Ho Kon Kim v Besty Lim Gek Kim and Others
[2001] SGCA 64

Case Number	: CA 164/2000, Suit 165/2000Q, CA 167/2000
Decision Date	: 26 September 2001
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; L P Thean JA; Yong Pung How CJ
Counsel Name(s)	: Michael Khoo SC and Josephine Low (Michael Khoo & Partners) for Ho Kon Kim; M Amaladass, Sivakolunthu and Gn Chiang Soon (M Dass & Co) for Besty Lim Gek Kim; Leslie Chew SC, Lioney Tay and Esther Ling (Khattar Wong & Partners) for RHB Bank Berhad; C R Rajah SC and Chew Kei-Jin (Tan Rajah & Cheah) for James Leslie Ponniah; Tan Kok Quan SC and Chia Boon Teck (Tan Kok Quan Partnership) for William Lai & Alan Wong
Parties	: Ho Kon Kim — Besty Lim Gek Kim; William Lai & Alan Wong; RHB Bank Berhad

Judgment:

Introduction

1. There are two appeals before us. The first is Civil Appeal No. 164 of 2000, which is an appeal by Madam Ho Kon Kim (Madam Ho) against the decision of the High Court dismissing her claim against the three defendants, Ms Betsy Lim Gek Kim (Ms Lim), the law firm of William Lai & Alan Wong (WLAW) and RHB Bank Berhad (RHB). In this appeal, Madam Ho appeals against the High Courts decision insofar as it relates to the dismissal of her claim against Ms Lim and RHB only. Although WLAW were named as the second respondents, Madam Ho in fact did not appeal against the dismissal of her claim against them. The second appeal is Civil Appeal No. 167 of 2000, which is an appeal by the two advocates and solicitors, Mr James Leslie Ponniah (Mr Ponniah) and Mr Wong Ann Pang (Mr Wong), against the decision of the High Court in which they were ordered to bear the costs payable by Madam Ho to WLAW and RHB on the ground that in acting for Madam Ho, they had acted improperly and unreasonably in joining these parties in the action instituted by Madam Ho. Mr Wong acted for Madam Ho in the transaction that gave rise to the present litigation and Mr Ponniah was her counsel in the proceedings below.

Facts

2. The relevant facts giving rise to these two appeals are as follows. Madam Ho is a widow and was the registered proprietor of a property with a house thereon known as 124 Branksome Road (the property). The property comprises a relatively large piece of land measuring some 15,173 square feet in area. She had lived there for some fifty years since her late husband, Dr Foo Chee Guan, purchased it in 1947.

3. Prior to 1996, Madam Ho had mortgaged the property to Keppel Finance Limited (Keppel) as security for the credit facilities extended to one of her sons, Robert. Sometime in 1996, Robert informed Madam Ho that he had defaulted on interest payments to Keppel and the latter had issued a notice recalling the loan granted to him and secured by the mortgage. Madam Ho then sought the advice of her solicitor, Mr Wong, a conveyancing partner of the law firm of Wong & Lim. She was advised of the consequences of default in payment to Keppel and on his advice decided to sell the property in the open market in the hope of obtaining a better price for it.

4. In or around April or May 1996, Madam Ho was introduced by her daughter, Jeanette, to Ms Lim and her husband, Mr Joseph Wee Woon Chuan (Mr Wee). Ms Lim was both a shareholder and director

of a property development company known as Derby Development Pte Ltd (Derby), while Mr Wee who was also a director was its project manager. At that time, Ms Lim and Mr Wee representing Derby were interested in purchasing the property and proposed a joint development with Madam Ho for the construction of three detached houses on the land, one of which was to be retained by Madam Ho while the other two were to be sold to Derby. During the negotiations, Madam Ho asked for a sum of $6m together with one of the houses to be built on the property as the price for the property. Derby, on the other hand, counter-offered the sum of $4.2m together with one completed house for the property, and required Madam Ho to mortgage the property to a bank or financial institution to raise the necessary finance for the proposed development. On Mr Wongs advice, Madam Ho decided not to participate in the joint development.

