

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1998] SGHC 129

OS 1399/1997, 153/1998

Between

Coastland Properties Pte Ltd

... Plaintiff

And

Ho San Kong Hoey and
another action

... Defendant

GROUND OF DECISION

Contract — Breach; Land — Caveats

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**Coastland Properties Pte Ltd v Ho San Kong Hoey and another
action**

[1998] SGHC 129

OS 1399/1997, 153/1998

Christopher Lau JC

21 April 1998

1 **CHRISTOPHER LAU JC**

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This matter concerned an action brought by the plaintiffs, the purchaser, in OS 1399/97 for a declaration that the defendants, the vendors, had failed to deliver property at Upper Dickson Road free from encumbrances pursuant to cl 6 of the contract of sale dated 10 July 1997 and for an order that the plaintiffs be entitled to the repayment of the deposit together with interest thereon and consequential reliefs. There was a subsequent cross-application, in OS 153/98, brought by the defendants, the vendors, for specific performance and/or forfeiture of the deposit. Whichever one of these originating summonses succeeded the other would necessarily fail. In the event, I found for the plaintiffs in OS 1399/97 and dismissed with costs the defendants' application in OS 153/98. These are my reasons.

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2. The material facts which were not in dispute were these. 2.1. By an option to purchase dated 26 June 1997 (the contract) and in consideration of the sum of S\$98,000, the defendants offered to sell to the plaintiffs the properties known as Nos 24 to 48 (even numbers only) Upper Dickson Road (the property) for the purchase price of S\$9.8m.

4 2.2. The option was duly exercised by the plaintiffs on 10 July 1997 by payment of the sum of S\$882,000, being the balance of the 10% deposit.

5 2.3. Clause 6 of the contract provided as follows:

The title to the property shall be properly deduced and free from encumbrances. The purchaser shall not investigate into or call for evidence of any earlier title or require the production or delivery of any deeds or documents not in the vendor's possession nor make any requisitions or objections whatsoever in reference thereto.

6 2.4. Clause 11 of the contract further provided:

The sale is subject to 'The Singapore Law Society's Conditions of Sale 1994' in so far as the same are applicable to a sale by private treaty and are not varied by or inconsistent with the conditions herewith.

7 2.5. Condition 29(3) of the Law Society's Conditions of Sale 1994 provided:

*Upon service of an effective notice pursuant to the preceding clause it shall be an express term of the contract that the party to whom the notice is given shall complete the transaction within twenty-one days after the day of service of the notice (excluding the day of service) and in respect of such period **time shall be of the essence of the contract** but without prejudice to any intermediate right of rescission by either party. [Emphasis added.]*

8 2.6. By a letter dated 30 June 1997, the plaintiffs' solicitors requested for the defendants' confirmation that all caveats lodged against the property would be withdrawn or removed on completion.

9 2.7. The contract was scheduled to be completed on 16 October 1997.

10 2.8. On the date of completion, there were two caveats subsisting on the property, namely, caveat at Vol 2589 No 192 by RMC Investment Pte Ltd (whose solicitors are M/s Tan Kim Seng & Partners) and caveat at Vol 2664 No 25 by Chng Chai Lan (whose solicitors are M/s Lee & Lee).

11 2.9. By a letter dated 21 October 1997, the plaintiffs' solicitors agreed to give reasonable time to enable the defendants to remove the caveats.

12 2.10. On 27 October 1997, caveat Vol 2589 No 192 by RMC Investment Pte Ltd was removed by their solicitors.

13 2.11. By a letter dated 27 October 1997, the defendants' solicitors wrote to M/s Lee & Lee requesting the removal of the caveat Vol 2664 No 25 by Chng Chai Lan (the caveat).

14 2.12. By 10 November 1997, the caveat was still not removed and there was no confirmation from the caveator that the caveat related only to the freehold reversionary interest.

15 2.13. On 10 November 1997, the plaintiffs served on the defendants a 21 days notice to complete.

16 2.14. On 15 November 1997, the defendants commenced legal proceedings in OS 1251/97 against Chng Chai Lan to remove the caveat. As of the date of the hearing the proceedings against Chng Chai Lan were still pending.

17 2.15. On 21 November 1997, the defendants also served on the plaintiffs a 21 days notice to complete.

18 2.16. On 2 December 1997, the plaintiffs` 21 days notice expired.

19 2.17. On 12 December 1997, the defendants` 21 days notice expired.

20 2.18. Upon the expiration of both 21 days notices to complete, the defendants failed to have the caveat removed and to deliver the property free from the caveat.

