IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1999] SGHC 127

Suit 1483/1998

Between

London & Provincial (S) Pte Ltd

… Plaintiff

And

BM San Development Pte Ltd

… Defendant

GROUNDS OF DECISION

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

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London & Provincial (S) Pte Ltd v BM San Development Pte Ltd

[1999] SGHC 127

Suit 1483/1998
Choo Han Teck JC
15 May 1999

1 **Judgment:**

2 **Cur Adv Vult**

3 1. This is a claim by the plaintiff company London & Provincial (S) Pte Ltd ("L&P") for the return of $772,500 being 10% of the purchase price which was paid as deposit under a sale and purchase agreement ("the Agreement") in respect of a property at 2 Jalan Labu Merah ("the Property"). The sum of $772,500 includes a sum of $88,000 paid as the option fee. The Agreement dated 23 September 1997 was embodied in an option agreement exercised by L&P on 28 November 1997. The defendant company BM San Development Pte Ltd ("BMS") was the vendor of the Property. The Agreement provided in clause 19 that the sale was subject to L&P obtaining written permission from the Land Dealings (Approval) Unit ("LDAU"). A Clearance Certificate was subsequently issued by the LDAU dated 26 November 1997 giving L&P clearance to acquire and retain the residential property "so long as –

(a) its memorandum and articles of association provide -

> (i) that all the members of the said Company shall be citizens of Singapore only;
>
> (ii) that all the directors of the said Company shall be citizens of Singapore only; (iii) for the prohibition of the issue or transfer of the said Company's shares to other companies/ corporations or to persons who are not citizens of Singapore, or trustees or nominees on their behalf; (iv) for the refusal to register as members of the said Company other companies/corporations or persons who are not citizens of Singapore, or trustee or nominees on their behalf; and (v) for the requiring of such evidence as the said Company may think fit as to whether any person desiring to be registered as a member of the said Company is a citizen of Singapore.
>
> (b) no amendment or deletion in respect of any of the approved provisions incorporated in the memorandum or the articles of association of the said Company shall be made without the prior written approval of the Controller of Residential Property; and
>
> (c) all members and all directors of the said Company are and shall remain citizens of Singapore."

4 2. The memorandum and articles of association of L&P were duly amended on 10 October 1997 to comply with the Clearance Certificate. The vendor's solicitors wrote to L&P's solicitors on 9 June 1998 tentatively fixing the date for completion of the sale as 23 June 1998. This was subsequently changed to 10 July 1998 at the request of L&P's solicitors who wrote to say that their clients were still "sorting out outstanding issues with the architects". However, L&P failed to complete on 10 July. On 14 July 1998 BMS's solicitors served the requisite 21 days Notice to Complete. On 18 July 1998 L&P's solicitors wrote to BMS's solicitors informing them that L&P has "a foreign element" and asked for the refund of the deposit. BMS refused and L&P commenced this action. In this suit, BMS is also counter-claiming against L&P for damages arising from a breach of contract.

5 3. The above facts are not in dispute. The only issue in this trial was whether the Agreement should be rescinded because it was "rendered

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unenforceable by an operation of law". The circumstances under which L&P claims that the Agreement should be nullified became the only relevant evidence. Since the evidence of BMS were straightforward and not disputed, they were admitted without challenge. Mr Harbajan Singh, counsel for L&P, conducted the case for his clients honourably and admirably given the circumstances. I should add that this sums up all the positive things that can be said of L&P and its case. The evidence of L&P's witnesses Lyndon Forman ("Forman") and Chay Kwok Kee ("Chay") reveal nothing but one shady transaction after another. This is their story.

6 4. L&P runs a language school at Parkway, Singapore. It has $1,000,000 fully paid up shares. All but two shares were owned by one Ho Hon Wai ("Ho"). He was thus instrumental in negotiating with the directors of BMS for the sale of the Property. He was the one who exercised the option on 28 November 1997. He was the one who procured the amendments to L&P's memorandum and articles of association to comply with the requirements of the LDAU's Clearance Certificate. He was probably the one who instructed L&P's solicitors on 25 June 1998 to tell BMS that the tentative completion date of 23 June was premature as the company was still sorting things out with its architects. On the same day, 25 June, a judgment in default was entered by Mega Gold International Ltd ("MGIL") against Ho in the High Court for the sum of $500,000. The said judgment also ordered Ho to transfer all his 999,998 shares in L&P as well as to 99,998 shares in ETS Schools Pte Ltd to MGIL. MGIL was mistakenly cited in the writ as "Mega Gold Ltd" but I do not think that this is of any importance.