5. Subsequently, on 15 July 1996, Derby offered to buy two-thirds of the property for the sum of $4.2m together with a fully-constructed house costing at least $700,000 to be built by Derby on the remaining one-third of the land of Madam Ho. Madam Ho agreed to this offer. On 17 July 1996, she accepted a sum of $88,000 from Derby as Ernest Money for the Re-development of 124 Branksome Road. Following the payment of this amount, on 25 July 1996, Madam Ho gave written permission to Derby to apply to the relevant authority for planning permission for the redevelopment of the property, and Mr Wong, as her solicitor, was instructed to proceed with the preparation of the agreement for the sale of two-thirds of the property as contemplated by the parties.

6. What Mr Wong came up with was an option to be given by Madam Ho to Derby, which upon exercise thereof would become a contract. On 16 August 1996, he sent a copy of the draft option to WLAW, the solicitors for Derby, for their consideration.

7. There arose subsequently a change of parties to the proposed purchase. Ms Lim informed Madam Ho that Derby had failed to secure a construction loan for the development of the property but that Ms Lim herself was able to obtain an overdraft facility in the amount of $6.1m from the bank, Oversea-Chinese Banking Corporation Ltd (OCBC). Under the terms offered by OCBC, $3.7m of the facility was to be used to pay for part of the cost for the land, $2.2m was to be used to pay for the costs of construction of the three houses, and the balance of $200,000 was to be used to service the interest accruing on the amounts borrowed. The overdraft facility was to be secured by a first legal mortgage on the entire property. A copy of the offer document from OCBC was furnished to Madam Ho, who on Mr Wongs advice, agreed to substitute Ms Lim as the purchaser of the property in place of Derby.

8. On 12 September 1996, Ms Jennifer Leong (Ms Leong), the solicitor in charge of this matter at WLAW, returned the draft option to Mr Wong with various amendments. There ensued some lengthy correspondence in exchange between the two firms of solicitors on the terms of the draft option. Whatever difficulties there were confronting the parties in arriving at a mutually satisfactory draft were probably compounded by the fact that, as the property on completion of the purchase was to be mortgaged to OCBC, the interests of the bank would have to be taken into account and incorporated therein. At that time, Ms Leong was also acting for OCBC in the mortgage of the property. In one of her letters to Mr Wong, she wrote that her clients financiers (i.e. OCBC) required the land area of Madam Hos plot to be capped at 5,030 sq. feet, and the relevant clause in the option should be amended to reflect this requirement. This was agreed to by Madam Ho.

9. Eventually all the terms of the option were settled and agreed. The salient terms were as follows:

> 3 The Cash Sale Price of the property is SINGAPORE DOLLARS FOUR MILLION AND TWO HUNDRED THOUSAND

ONLY (S$4,200,000), subject to special conditions enumerated below.

..

17. The Purchaser is entitled to create a paramount mortgage over the property.

The Law Societys Conditions of Sale 1994 were incorporated in the terms of the sale, in so far as they were not inconsistent with those terms and were not varied thereby. The general terms and conditions of sale are not contentious. In addition, there are special conditions to the sale and the material terms thereof are the following:

SPECIAL CONDITIONS

18(a). In addition to the payment of S$4.2 million by the Purchaser, the Purchaser shall deliver a completed detached bungalow unit to the Vendor free from encumbrances. The Vendor shall be at liberty to choose any one of the three units approved by the relevant authority ("the Vendors Unit") within 1 month from the date full details of the approved drawings by the Architect appointed by the Purchaser ("the said Architect") have been presented to the Vendor

18(b) Pursuant to clause 18(a) the Purchaser shall ensure that the approved plan shall not comprise any individual unit with a land area exceeding 5,030 square feet or 5% more than each of the other units. Should any unit exceed the land area stated above which compels the Vendor to choose a unit of less than 5,030 square feet the Vendor shall be entitled to a monetary compensation calculated at $503.00 per square foot for every square foot of the Vendors Unit less than 5,050 square feet.

19. The Purchaser shall obtain consent from the paramount mortgagee to allow the Vendor to lodge a caveat over the Vendors Unit as soon as the private lot is allotted.

..

22 In addition to the cash payment of S$4.2 million and the delivery of one completed unit to the Vendor the Purchaser shall account to the Vendor as one-half of the consideration in excess of S$3.8 million for each of the remaining 2 units after deduction of the costs incurred in the sale thereof. ..

..

> 25. Notwithstanding completion of sale and purchase herein the terms and conditions of this Agreement shall remain in full force and effect between the Vendor and the Purchaser in so far as the same are not fulfilled and shall not merge in the assurance of the said property on completion of the sale and purchaser herein or upon registration of such assurance. ..