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3.The issue was whether the failure of the defendants to remove the caveat on the expiry of the 21 days notice constituted failure to deliver the property free from encumbrances as required by the contract. Were the defendants able and ready to deliver a clear title in view of the existence of the caveat against the property? If not, the plaintiffs were entitled to rescind the contract and claim for repayment of the deposit and interest in accordance with cl 29 of the Law Society`s Conditions of Sale 1994.

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4.Where the title of the vendor is subject to potential or actual adverse claims,

as for example by the existence of a caveat, it is the duty of the vendor to clear his title so long as the claims are not fanciful or theoretical. The fact that the vendor's title which is subject to such an adverse claim is subsequently proved not to be bad but essentially good does not alter the fact that it is sufficiently doubtful not to be forced upon the purchaser.

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5.As Warren LH Khoo J pointed out in **Huang Ching Hwee v Heng Kay Pay** [1993] 1 SLR 100 , at p111:

The rule allowing a purchaser to rescind in the case of a defective title is based on an express or implied term in the contract of sale that the vendor has to show good title, that he is selling the property contracted to be sold free from encumbrances.

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6.JT Ferrand in **Contract and Conveyance** (4th Ed) (at p 87) referred to the oft-cited test propounded by Wilberforce J in **Re Stirrup's Contract; Stirrup v Foel Agricultural Co-operative Society Ltd** [1961] 1 WLR 449, at p 454 as follows:

The answer which lies to that is that what a purchaser is entitled to is to be satisfied that his vendor is seised of the estate which he is purporting to sell, in this case the fee simple, and that he is in the position, without the possibility of dispute or litigation, to pass that fee simple to the purchaser.

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7.JT Ferrand then went on to refer to two helpful cases on the question of doubtful title and its consequences (at p 88): (i). In **Re Trustees of Hollis`**

Hospital and Hague's Contract [1899] 2 Ch 540, the purchaser sought a declaration that a good title had not been shown because of a reverter clause in the title deeds. Byrne J first held that the clause constituted a common law condition subsequent which was void for remoteness but because the point was 'one of some obscurity and difficulty' and because 'the purchaser, if he completes, will be in danger of immediate litigation' he concluded that the title was not such as ought to be forced upon an unwilling purchaser.

26 (ii). In **Horton v Kurzke** [1971] 1 WLR 769, where land had been sold with vacant possession, an agricultural grazing right tenancy had been claimed but eventually the claim was effectively rejected by an arbitrator. Before this rejection the vendor served a notice to complete. Goff J said (at p 772):

It is a fundamental part of a vendor's obligation to prove his title, and the defendant is not, in my judgment, able to complete when she is not in a position to discharge that duty. Now, when she served the notice, and when it expired, the position was that there was an adverse claim to the property which was either a question of fact or of mixed law and fact, the facts being - apart from a matter which I shall mention later - within the knowledge of the defendant and the claimant to clear her title, either by a vendor and purchaser summons, or probably more aptly by awaiting the determination of the arbitration, but she chose to claim to be able to perform her contract without taking either of those courses, and in my judgment that was something she was not entitled to do and she did not bring herself within condition 22.

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The vendor's title subject to the adverse claim was not bad and was eventually good but in the meantime was sufficiently doubtful not to be forced upon a purchaser.

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8. In the present case, at the time of completion, that is - 16 October 1997 - and on the expiration of the 21 days notice to complete, that is, 1 December 1997, there was in existence the caveat claiming an interest which was not limited to the freehold reversion. On the face of the caveat, the interest claimed was not so limited. At that critical point of time, there was no confirmation by the caveator that her interest was only limited to the freehold reversion. All that the plaintiffs had was a mere assertion by the defendants that the caveat could only relate to the freehold reversion. This assertion was opposed by the caveator as the fact of the subsequent litigation in OS 1251/97 between the defendants and the caveator showed. OS 1251/97 was filed by the defendants against the caveator on 15 November 1997, seeking an order for the caveat to be cancelled and for consequential orders for indemnity to the defendants for losses arising from the defendants' inability to complete the contract of sale dated 10 July 1997 between the defendants and the plaintiffs.

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9. No step was taken by the defendants to seek the declaration prior to completion that the caveat related to the freehold reversion despite the plaintiffs' solicitors' letter dated as early as 30 June 1997 requiring the defendants' solicitors' confirmation that all the caveats lodged against the property will be withdrawn/removed before completion.

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10. Nor did the defendants request for a reasonable time to seek such a

declaration. Instead, they maintained that the caveat related to the freehold reversion.

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11. In their affidavit filed in reply the defendants through their director, Lim Swee Eng, submitted at para 30 that 'the defendants were not aware of the existence of this caveat until preparation of completion' (that is sometime in October 1997). This assertion was completely false and untrue in the light of the plaintiffs' letter dated 30 June 1997 which highlighted the existence of a caveat in June 1997.