7 5. What is significant is that MGIL is a foreign company as it was registered in the British Virgin Islands and wholly owned by Forman, an Australian citizen. This paved the way for Mr Harbajan Singh, counsel for L&P,

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to advance the intriguing proposition that the agreement was rendered incapable of performance by an operation of law, namely that it would otherwise contravene the Residential Property Act. As the evidence unfolds this proposition became increasingly improbable. The writ taken out by MGIL against Ho was filed in the High Court on 15 June 1998, about a week after L&P were notified by the solicitors for BMS that the tentative completion date was fixed at 23 June. MGIL's claim in the writ against Ho was based on a Deed of Acknowledgment dated 3 November 1997 executed by Ho. It was drawn up by Tan Bock Huat, the solicitor for Forman at the latter's request. This deed was an acknowledgment of a loan of $500,000 by MGIL to Ho made in October, and disbursed by way of three cash cheques dated 6 October 1997 (for $313,000), 9 October 1997 (for $91,080), and 16 October 1997 (for $78,000). The total sum disbursed was thus $482,500 and not $500,000. The difference of $17,500 was claimed by Chay as his commission from Ho because it was Chay who arranged the deal between Forman and Ho. I ought to pause here to note that this deed was executed after the money had purportedly passed into Ho's hands, and yet it was prefaced by these words, "in consideration of you agreeing to lend me S$500,000 …" and not "in consideration of you having lent me S$500,000 …". The wording, upon advice, is strange given that the money was allegedly disbursed by Forman through Chay, without any acknowledgment of receipt whatsoever prior to the execution of the deed. The deed was unstamped and this adds to my scepticism that the date of execution, and for that matter, the deed itself, was genuine. More follows. There is no evidence that the three cheques were received by Ho save that Chay testified that he personally handed them to him. Although Ho obliged Forman and assisted L&P's solicitors two weeks before trial, he did not appear as a witness.

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8 6. The three cheques were drawn by a company called Standard Lloyds Investment Pte Ltd. There was no credible explanation as to why the loan of $500,000 was disbursed by cash cheques. Why it was not disbursed in one cheque was a question I asked Mr Chay out of wonder. Chay's answer was that Ho was a "calculative man and he wanted to save on interest payment". He left it at that, but when asked how much interest Ho could have saved, Chay said "thousands of dollars". A perusal of the Deed of Acknowledgment shows that the agreed interest was $5,000 a month. The cheques were only days apart, hardly any interest worth saving.

9 7. Chay's evidence under cross-examination follows consistently with his evidence-in-chief that his commission from Ho was the said $17,500 which he stated in his affidavit of evidence-in-chief, was based on 3.5% of $500,000. Forman on the other hand, had consistently stated that Chay's commission was $17,920. This figure from Forman was obviously the difference between $500,000 and the sum total of the three cheques ($313,000 plus $91,080, plus $78,000). The discrepancy of $420 (between Chay's version and Forman's) may not be much, but it becomes awkwardly conspicuous in the absence of any explanation. It reinforces the doubt expressed by counsel for BMS that the three cheques were really given to Ho as Chay and Forman claimed.

10 8. Forman testified that when Ho failed to repay the loan on demand, he commenced proceedings on the strength of the deed, which had provided, among other things, that Ho deposits his 999,998 shares together with executed transfer forms as security for the loan. Forman's demand was issued through his lawyer by letter dated 7 January 1998. However, he continued to accept the monthly $5,000 interest payment up to 29 May 1998 before issuing a writ without further notice on 15 June 1998. I am of the view that the receipts of interest payments were also sham documents. There was neither logic nor

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evidence as to why Ho did not resist the suit by MGIL or take any step to preserve his shares when the debt was only $500,000 whereas the security provided was 999,998 fully paid up shares (of $1.00 each) in L&P as well as 99,998 shares in another company. I do not think that L&P could be oblivious to the prohibition against such a transfer of shares under the company's memorandum and articles of association. It was remarkable that Ho's lawyer, Tan Geok Ser should write to L&P's lawyer Tan Bock Huat stating that Ho would not be contesting the suit in order "to save costs". It is also apparent from the documents (1PB 113,116) that Tan Geok Ser had acted for L&P in a loan agreement as recently as March 1998. It can also be seen from the same documents that Tan Geok Ser shares the same office as Chay at #29-00 High Street Centre. Finally, Tan Geok Ser was at all material times a shareholder in Top-Test, the company that paid out the $500,000 commission to Forman. While these are only peripheral points, they fit the fast emerging picture of a nefarious collaboration between Ho, Forman, Chay and L&P for L&P to renege from its contract with BMS. No evidence was adduced before me, but the logical conclusion must be that the property market had fallen. Otherwise, there was no reason for L&P not to proceed with completion and then re-sell the property. In which case, Ho would have cleared his alleged debt to MGIL, and still retain his shares.