10. The option was signed by Madam Ho on 26 September 1996 and was issued soon thereafter to Ms Lim. On 14 October 1996, Ms Lim paid Madam Ho the sum of $332,000 and exercised the option and thereupon a binding sale and purchase agreement was made between the parties. For convenience, we shall hereafter refer to this document as the sale agreement. Before that date, in early October 1996, the layout plan for the development of the proposed three units of detached houses had been drawn up and settled by Ms Lims architects, Atelier Group Architect, and Madam Ho had selected the plot she wanted, namely the plot marked as Plot 3 on the plan. This was evident from the letter dated 2 October 1996 written by Derby to WLAW as the solicitors for OCBC, indicating the particular plot selected by Madam Ho. The letter said:

> *RE: 124 BRANKSOME ROAD*
>
> We refer to the above subject matter and as requested by Mrs Ong Lee Foong from OCBC on the Plot as selected by Madam Ho Kon Kim, we enclose herewith a Plan from M/s Atelier group Architect as ***"Marked Plot 3"*** as selected for your kind attention and transmission.
>
> Kindly also be informed that Notice of Provisional Permission has been granted 20.9.96 and it was our understanding and agreed between our undersigned and Madam Ho that the proposed development for the three units must be of the same plot size and that Madam Ho has the first Option to select her one unit for her own occupation and confirm that there are no changes in the Plot sizes so as to comply to Chief Planner (URA) requirements.

Enclosed in the letter was a plan which delineated the three lots of land on which the three houses were to be built. Hence, as at the date when the sale and purchase agreement was made between Madam Ho and Ms Lim, the parties had already reached agreement on the particular plot of land which Madam Ho had selected and which was to be re-transferred to her on completion of the house pursuant to the sale agreement. In other words, plot 3 had been earmarked as the plot belonging to Madam Ho and to be transferred to her eventually.

11. The sale of the property to Ms Lim was completed on 15 November 1996. On completion, the loan owing to Keppel was repaid and the mortgage in their favour discharged. Simultaneously, the property was transferred to Ms Lim and was mortgaged to OCBC as security for the overdraft facility (described in 7 above). In connection with the overdraft facility, OCBC and Ms Lim entered into a Facility Agreement dated 15 November 1996. The relevant clauses of the agreement provided as follows:

> 15(2) The Bank agrees to discharge the Vendors Unit upon the private lot number being allocated to the Vendors Unit

> subject to the land area of the Vendors Unit not being more than 5,030 square feet provided further that the Vendors Unit shall not have a land area exceeding more than 5% of each of the other 2 Units.
>
> (3) The Bank hereby agrees that upon payment of the Facility of an aggregate amount of $3,500,000.00 or 85% of the sale price whichever is higher paid into the Account by the individual purchaser or purchaser in respect of each of the remaining 2 Units sold and comprised in the Building Project other than the Vendors Unit, the Bank will at any time thereafter at the cost of the Borrower, execute a Deed of Release or Partial Discharge of Mortgage relating to that Unit.

Under cl 1 of the agreement the term Vendor referred to Madam Ho, and the term Vendors Unit referred to the unit selected by Madam Ho for her retention in accordance with the Sale and Purchase Agreement/Option between her and Ms Lim. As we have related, at that time, Madam Hos unit had already been identified and selected by her, namely plot 3, and this was known to all of them, Ms Lim, Ms Leong and OCBC. This was evident from Derbys letter dated 2 October 1996 written to Ms Leong (referred to in 10 above). The information stated in the letter was required by OCBC, and Ms Leong must have informed OCBC accordingly.

12. On 19 June 1997, planning permission for the proposed erection of 3 units of 2-storey detached dwelling houses each with a basement was granted by the competent authority. More particularly, the grant of written permission stated the approved development in the following terms:

> Development of Lot 117-31 Mk 25 at Branksome Road as shown verged red on the proposal/sketch plan (3) in DC414/73-2 for a residential development (comprising 3 units) as follows:
>
> Plot (1) to (3) edged red each for the erection of a 2-storey detached dwelling house with a basement

13. On 17 July 1997, Madam Ho vacated the property and by a letter dated 18 July 1997, Mr Wong informed WLAW of that fact, and at the same time requested for OCBCs permission to lodge a caveat on plot 3 which Madam Ho had selected. There was however no reply. Another letter dated 23 July 1997 from Mr Wong followed requesting for the same thing. There was still no reply forthcoming. Mr Wong repeated his request the third time in August 1997, and the only response from Ms Leong then was that she was still awaiting her clients instructions. Not a word was mentioned by Ms Leong to Mr Wong, nor by Ms Lim to Madam Ho direct, of the material changes that Ms Lim had in the meanwhile made to the financing arrangement affecting the property.