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12. What would have happened if the plaintiffs had completed the contract of sale on 16 October 1997 or on the expiration of the 21 days notice? The consequence would have been that the plaintiffs would have been met with the third party claim by the caveator Chng Chai Lan seeking to defeat the plaintiffs' interest. The plaintiffs would then be embroiled in a prolonged and costly litigation with the caveator to clear the title.

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13. As Lindley LJ put it in the case of **Re Heaysman's and Tweedy's Contract** [1893] 69 LT 89 (at p 91):

It is a general principle that a purchaser ought not to be forced to accept a doubtful title or buy a law suit. In applying that principle, however, we must exercise our common sense, and see if the supposed law suit has any basis whatever. We must see if there is the slightest reasonable chance of any such law suit

being instituted. If we come to the conclusion that the supposed law suit exist only in the imagination of the purchaser, we ought to disregard it, giving him the advantage of every reasonable doubt.

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14. The law suit in OS 1251/97 was firstly, not merely a matter which existed in the plaintiffs' imagination, in which case it was theoretical or fanciful and ought to have been disregarded but it was a nightmarish reality. Secondly, even if the law suit turned out in the defendants' favour, that is to say, the caveat related only to the freehold reversion, the defendants would still not have successfully proved their title either at the time of completion or on the expiry of the 21 days notice as they had failed to have the title cleared and to be ready completion. As Goff J put it in **Horton v Kurzke** (at p 773):

Here the vendor chose neither to have the matter determined so as to bind all parties by awaiting the result of the arbitration nor to have a vendor and purchaser summons as between herself and the purchaser, but said 'You must buy a lawsuit. You must either comply with this notice without any protection if the claims turns out to be good, or you must refuse to comply with it at the risk of forfeiting your deposit if the claim turns out to be bad.' That in my judgment, was a position in which she was not entitled to put the plaintiff, and condition 22 did not help her to do so.

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15. The defendants asserted that the plaintiffs had knowledge at all material times that they were purchasing an unexpired 999-year leasehold interest. That however did not change the defendants' obligation to deliver the leasehold interest free from potential third party claims as represented by the caveat. The plaintiffs were not asserting the claim to the freehold title but were contending that the 999-year leasehold title was, in the face of the litigation or dispute, a

doubtful title at the time of completion. Section 3(1) of the Conveyancing and Law of Property Act (Cap 61, 1994 Ed) was of no assistance to the defendants as it did not deal with the question of what was a doubtful title for the purposes of completion.

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16. The defendants further asserted that the trustee's title, if any, to the property was limited only to the freehold reversion while the defendants' title was to the unexpired term of the 999-year leasehold interest. However this assertion was in fact the subject of the lawsuit in OS 1251/97 and that litigation was the clearest evidence that the defendants could not deliver the property free from potential litigation at the time for completion. The plaintiffs could not be expected to be saddled with a piece of litigation upon completion.

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17. The defendants referred also to a letter of 21 October 1997 by the plaintiffs in which the plaintiffs gave the defendants reasonable time to remove the caveat but that letter was clearly written on a without prejudice basis and it did not affect the legal position of the plaintiffs. The letter maintained that the caveat was to be removed. There was no assurance or understanding that the plaintiffs would wait indefinitely. The defendants were obliged to remove the caveat and the plaintiffs were not obliged to wait indefinitely for the title to be cleared.

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18. The defendants themselves acknowledged their difficulties because in their

solicitors' letter of 22 October 1997 to Tan Kim Seng & Partners, the caveators' solicitors (exhibited to Chan Boon Sin's first affidavit at pp 30 and 34), the defendants' solicitors explicitly stated that the lodgment of the caveat had impeded the defendants' completion of the sale and purchase. This was the clearest admission that the caveat was an impediment to completion.

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19. In these circumstances, had the plaintiffs completed, they would also have bought a lawsuit. That clearly meant the defendants were unable to deliver the property free of encumbrances on completion as stipulated under the contract. The plaintiffs were therefore entitled to treat the contract as at an end and to claim relief under condition 29 of the Law Society's Conditions of Sale 1994.

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20. In summary, I saw no merit in the defendants' case and accordingly granted the plaintiffs the orders they sought in OS 1399/97 and dismissed the defendants' action in OS 153/98. The orders made in OS 1399/97 were an order in terms of prayers 1, 2, 3 and 4 with an order that the assessment which was to be by the registrar, was to include the interest claimed by the plaintiffs.

Christopher Lau JC

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Lim Joon Toon (Cheong Hoh & Associates) for the plaintiffs
Low Chai Chong and Lauw Yaan Ching (Rodyk & Davidson) for the
defendants
