub-lessee applied to the sub-lessor and the superior landlords for consent to assign the property. The superior landlords refused consent and their refusal was clearly unreasonable. The sub-lessors, however, also refused to consent, stating that they would only consent if the superior landlord did. In an action taken against the sub-lessor only, the sub-

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lessee applied for a declaration that both the sub-lessor and the superior landlords were unreasonable in their withholding of consent. It was held that the unreasonable withholding of consent by the superior landlords did not make it reasonable for the sub-lessor to withhold their consent and therefore a declaration was made to this effect against the sub-lessor notwithstanding that the superior landlords were not parties to the proceedings. However, the court refused, in the absence of the superior landlords, to make a declaration that their refusal was also unreasonable.

108.The plaintiff submitted that the court in ***Vienit*** would have made a declaration against the superior landlords notwithstanding the fact that there was no direct contractual link between the superior landlords and the sub-lessee. The only reason why such a declaration was not made was because the superior landlord was not a party to the action and such a declaration could not be made in their absence. Had the superior landlord been a party to the proceedings, the court would have made the declaration. He argued that based on the principles of ***Vienit*** , since MEH is a party to this action it is well within my power to make a declaration against it.

109.The reading which the plaintiff has given ***Vienit*** is not quite accurate. It appears from the facts of that case that the reason why the sub-lessors withheld consent was simply because the superior landlord had withheld it. Thus, effectively, the sub-lessor was relying on the superior landlord`s reason for withholding consent. As the court was of the view that the superior landlord`s refusal was unreasonable, it was held that the sub-lessors could not refuse to give their consent in reliance on the position of the superior landlords. It is also clear from a scrutiny of the judgment that the question of the plaintiff`s entitlement to obtain a declaration against the superior landlord was not considered or argued. The only question considered was whether to grant the

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declaration in the absence of that party. The case therefore cannot be authority for the proposition that the plaintiff there had the locus standi to sue the superior landlord.

110.In considering the plaintiff`s entitlement to the various declarations asked for, there is one other matter that has concerned me. It is well settled that the remedy of declaration will not be granted to a plaintiff whose claim is too indirect and insubstantial and would not give him `relief` in any real sense ie relieve him from any liability or disadvantage or difficulty. See ***Supreme Court Practice 1997*** Vol 1 para 15/16/2. First, I should point out that in view of my findings in the earlier part of this judgment, I cannot make a declaration that cl (f) of the third schedule is void nor that MEH has granted any consent necessary to the sale between the plaintiff and the first defendant. Therefore, how would it serve the plaintiff if I did grant him the other declarations that he wants? Even if I declared that the refusal of MEH to consent to the sale was unreasonable or unlawful or alternatively I declared that the first defendant was entitled to proceed with the completion of the sale and purchase of the property, in view of my holding that the option/contract for sale has been validly rescinded, the first defendant would not be under any obligation to complete the sale and could, perfectly lawfully, refuse to do so. It is highly unlikely that the first defendant would want to complete the sale at this stage even if I declared it was entitled to do so. Since no declaration that I could give the plaintiff would assist him in any practical way, I do not think that my discretion would be well exercised in making the declarations asked for.

111.For the foregoing reasons, I hold first that the plaintiff has no locus standi to ask for declaratory relief against MEH and secondly, that in any case, this is not a situation in which the court`s discretion should be exercised in favour of granting such declarations.

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112.In view of the above holding, I do not think that it serves any purpose for me to go on to consider whether or not in fact MEH acted unreasonably in withholding its consent to the sale to the plaintiff. The plaintiff has also claimed damages against MEH. This claim must fail. The plaintiff has no cause of action at all against MEH for damages. MEH did not owe him a duty in deciding whether or not to grant/refuse consent in response to a request from the first defendant. The plaintiff did not even plead such a duty. Having no cause of action, the plaintiff cannot claim damages as the first is a pre-requisite to the second.

113.I therefore dismiss the claim of the plaintiff against the second defendant with costs.

114. **The first defendant`s counterclaim against the plaintiff**

The first defendant has made a counterclaim against the plaintiff on the basis that the caveat which the plaintiff lodged against the property on 15 July 1992 was either lodged wrongfully or vexatiously or without reasonable cause in the first place or alternatively, should have been withdrawn on 20 September 1992. The first defendant pleaded that it suffered damages by reason of the wrongful presence of the caveat on the land register. It claimed orders involving the removal of the caveat and an order for damages.