14. Regrettably, only on 11 June 1998, did Mr Wong lodge a caveat on the property to protect Madam Hos interest. It was then discovered, from a title search carried out at the Registry of Titles, that Ms Lim had on 9 May 1997 discharged the OCBC mortgage over the property, and had re-mortgaged it to RHB, as security for credit facilities extended to a three-dollar company named Earling Builders Pte Ltd (Ealing) of which Ms Lim and her husband Mr Wee were directors and shareholders. We shall refer to these facilities and the relevant terms thereof in detail in a moment.

15. When confronted by Madam Ho about the re-mortgage to RHB, Ms Lim confirmed the transactions and explained that she needed more funds to complete the project and that the re-mortgage was a commercial decision taken by her to obtain borrowings at a better rate. She assured Madam Ho that she would however complete the project and would deliver one house to Madam Ho as agreed. As it turned out, that optimism was unwarranted. Not long thereafter, Ms Lim became insolvent and was made a bankrupt. Predictably, her three-dollar company, Earling, also became insolvent and a winding-up order was made against it. Construction works on the property had, in fact, ceased by September 1998, and the proposed three houses remained uncompleted.

16. Madam Ho, naturally upset and disgruntled at the turn of events, decided, no doubt, on the advice of Mr Wong and Mr Ponniah, the latter being the litigation partner in the same law firm, to commence legal proceedings, claiming against Ms Lim, for breach of trust, against RHB for knowing receipt of trust property and against their solicitors WLAW for knowingly assisting Ms Lim and RHB in the breach of trust.

The decision below

17. The trial judge dismissed Madam Hos claims against all the defendants. She held that the action for breach of trust against Ms Lim could not be sustained as there was no fiduciary relationship between her and Madam Ho and that Ms Lim had done her best to comply with her obligations to Madam Ho under the sale agreement. Her eventual failure to convey a house back to Madam Ho was the result only of the 1997 regional economic crisis.

18. The judge referred extensively to the text of the sale agreement in reaching this conclusion, and in particular to its heading which read 124 Branksome Road and to the words contained in the body of the sale agreement to the effect that Madam Ho offered to sell the above-mentioned property. Regard was further had to the transfer and the fact that Consideration therein was described as being Singapore dollars four million and two hundred thousand ($4,200,000) cash consideration and one (1) detached house to be constructed by the Transferee for the Transferor. She held that all these, taken collectively, showed that regardless of whatever Madam Ho may have intended, the sale agreement had the effect of disposing of the entire property to Ms Lim. No trust could be found in favour of Madam Ho as she had received good and valuable consideration for the entire piece of land.

19. As for RHB and WLAW, the judge held that no constructive trust could arise against them. With respect to the latter, she held that they did not owe any duty of care to act in the interests of Madam Ho, who was not their client. She went on to suggest that a fortiori, the action against RHB was unsustainable, given the lack of privity between them and Madam Ho. In view of ss 47 and 49 of the Land Titles Act (Cap 157), the learned judge held that even actual knowledge on RHBs part of Ms Lims contractual obligation to build and convey a bungalow to Madam Ho did not amount to fraud, rendering RHBs title under the mortgage indefeasible.

20. In the light of the above, the judge dismissed Madam Hos claims against all of the defendants. She found no evidence of a want of probity or any unconscionable conduct on the part of the defendants which warranted the imposition of a constructive trust.

21. Pursuant to the courts powers under O 58 r 8 of the Rules of Court, the judge further ordered Mr Ponniah and Mr Wong to pay the costs which Madam Ho was ordered to pay to WLAW and RHB. In this regard, the judge held that Mr Ponniahs and Mr Wongs conduct in instituting a suit against WLAW and RHB amounted to an abuse of process of the court.

