IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1997] SGHC 94

OS 898/1996

Between

Cathay Theatres Pte Ltd

… Plaintiff

And

Lkm Investment Holdings Pte Ltd

… Defendant

GROUNDS OF DECISION

Version No 1: 20 Nov 2026 (00:35 hrs)

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Cathay Theatres Pte Ltd v Lkm Investment Holdings Pte Ltd

[1997] SGHC 94

OS 898/1996
Lim Teong Qwee JC
12 April 1997

Judgment:

GROUNDS OF JUDGMENT

1. By a contract contained in an offer in writing dated 17 April 1996 which was accepted on 17 May 1996 the plaintiff agreed to sell and the defendant agreed to purchase the property at 3501 Jalan Bukit Merah known as the "Regal Theatre" for $16,500,000. The property is comprised in a lease for a term of 99 years commencing on 1 February 1977 granted by the Housing and Development Board ("HDB") to the plaintiff. The lease is registered under the Land Titles Act. The sale is subject to the consent of HDB and is due for completion within three months of the acceptance or two weeks of the receipt of the consent whichever is later.

2. Clause 4(1) of the terms of sale provides:

"The property is sold subject to 4 Leases dated 10th October 1987 (as varied by a Deed dated 6th December 1990) and 3 Leases dated 23rd April 1991 all made bet een the < plaintiff > of the one part and McDonald's Restaurants Pte Ltd

('the Te ant') of the other part (hereinafter collectively referred to as 'the Leases' w ich expression shall where the context so requires mean any one of or more of t em) unless the Leases shall have been terminated for any reason whatsoever befo e completion ...."

Clause 4(2) provides:

".... No requisitions or objections whatsoever shall be raised by the < defendan > in respect of or in connection with the contents effect or regularity of the eases nor shall the < defendant > require the production of any other document re erred to in or connected with the Leases."

The four leases all dated 10 October 1987, the deed (or deed of variation) dated 6 December 1990 and the three leases all dated 23 April 1991 referred to in cl 4(1) were produced for the inspection of the defendant.

3. The property is affected by a caveat over part of the building lodged on 17 August 1995 by McDonald's Restaurants Pte Ltd ("McDonald's" or "caveator") and notified in the land- register. Under the caveat McDonald's claims an interest as lessee by virtue of "an Agreement for lease dated 11 February 1987, the Deeds of Variation dated 10 October 1987 and 6 December 1990 and the several leases executed pursuant thereto between the registered proprietor as lessor and the Caveator as lessee" and forbids the registration of any instrument affecting the land "unless the instrument is expressed to be subject to the interest claimed by the Caveator".

4. HDB has given its consent to the sale but the defendant has declined to complete unless the caveat lodged by McDonald's is removed. More specifically the defendant has insisted that the transfer should state "Nil" in the "Prior

Encumbrances" box and not "subject to Caveat No CV/051297E" which is the caveat lodged by McDonald's. It will not accept a transfer that is expressed to be subject to the caveat stated in the space for prior encumbrances. On 17 August 1996 the defendant gave the plaintiff a written notice to complete the sale if the caveat is withdrawn.

5. In this originating summons the plaintiff claims a declaration that the defendant is precluded from and not entitled to insist on the withdrawal of the caveat and that it is precluded from and not entitled to rely on the existence and non- withdrawal of the caveat as a reason or ground for not completing the sale. It also claims a declaration that the notice to complete given by the defendant on 17 August 1996 is null and void and of no effect as a notice to complete under cl 29 of the Law Society's Conditions of Sale 1994.

6. The plaintiff's case stated quite simply is that the sale is subject to the four leases of 10 October 1987 as varied by the deed of variation of 6 December 1990 and the three leases of 23 April 1991 and that McDonald's has an interest in the land by virtue of these leases and such interest will support the caveat and accordingly the plaintiff is entitled to the declarations claimed.

The caveat

7. Ms Rajah submitted that by taking a transfer in the form required by the plaintiff the defendant would be taken to admit the interest of the caveator as claimed in the caveat. She referred to Tan Sook Yee, Principles of Singapore Land Law (1994) which states at p 200:

"Where the proprietor takes subject to the interest claimed, he acknowledges th t the caveator does have the interest as claimed."

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8. Section 115(2) of the Land Titles Act provides:

"A caveator may, according to the extent of his interest, forbid the registrati n under this Act of any dealing affecting the land against which the caveat is irected, either -

(a) unless the dealing is expressed to be subject to the interest claimed by th caveator; or...."