115.In September 1992, the law governing the first defendant`s claim was s 112 of the Land Titles Act (Cap 157 of the Revised Edition 1985). This reads:

> (1) 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.
>
> (2) In any action of suit in which the Court orders the withdrawal or removal of a caveat it may also grant an injunction restraining the caveator from lodging another caveat in the same matter.
>
> (3) For the purposes of this section, a caveator shall be deemed to allow a caveat to remain without reasonable cause if he fails to withdraw it within three months of the day on which his right to the interest claimed terminates.

116.I have made two findings in relation to the plaintiff`s case against the first defendant which are material to this issue. The first was that the first defendant had succeeded in showing that as at 14 July 1992 when MEH`s consent to the sale was refused, it would have been useless to try to persuade it to change its mind. On the basis of that finding the option terminated on 14 July itself and the plaintiff had no caveatable interest in the property as at 15 July when he lodged his caveat. The caveat was therefore lodged wrongfully. My alternative finding was that in any event, the option was rescinded on 20 September 1992 when despite the reasonable endeavours of the first defendant, no consent from MEH was forthcoming. On this basis, the plaintiff`s right to maintain the caveat ended the same day and the caveat should have been withdrawn.

117.The question that arises is whether the caveat was lodged or allowed to remain `wrongfully or vexatiously or without reasonable cause` within the meaning of s 112(1). In my judgment, the plaintiff acted wrongfully in lodging the caveat in the first place. If that holding is wrong because the option did not terminate on 14 July 1992, then in any event, he acted wrongfully in allowing it to remain after 20 September 1992.

118.After the plaintiff`s case against the first defendant was struck out and before the hearing of the appeal, the first defendant made an application for

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removal of the caveat. It was held by GP Selvam J in a decision reported in [1993] 3 SLR 569 that the pre-conditions in the section were disjunctive and that all that a caveatee needed to show to satisfy them was that the caveat had been lodged `wrongfully` in that it had been lodged `without legal right`. His Honour held that the other pre-conditions in s 112(1) namely `without reasonable cause` and `vexatiously` were tautologous.

119.I agree with Selvam J`s construction of s 112(1). I followed it in **Eng Bee Properties Pte Ltd v Lee Foong Fatt** [1993] 3 SLR 837 where I held that a caveator had no legal right to place a caveat against the property which was the subject matter of the dispute in the case because at the date the caveat was lodged, there was no valid option in favour of the caveator. He did not have any legal right to maintain the caveat thereafter since nothing occurred to give him such a right and he therefore acted wrongfully both in lodging the caveat and in allowing it to remain. The caveator`s position in the ***Eng Bee Properties*** ` case cannot be distinguished from the plaintiff`s position here.

120.The plaintiff having acted wrongfully in relation to the lodging and maintenance of the caveat, the first defendant is entitled to claim compensation for any damage which he can show he sustained by reason of the existence of the caveat. There is no doubt that this is the effect of s 112(1). See **Alrich Development Pte Ltd v Rafiq Jumabhoy** [1993] 2 SLR 446 . In this respect, the first defendant`s contention is that because of the presence of the caveat and the plaintiff`s actions, it was unable to rent out the property after 20 September 1992. The plaintiff`s position is that the first defendant is not entitled to any damages as it failed to take steps to mitigate its loss. I therefore have to consider the evidence on this aspect.

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121.The first defendant`s stand was that it made several efforts to rent out the property while the dispute with the plaintiff was pending. The first prospective tenant was a Dr Heng Tung Lan, an obstetrician and gynaecologist. Her husband, Dr Kenneth Thean, spoke to Dr Wee in October 1992 about renting the property. His evidence was that his wife wanted to go out into private practice and they had approached MEH about the availability of a unit for rental in the medical centre. MEH had been enthusiastic about Dr Heng`s moving into the centre and tried to assist them in finding a suitable unit. According to Mrs Poh, when Dr Thean told her about his wife`s interest in unit #11-11, she had spoken to Mr Clapp and his indication was that he was open to consider the request. The inference that must be drawn is that MEH would have consented to a letting of the unit to Dr Heng.