22. We turn first to the appeal by Madam Ho against the dismissal of her claim against Ms Lim and RHB. The principal issues arising in this appeal are as follows:

> (i) whether under the sale agreement Madam Ho has an equitable interest in the property, after she had sold and transferred it to Ms Lim;
>
> (ii) if the answer is in the affirmative, whether Ms Lim acted in breach of trust by discharging the OCBC mortgage over the property and re-mortgaging it to RHB;
>
> (iii) if the answers to the questions are in the affirmative, whether RHB hold the mortgage subject to the equitable interest of Madam Ho.

Matrix of circumstances

23. The first issue turns on whether under the sale agreement Madam Ho retains or has any interest in the property after she had sold and transferred it to Ms Lim. In considering this issue, it is necessary to have regard to the matrix of circumstances in which the sale agreement was made. The first thing we note is that what the parties contemplated at the material time was not an out and out sale of the entire property by Madam Ho to a developer for development, and a re-sale by the developer to Madam Ho of a subdivided lot of the property together with the proposed development thereon. Initially, the developer contemplated was Derby, but later Ms Lim was substituted as the developer for the simple reason that she was able to obtain financing from OCBC. Secondly, the property for development purposes has a limited area of 15,173 square feet, and its potential for development was limited. At most, only three detached houses would be allowed to be built thereon, and that was the development the parties had in mind when they were negotiating the transaction. Thirdly, Madam Ho, who had been living there for nearly fifty years, not unnaturally required for herself one of the houses proposed to be built by the developer. This requirement appeared to be acceptable to the developer, as initially the parties were talking of a joint development, which Madam Ho later rejected. What the parties then contemplated was a sale of the property by Madam Ho to the developer with a view to it being re-developed by the construction of three detached houses thereon with one of them being earmarked for and eventually to be re-transferred to her free of any payment. If the development as contemplated had been successful, Madam Ho would at the end of the day have re-transferred to her a subdivided lot with a detached house built on it free of any payment, and the developer would retain or sell to third parties the other two subdivided lots with similar houses built on them respectively. Putting it in another way, if subdivision approval of the property into three subdivided lots had been obtained and separate document of title to each lot had been issued, the contemplated sale would be an out and out sale of two of the subdivided lots at a price comprising: (i) a certain sum in cash, and (ii) the construction of a house on the unsold subdivided lot retained by Madam Ho. As this was not the case, the property could not be dealt with in that way; hence the parties proceeded by way of an agreement with a view to giving effect to what the parties then contemplated. On that basis, rightly or wrongly, the agreement was drawn up and the terms were agreed to. It was in the form of an option which was exercised by Ms Lim. We do not find it necessary for our purpose to pass any judgment on the merits of the sale agreement. We are only concerned with the construction of the sale agreement as agreed to by the parties.

The subject of the sale

24. We now turn to the terms of the sale agreement. The subject of the sale was expressed to be the whole of the property and that was also expressed to be so in the transfer, which was registered,

and on the register of title Ms Lim is the sole registered proprietor of the entire property. The consideration for the sale as expressed in the agreement had two components: (i) the sum of $4.2m, and (ii) the construction of a house estimated to cost about $700,000 on the subdivided lot of the property which Madam Ho had selected and agreed to by Ms Lim, namely the lot marked as plot 3, which was to be re-transferred to Madam Ho free of any payment. Insofar as first component is concerned, it had been paid, and nothing in the point arises. The second component is provided for in special conditions 18(a) and (b), the full terms of which have been set out in 9 above. Under special condition 18 (a), Ms Lim agreed to deliver to Madam Ho a completed detached bungalow unit and to allow Madam Ho to choose one of the three units. The second part of this condition had been satisfied in that Madam Ho had chosen the unit, namely, plot 3. Special condition 18 (b) was inserted as required by OCBC and was intended to limit expressly the area of the subdivided lot to be re-transferred to Madam Ho, such subdivided lot not to exceed 5,030 square feet, which is approximately one-third of the area of the land. There was certainly an obligation on the part of Ms Lim to build a house on the subdivided lot marked as plot 3 lot estimated to cost about $700,000 and on completion to re-transfer that lot to Madam Ho free from encumbrances and without any payment from Madam Ho. The end result is that no amount will be paid by Madam Ho for this subdivided lot. The question is whether any amount was paid by Ms Lim for this particular lot in the purchase of the property under the sale agreement. Plainly not, as a matter of simple deduction. Obviously the price of $4.2m as stated in the sale agreement was calculated on the basis of the area of the land alone, and obviously too that price did not, on our analysis, include a sum payable for the particular lot earmarked for Madam Ho. In so far as any payment is concerned, no amount was paid by Ms Lim for that lot upon the purchase of the property by her under the sale agreement, and by the same token no amount will be paid by Madam Ho on the re-transfer. As this lot was to comprise only an area of 5,030 square feet, which is about one-third of the area of the land, Ms Lim paid only a price representing approximately two-thirds of the agreed value of the property.