This is what the caveator has done. McDonald's has prohibited the registration of any instrument such as the transfer from the plaintiff to the defendant unless the transfer is expressed to be subject to the interest claimed. What the plaintiff in fact insisted on was a transfer subject to the caveat and not subject to the interest claimed but I think it makes no difference in the circumstances of this case. If the transfer is not expressed to be subject to the interest claimed the registration is prohibited and upon its lodgment the Registrar of Titles will proceed under s 120 of the Act. The transfer will have to be uplifted or withdrawn unless it is amended accordingly. The question then is whether by taking the property subject to the interest claimed the defendant will be treated as having acknowledged that the caveator has that interest.

9. In Leros Pty Ltd v Terara Pty Ltd & Anor (1991-1992) 174 CLR 407 s 137 of the Transfer of Land Act 1893 of Western Australia provides:

"Any beneficiary or other person claiming any estate or interest in land ... ma lodge a caveat ... forbidding the registration of ... any instrument affecting such estate or interest ... unless such instrument be expressed to be subject t the claim of the caveator ...."

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Mason CJ, Dawson and McHugh JJ said at p 420:

"If, in conformity with such a caveat, an instrument of transfer, expressed to e subject to the caveat, is registered, the title of the transferee is subject o the rights of the caveator ....

However, the effect of the registration of such a transfer is not to validate he estate or interest claimed by the caveat. All that registration in that for , in conformity with the caveat, achieves is to prevent the registration from d stroying or defeating the prior unregistered interest claimed by the caveator, assuming it to be valid and enforceable. Whether the interest so clai ed is valid and enforceable remains a matter for resolution after registration.

Later at p 421 they said:

"The registered proprietor takes, under such a transfer, subject to the caveat, that is, subject to the claim made by the caveator; the proprietor does not tak subject to the interest claimed by the caveator."

10. In Coles KMA Ltd v Sword Nominees Pty Ltd & Ors (1986) 44 SASR 120 the Real Property Act 1886 of South Australia also provides for a "permissive" caveat to forbid the registration of any dealing "unless such dealing shall be expressed to be subject to the claim of the caveator". The land was sold "subject to lease to < the plaintiff > for a term of 30 years". The lease was not registered but the lessee lodged a caveat which forbids the registration of any dealing "unless such dealing shall be made subject to the caveator's claim". The transfer was expressed to be "subject to the estate and interest claimed by the caveator". Bollen J said at p 127:

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" < The defendants > knew that the plaintiff was in possession. The memorandum of transfer from T & G to the defendants records, in the space set aside for 'encu brances', that there are two encumbrances on the title in favour of the housing trust and then says 'and subject to estate and interest claimed by caveator in caveat numbered 5144869'. That is the caveat lodged by the plaintiff. It records a claim to a estate or interest by virtue of the indenture of lease. The 'effective part' f the emorandum of Transfer says: 'The transferor acknowledging receipt of the bove consideration hereby transfers to the transferee the estate and interest h rein specified in the land above described subject to the above encumbrances.' And the parties have included the indenture of lease in the expression 'encumbrances'. The defendants accepted t at memorandum of transfer. Therefore, in my opinion, the defendants have purch sed subject to the rights of the caveator."

And later at p 129:

"The caveat is not a memorial of an interest. But it is notice of < an > interes which equity recognises. If the principles of equity did not exist the defend nts could no doubt ignore the interest claimed in the caveat. But equity forbi s them so to ignore it."

11. I think the effect would be the same if the defendant in the circumstances of this case accepts a transfer subject to the interest claimed by McDonald's under the caveat. It is not a transfer that is merely "subject to the caveat" as in Leros Pty Ltd v Terara Pty Ltd & Anor. Further McDonald's is in possession to the knowledge of the defendant and it claims interest as lessee.

12. I agree with the statement in Tan Sook Yee, Principles of Singapore Land Law (1994) at p 200. If the defendant accepts a transfer subject to the interest

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claimed under McDonald's caveat it acknowledges that McDonald's does have that interest. That is the effect of registering a transfer that conforms with the caveat under para (a) of s 115(2) of the Act. In the circumstances of this case there would also be a personal equity against the defendant.

13. The agreement for sale does not provide that the property is sold subject to the interest claimed under the caveat. It does not provide that the defendant is to acknowledge that the caveator has that interest. Clause 4(1) binds the defendant as against the plaintiff to accept the property subject to such interest as McDonald's may be entitled to under the leases leaving the defendant free to dispute the interest as against McDonald's if it chooses to do so. In my judgment this is a sufficient answer to the plaintiff's claim but other points have been taken and I should deal with them.