122.Dr Wee and Dr Thean agreed in principle to a rental of the unit to the latter`s wife at a monthly rental of $5,500 for a term of three years with an option to renew for a further three years. The tenancy did not go through. Dr Thean testified that this was because he had been given legal advice that it would not be wise to rent the clinic when there was a potential law suit hanging over it and the possibility of the landlord changing suddenly when he could rent another unit without such potential dislocation.

123.The first defendant continued to try to obtain a tenant. It kept asking the plaintiff to remove the caveat but he refused. In July 1993, the first defendant`s solicitors wrote to the plaintiff`s solicitors to ask for the plaintiff`s consent to a rental of the premises for a period of three years. They explained that a short term tenant was unlikely to be found. The plaintiff`s reply, sent on 29 July 1993, was to agree that the premises could be rented out for a period of two years subject to (i) the premises being fully reinstated, at the end of the tenancy, to their condition at 27 June 1992, (ii) to the plaintiff approving the proposed

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tenancy agreement and (iii) to the parties agreeing on the manner in which the rental monies were to be dealt with.

124.The first defendant considered that the plaintiff was being unreasonable. It rejected the plaintiff`s terms. On 15 September 1993, it`s solicitors wrote to the plaintiff`s solicitors stating that the first defendant was unable to find a tenant who was prepared to accept the plaintiff`s terms and that the minimum term which prospective tenants approached by the first defendant wanted was three years with an option for another three. Dr Satkunanantham stated in court that the first defendant had not tried to get a potential tenant on the plaintiff`s terms since the people who had talked to the first defendant had all wanted a three year period. Dr Thean also confirmed that a tenancy for three years with an option to renew for a further three years was a fairly standard arrangement and that he himself would not have accepted a shorter tenancy for his wife.

125.Dr Satkunanantham also testified that after 25 September 1993, quite a few of his colleagues who were going into private practice approached him about the possibility of renting the premises. Once he had explained the situation to them, however, they were not keen to take the property for either two or three years because they did not want to get involved in a litigation.

126.In his submissions, the plaintiff took the position that the first defendant should have proceeded to rent out the property regardless of his consent since as a matter of law, such consent was not required to enable the first defendant to do this. This was not the position that he took at the time. When he was asked by the first defendant for consent, he could very well have said that the lease had nothing to do with him. Instead, he took the opportunity to impose additional conditions on the proposed letting. His actions and attitude at that time illustrate vividly the practical difficulty which the first defendant faced in

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trying to let out the property. Before going into a contract, it had to ensure that the persons who took up the unit would be able to practice there for some time and would not be harassed by the plaintiff. It was always a possibility that if the plaintiff won his case, he would evict the tenant on the basis that the first defendant had no right to rent out the property and if that happened, such tenant would, of course, look to the first defendant for compensation. It was therefore a wise precaution to ask for the plaintiff`s prior consent.

127.I am satisfied that the evidence that I have recounted above together with further evidence regarding a prospective tenancy to Professor YO Tan who owned the unit next to the property, establishes that the first defendant was unable to lease the property after September 1992 because of the presence of the caveat and because of the unreasonable attitude which the plaintiff took to the letting. As a result, prima facie the first defendant has suffered damages in that it did not earn the rental it could otherwise have earned. The plaintiff submitted that in actuality the first defendant has gained rather than lost through his actions because the value of the property has increased substantially since September 1992. Whether the gain outweighs the loss and of what items exactly the loss, if any, consists are matters that will have to go for assessment. It appears from the evidence that if the proposed tenancy to Dr Heng had gone through, it would have commenced from February or March 1993. That being the case, I consider that the period for which damages should be assessed should be from March 1993 onwards.

128.In the result there will be judgment for the first defendant on its counterclaim and costs. I make the following additional orders: (1). there shall be a declaration that the caveat lodged by the plaintiff, Caveat No CV/17833C was lodged wrongfully;

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(2). the Registrar of Land Titles is directed to cancel or otherwise remove forthwith Caveat No CV/17833C from the Land Register kept by the Registrar;

(3). the plaintiff be and is hereby restrained from lodging any further caveats against the property;

(4). the plaintiff do pay to the first defendant damages to be assessed.

Judith Prakash J

Harry Elias SC, Devinder Rai and Looi Teck Kheong (Harry Elias &Partners) for the plaintiff
K Shanmugam and Maria Ho (Allen & Gledhill) for the first defendant
Chua Lee Ming and Tan Kian Siew (Lee & Lee) for the second defendant

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