25. As between the parties to the sale agreement, a subdivided lot, namely plot 3 had been earmarked for Madam Ho and was intended to be hers. There was certainly an obligation on the part of Ms Lim to build a house thereon and on completion to re-transfer that lot to Madam Ho. Special condition 19 of the sale agreement gave Madam Ho the right to lodge a caveat as soon as the private lot was allotted to her unit, subject to the consent of the paramount mortgagee. The requirement of obtaining such consent did not detract from the right of Madam Ho to lodge a caveat in respect of the lot selected by and earmarked for her. It is also significant that in the facility agreement made between OCBC and Ms Lim a clause was inserted there to provide for the unconditional discharge of Madam Hos unit without any payment, once the private lot had been allotted. Such a clause was intended to protect Madam Hos interest in the property, notwithstanding the mortgage of the entire property. From the transaction as structured in the sale agreement it was intended that Madam Ho should retain and have a beneficial interest in the plot selected by her, namely plot 3, and in our judgment, Madam Ho has a beneficial interest in that plot and Ms Lim holds the beneficial interest of Madam Ho in trust for Madam Ho. The judge below, with respect, erred in holding that Madam Ho had no equitable interest in the property on the ground that she had transferred the entire property to Ms Lim who became the registered proprietor thereof.

Indefeasibility of title of Ms Lim

26. What Ms Lim did at the trial and before us in defence of the claim by Madam Ho is to set up the absolute character of the transfer of the property to her and her title to the property as the registered proprietor to defeat the equitable interest of Madam Ho. This defence is presumably based on s 46(1) of the Land Titles Act (Cap 157, 1994 ed), which is to the effect that a proprietor of registered land holds the land free from all encumbrances, liens, estates and interest whatsoever except such as may be registered or notified in the land-register. On the basis of this section, it is

submitted on behalf of Ms Lim that as Madam Ho had not lodged a caveat to protect her equitable interest, Ms Lim by virtue of that section holds the property free from that interest. We shall consider this section together with s 47 of the Act in a moment. For the present purpose, it is sufficient to say that the short answer to this argument is that s 46(1) has no application as between Ms Lim and Madam Ho. Section 46(2) of the Act provides:

> 2) Nothing in this section shall be held to prejudice the rights and remedies of any person
>
> (a) ..
>
> (b) to enforce against a proprietor any contract to which that proprietor was a party;
>
> (c) to enforce against a proprietor who is a trustee the provisions of the trust;
>
> (d) ..
>
> (e) ..

Therefore, as between Madam Ho and Ms Lim, who were the parties to the agreement, it is not open to Ms Lim to say that the titled she acquired to the property was held free of that equitable interest of Madam Ho.

27. If any further authority is required in support, we need only to quote the following passage of the judgment of Skerrett CJ of the New Zealand Supreme Court in *Tataurangi Tairuakena and Ors v Mua Carr and Ors* [1927] NZLR 688 at 702:

> It was further contended that the registration of the lease under the provisions of the Land Transfer Act confers an indefeasible title upon the respondent Carr. I think that this contention is wholly untenable. The provisions of the Land Transfer Act as to indefeasibility of title have no reference either to contracts entered into by the registered proprietor himself or to obligations under trusts created by him or arising out of fiduciary relations which spring from his own acts contemporaneously with or subsequent to the registration of his interest. This principle appears to be well settled in Australia: See *Cuthbertson v Swan* 11 SALR 102, *Groongall Pastoral Co Ltd v Falkiner* 35 CLR 157, 163, and *Barry v Heider* 19 CLR 197.

This passage was quoted with approval by this Court in *HSBC Trustee (Singapore) Ltd and Anor v Lycee Francais de Singapur* [1996] 2 SLR 24 at 38.