11 9. Forman was asked in court, what he intended to do with the balance after he had satisfied Ho's debt to him. He replied that he would return the balance shares to Ho. I do not believe this evidence. Ho had made no effort to recover the balance shares, nor had he given any indication whatsoever that he wanted them back.

12 10. It also appears that the shares were registered by L&P on 6 July 1998. This was in contravention of the LDAU's Clearance Certificate as well as

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L&P's own Special Resolution passed on 2 July 1998 resolving to transfer the said shares from Ho to MGIL "subject to LDAU's approval". That approval was formally sought but not given. The transfer and registration was thus in breach of section 14 of the Residential Property Act, Cap 274, an offence punishable under the Act. The hastiness in which Ho rendered his co-operation in the registration of his transferred shares raises a huge question mark but no answer. Ho's eagerness was no more glaringly emphasized than by L&P's letter to LDAU asking for their consent to amend its memorandum and articles of association. This letter was written on 2 July enclosing Forman's lawyers' letter dated only the day before on 1 July requesting that MGIL be registered as a shareholder.

13 11. Forman and Chay were cross-examined as to how MGIL's loan to Ho came about, and where that money came from. Forman testified that in 1997 he was a director of a public listed company in Australia called Network Entertainment Group Ltd ("NEG"). Chay was at that time a director of a Singapore company called Top-Test International Pte Ltd ("Top-Test") which owned a company called Credit Development Pte Ltd ("Credit Development"). The last company owned a valuable asset in the form of the High Street Centre in Singapore. Top-Test signed an agreement to sell all its shares in Credit Development to NEG for A$170,000,000. The agreement was signed on 15 September 1997. Top-Test had agreed to pay Forman a sum of $500,000 if he could get NEG to sign the agreement. Thus, Forman became entitled to the $500,000 on 15 September 1997, but he testified that he did not want to bring the money into Australia to avoid paying tax on it. Forman testified that he did not vote at the board meeting approving the commitment by NEG, but there was no evidence as to what it was exactly that Forman did to earn his commission of $500,000. He said that the Board approved his commission but, according to

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him, no evidence was recorded by the board of this alleged approval of a commission payment to one of its directors. When the cash cheques were purportedly handed over to Ho by Chay, there was no acknowledgment of receipt by Ho. There was correspondingly no acknowledgment by Forman to Chay or Top-Test of receipt of his commission. There was no acknowledgment of receipt by Chay to Standard Lloyds Investment Pte Ltd (the drawer of the cheques on behalf of Top-Test), and there was no acknowledgment of receipt of payment by Top-Test to Standard Lloyds. In other words, there is no documentary evidence to support the convoluted path of the advancement of $500,000 to Ho other than a belatedly drawn up Deed of Acknowledgment signed by Ho.

14 12. L&P through Forman produced a written contract purporting to be the agreement for sale by Top-Test of Credit Development shares to NEG. This document was executed by Forman on behalf of NEG. However, there was no evidence that the board of directors of NEG had resolved to authorise Forman’s role. This document appears to be a comprehensive agreement, yet Forman testified, without elaboration, that it was still subject to "a more detailed" agreement which, in the event, did not materialise. He maintained that notwithstanding the aborted sale, he was entitled to retain his commission of $500,000. I do not believe any of this evidence at all.

15 13. Next, I turn to the man in the eye of the storm, Mr Ho Hon Wai, but there was no evidence from him. He did not appear as a witness. He did not disappear mysteriously because according to Forman and Chay, he had been assisting them in the preparation of L&P’s case. He simply chose to stay away at trial. But he must because he would otherwise face great difficulty in answering some very simple questions.