Interest claimed

14. The interest claimed by McDonald's is as lessee by virtue of (1) an agreement for lease dated 11 February 1987, (2) the deeds of variation dated 10 October 1987 and 6 December 1990 and (3) "the several leases executed pursuant thereto" between the plaintiff and McDonald's. The plaintiff has produced a copy of the agreement for lease dated 11 February 1987 and a copy of the deed of variation dated 10 October 1987 and the defendant has produced a copy of the deed of variation dated 6 December 1990 in these proceedings. No attempt has been made by the plaintiff to identify the several leases claimed by McDonald's to have been executed by the plaintiff as proprietor and McDonald's as lessee.

15. The plaintiff alleges that the agreement for lease dated 11 February 1987 and the deed of variation dated 10 October 1987 have been superseded by the

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later leases referred to in cl 4(1) of the terms of sale. The agreement for lease as varied by the deed of variation provides for two leases each for a term of three years the first commencing on 21 May 1987 and the second on 21 May 1990. The four leases dated 10 October 1987 as varied by the deed of 6 December 1990 provide for nine leases for successive terms of two years each the first commencing on 21 May 1990. The remaining three leases referred to in cl 4(1) provide for the last three successive terms of two years each commencing on 21 May 2002 and were executed pursuant to the deed of 6 December 1990.

16. The parcels comprised in the agreement for lease as varied by the deed are so far as I can see the same as those comprised in the seven leases and the deed referred to in cl 4(1) and the earlier documents may well have been superseded by the later. Counsel have not said whether the conditions of the leases are the same but it can be seen that the rent is different.

17. The deed of 6 December 1990 referred to in the caveat only serves to add confusion to the caveator's claim. It varies leases which are not referred to in the caveat and in respect of which no claims are made. The "several leases executed pursuant thereto" have not been otherwise identified. It is not known if any lease has been executed pursuant to the agreement for lease dated 11 February 1987 or the deed of 10 October 1987 but three leases were executed pursuant to the deed of 6 December 1990. These are the three leases referred to in cl 4(1) and provide for successive terms of two years each expiring on 20 May 2008. If there are other leases which have been executed they certainly have not been identified or identified with any degree of certainty.

18. In summary the position of McDonald's as seen from the caveat comes to this. It was in possession as lessee under two leases for successive terms of three years each. The second term expired on 20 May 1993. It has three other leases

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for successive terms of two years each the first commencing on 21 May 2002. It is now in possession but the term under the last lease has expired and the term under the next lease has not commenced.

19. In my judgment the defendant is not obliged under the terms of sale to accept a transfer that is expressed to be subject to the caveat (even if such a transfer is registrable) or subject to the interest claimed by the caveator. The interest claimed is different from that to which the caveator is entitled under the terms of the leases and deeds of variation to which the sale is subject. The wider interest claimed is not ascertainable with sufficient certainty. As between the plaintiff as vendor and the defendant as purchaser it is the plaintiff which must cause the caveat to be removed before completion under the agreement for sale of the property.

Interest of reversionary lessee

20. The agreement for lease dated 11 February 1987 as varied by the deed dated 10 October 1987 created two successive terms of three years each the second of which would have expired a long time ago on 20 May 1993. Assuming but without deciding the question that the interest claimed under the caveat is as lessee under the four leases dated 10 October 1987 as varied by the deed of 6 December 1990 and the three leases dated 23 April 1991 then at the date of hearing of this originating summons McDonald's was in possession as lessee under one of the leases dated 10 October 1987 for a term of two years commencing on 21 May 1996. It was not or not yet in possession under the other leases for terms commencing only on 21 May 1998 and later. It had not entered upon the premises. In respect of those leases it was a reversionary lessee.

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21. Coke's Commentary upon Littleton (1832) Vol 1 has this statement at 46.b: "But the lessee before entry hath an interest, interesse termini, grantable to nother .... And albeit the lessor dye before the lessee enters, yet the lessee may enter into the lands, as our author himselfe holdeth in this Chapter. And o if the lessee dyeth before he entred, yet his executors or administrators may enter, because he presently by the lease hath an interest in him; and if it be ade to two, and one dye before entry, his interest shall survive."

22. In Gillard v Cheshire Lines Committee (1884) 32 WR 943 the plaintiff agreed to take a threatre for eight weeks to commence on a future day. Before the commencement of the term and before entry by him the defendants by excavations on their property deprived the theatre of the support of the adjacent land so that the theatre was rendered unsafe and was closed during the eight weeks by order of the proper local authorities. The plaintiff sued the defendants in respect of the damage suffered by him in consequence of their acts. Brett MR said at p 943 (right):

"It seems to me that the right of the plaintiff is one which is recognized by t e common law. It is a right existing in him against all the world."

Bowen LJ said at p 943 (right):

"But it seems to me that this right is a right in rem, a right which is alienab e at common law, a right which not only passes to the executor, as pointed out n Williams' Saunders, but can be granted away."

23. Section 115 of the Land Titles Act gives to a person claiming an "interest in land" a right to lodge a caveat and s 4 defines "interest" in relation to land as "any interest in land recognised as such by law, and includes an estate in land".

24. A lessee with an interesse termini has a right of entry upon the land and when he enters in accordance with the lease he becomes a tenant in possession for a term of years. The right is alienable. Upon the lessee's death it passes to his personal representative and is further enforceable notwithstanding the death of the lessor. It is a right in rem. It seems to me that an interesse termini is an interest in land recognised as such by law and is an interest that can support a caveat under s 115 of the Act.

HDB consent

25. The head lease granted by HDB contains a covenant against subletting "without first obtaining the consent of < HDB > in writing which consent < HDB > may give on terms and conditions as it may in its absolute and unfettered discretion deem fit". HDB has by its letter dated 6 June 1990 given its consent to the lease in favour of McDonald's for a term of two years from 21 May 1990. The consent is subject among other things to HDB's right to withdraw it and to put an end to the subletting. There is no evidence before me that the consent has been withdrawn but there is also no evidence that HDB has given its consent to any of the reversionary leases. Ms Rajah submitted that McDonald's interest under the reversionary leases cannot support its caveat as HDB's consent has not been first obtained.

26. By granting the reversionary leases the plaintiff has committed a breach of covenant under the head lease. There is a proviso for re-entry for breach of any covenant but it is not the defendant's case that completion of the agreement for sale is excused by reason of such breach. Its case is that until HDB's consent is obtained the lessee has no interest in land for the purpose of lodging a caveat and the consent may be given on terms which are not acceptable or refused altogether.

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27. Mr Almenoar submitted that notwithstanding the failure to obtain HDB's consent the interest of McDonald's under the leases was an interest that could support a caveat. He referred to Parker v Jones < 1910 > 2 KB 32 where a tenant under a lease containing a covenant against subletting without licence and a proviso for re-entry on breach of the covenant underlet part of the premises to the plaintiff in breach of the covenant. Subsequently the tenant surrendered his term to the lessor who accepted the surrender in ignorance of the subletting and of the fact of the plaintiff's occupation. The lessor then relet the premises to the defendant. The plaintiff claimed possession. Bucknill J said at p 38:

"A covenant not to underlet without licence does not make an underletting in br ach of that covenant illegal; it merely gives the lessor a right to re-enter. s between himself and the plaintiff the lessee allowed the plaintiff by an act hich was not illegal to take possession; and the lessor did not treat that as a ground of forfeiture. He accepted a surrender from his tenant. Can he after t at treat the under-lessee as a respasser? I think not."

28. The plaintiff in Parker v Jones was entitled to possession under the under-lease although it was granted in breach of covenant. That was so because the head lease was not forfeited. The lessor accepted a surrender. If he had exercised his right of re-entry then both the tenant and his under-lessee (the plaintiff) would have lost their estates or other interests in the premises. Until then the plaintiff had an estate although the under-lease had been granted without licence in breach of covenant.

29. If McDonald's is in possession under a lease granted without first obtaining the consent of HDB and such consent has still not been obtained then its position is no different from that of the plaintiff in Parker v Jones. It has an interest in land to support a caveat. It has no legal estate under the reversionary leases but

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it has an interest that can support a caveat and I can see no reason why this interest should be any the less an interest for this purpose only because HDB's consent has not been obtained. It may well be the case that entry upon the premises may be effected before the happening of some event to defeat the interest such as forfeiture by HDB. Upon such entry McDonald's clearly has an interest to support a caveat.

30. I think substantial injustice would be caused to an intending caveator with an interest under a lease granted in breach of covenant without the head lessor's consent if it were held that a caveat could not be lodged to protect it. I can see no warrant for so holding. In my opinion McDonald's interest under the current lease (if any) and the reversionary leases is an interest in land that can support a caveat notwithstanding that in breach of covenant under the head lease HDB's consent has not been first obtained or obtained at any time at all.

31. The plaintiff's claim is dismissed with costs.

LIM TEONG QWEE

JUDICIAL COMMISSIONER SUPREME COURT

Lim Teong Qwee JC

S H Almenoar, William Ricquier and Chew Su Jin for the plaintiff
Indranee Rajah and Eileen Khoo for the defendant

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