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16 14. On the evidence before me, it is abundantly clear that the so-called loan of $500,000 by MGIL to Ho was a sham transaction and everything else that followed, including the story woven by the witnesses for L&P in court to give it credence, was part of the sham. L&P registered MGIL as a shareholder even before LDAU had given its reply to L&P's application to amend its memorandum and articles of association. The rushed registration leads me inexorably to the conclusion that it was to support L&P's response to the call by BMS for completion of the sale. This leads me to the crux of the case. Is L&P entitled to a refund of its deposit? The legal issue in this case was, initially, more difficult to formulate than the facts might indicate. The key lies in the term of the Agreement that the contract was subject to the approval of the LDAU. This simple, straightforward condition makes no provision in the event that the LDAU grants approval on terms. If L&P already has a foreign shareholder who had no intention of relinquishing his shares, then the conditions that LDAU imposed in this case would render the Agreement unworkable. In that situation, the parties would be right to say that the Agreement has to be rescinded. That must be the conclusion that any reasonable bystander would reach. However, if L&P and its foreign shareholder (still under the assumption that it has one) had taken steps to devoid itself of the foreign element so as to comply with the terms of the LDAU, and in fact does so, the reasonable bystander would have said that in those circumstances, the contract is sealed. There is no dispute that L&P in this case carefully complied with all the terms of the LDAU approval on 10 October 1997. Its agreement with BMS was thus sealed. The judgment of Lai Kew Chai J in the Court of Appeal decision in *Lim Hwee Meng v Citadel Investment Pte Ltd [1998] 3 SLR 601, at 616,* illuminates the legal position in a situation where the approval from the LDAU is a term of the contract, but was not actively sought by the party bound to do so. The relevant portion from the learned judge's grounds of decision reads as follows:

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> "There was an implied promise by the purchasers, in this case the respondents, to take reasonable steps to obtain the requisite approval from the Land Dealings Unit before the completion date. If the respondents failed to take reasonable steps to obtain the requisite approval, they would be in breach of contract and liable for damages. If the Land Dealings Unit gave the requisite approval, the principal obligations under the contract, namely the sale and purchase of the property, would then accrue. If not, the parties would be released from their obligations under the contract. Pending the application to and the decision of the Land Dealings Unit, there remained in existence a contract which bound both parties and which neither party could disavow, notwithstanding that the principal obligations under the contract, namely the sale and purchase of the property, would not accrue until the requisite approval was obtained."

17 15. What then is the effect of the judgment ordering Ho to transfer his shares in L&P to a foreign company? If that was an intervening event due to no fault of the parties, an argument might be made out to the effect that the contract had been frustrated before its completion. The facts here rule out this approach. I do not accept L&P's evidence that the suit against Ho by MGIL was a genuine action arising from a *bona fide* debt. It is axiomatic that a person should not rely on his own wrong to seek redress through the courts. The law is replete with examples of how such efforts are struck down. *New Zealand and Shipping Company Ltd v Societe de Atliers et Chantiers de France [1919] AC 1* is one. In that case, Lord Atkinson held (at p9) that it

> "is undoubtedly competent for the two parties to a contract to stipulate by a clause in it that the contract shall be void upon the happening of an event over which neither of the parties shall have any control, cannot bring about, prevent or retard. For instance they may stipulate that if rain should fall on the thirtieth day after the date of the contract the contract should be void. Then if rain did fall on that day the contract would be put to an end to by this event, whether the parties so desire or not. Of course, they might during the currency of the contract rescind it and enter into a new contract. But if the stipulation be that the contract be that the contract shall be void on an event which one or either of them can by his own act or omission bring about, then the party, who by his own actor omission brings that event about, cannot be permitted either to

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> insist upon the stipulation himself or to compel the other party who is blameless, to insist upon it, because to permit the blamable party to do either would be to permit him to take advantage of his own wrong, in the case directly, and in the other case indirectly in a roundabout way, but in either way putting an end to the contract."

18 16. Mr Harbajan Singh submitted that "there was nothing self-inducing done by [L&P]. The actions taken here were taken between two (2) parties namely [MGIL] and Ho and had nothing to do with [L&P]". I cannot accept this submission for the simple reason that this is a case in which I have no hesitation in lifting the corporate veil of L&P. Once the veil is lifted the shareholder (Ho) and the company are seen as one. The act of Ho is the act of the company, and vice versa. I thus find that the infusion of the foreign element into L&P was a self-induced act which the latter cannot now use as a basis to regard the contract as being incapable of performance. L&P was clearly in breach of contract. The condition precedent had been fulfilled when the terms laid down by the LDAU were complied with. The memorandum and articles of association of L&P were amended to prohibit the transfer and registration of its shares in respect of any person who is not a citizen of Singapore. Thus, the urgency in which Ho proceeded to transfer his shares, when the LDAU was not forthcoming in response to L&P’s subsequent application for approval, highlights the breach because at that time, the memorandum and articles of association of the company (which binds the company and its members) prohibit the transfer by a shareholder as well as a registration by the company of such transfer.

19 17. I, therefore, dismiss L&P’s claim for a refund of the deposit from BMS, and allow BMS’s counter-claim for damages for breach to be assessed. Costs to follow the event.

20 - Sgd -

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21 Choo Han Teck

22 Judicial Commissioner

Choo Han Teck JC

Harbajan Singh [Daisy Yeo & Co] for the plaintiffs
Tan Soo Kiang and Khoo Boo Jin [Wee Swee Teow & Co] for the defendants

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