Breach of trust by Ms Lim

28. There is no doubt that the sale of the property by Madam Ho to Ms Lim in terms of the sale agreement was closely linked to the overdraft facility provided by OCBC and secured by the mortgage over the property. During their negotiations for the sale and purchase of the property, Ms Lim or Mr Wee gave to Madam Ho a copy of the letter of offer of facility by OCBC, and the facility offered was expressly required by OCBC to be used for the construction of the development on the property. This was in a way an assurance to Madam Ho that there would be a source of funds available for the

development as contemplated by the parties. The sale agreement in draft at that time it was a draft option was shown to OCBC which was fully apprised of the transaction, and OCBC required the area of the lot earmarked for Madam Ho to be limited to 5,030 square feet, which is about one-third of the area of the property, and this was provided for in special condition 18(b) of the sale agreement. Thus, the sale agreement as drafted incorporated the requirement of OCBC. OCBC in turn, in the Facility Agreement, which was supplemental to the mortgage, by cl 15(2) recognised Madam Hos interest in the property. This provision is of great importance to Madam Ho, and Ms Lim was clearly aware of it. It was a stipulation agreed to between her and OCBC and was intended to give some protection to Madam Ho of her interest in the property, notwithstanding the mortgage of the whole property to OCBC.

29. It is true that there was nothing in the agreement that prohibited or restrained Ms Lim from switching from OCBC to RHB and obtaining fresh finance from the latter. Nor had Ms Lim given an undertaking separately to that effect. However, what Ms Lim did was more than merely switching banks to obtain finance for the development to be carried out on the property. She made use of the property purely for her own purposes: she used the property to secure loans and advances made or to be made to her three-dollar company for purposes which had no relation to the proposed development of the three houses on the property. Madam Ho has an equitable interest in the property which Ms Lim holds in trust for her (Madam Ho). It is implicit in that trust that Ms Lim was to use the property to secure facilities to be used for carrying out the proposed development on the property. There is no question that Ms Lim was aware of her obligation to Madam Ho. She surreptitiously switched the banks and deliberately hid from Madam Ho the fact that she had discharged the OCBC mortgage over the property and re-mortgaged it to RHB to secure facilities granted or to be granted to Earling. This is evident from the fact that as late as July and August 1997, when Mr Wong, very belatedly, wrote to Ms Leong seeking the consent of OCBC to lodge the caveat, not a word was forthcoming from Ms Leong, or for that matter from Ms Lim, of the change of banks and the facilities then granted and secured by the mortgage on the property. The only response from Ms Leong was that she was awaiting her clients instructions. Ms Lims conduct was truly indefensible and there was clearly a want of probity on her part. In our judgment, Ms Lim committed a breach of trust in relation to Madam Hos equitable interest in the property.

Appeal against RHB

30. The appeal against RHB raises a difficult of point of law. The facts, however, are clear. In mid-April 1997 or thereabouts, Ms Lim and Mr Wee sought financing from RHB for their company, Earling, on the security of the property. There was evidence that in their application to the bank for finance, Ms Lim and/or Mr Wee disclosed the sale agreement made with Madam Ho. Certainly the bank was aware of the proposed development of three detached houses on the property. Ms Leong again acted for RHB as well as Ms Lim in the mortgage. It is not in dispute that the bank had notice of Madam Hos interest in the property, and in particular was aware that one of the three subdivided lots was earmarked for Madam Ho, and Ms Lim had an obligation to build a house thereon and to re-transfer it to Madam Ho free of payment. Further, the bank must have known that plot 3 had been selected by Madam Ho and that that was the lot earmarked for Madam Ho which was to be re-transferred to her. Certainly Ms Leong was fully aware that plot 3 was the particular lot earmarked for Madam Ho which was to be re-transferred to her and acting for RHB she must have informed the bank of that fact. After all, she had previously acted for OCBC in the mortgage and knew that this information was required by OCBC in connection with the mortgage of the property, and in her advice to RHB she must have conveyed this information the bank.

31. In the credit application form of RHB dated 14 April 1997, the following note was made:

> One of the detached houses will be given to the previous owner as part of the deal.

and in addition the following comment was stated as the background information:

> Mr Wee bought the property at 124 Branksome Road Singapore for S$4.2m with the condition that one of the newly constructed detached house be given to the seller. One of the remaining 2 units will be sold to his good friend and a valued customer of Bukit Timah Branch, Mr Tan Ang Piow of Sitley Timber Pte Ltd for S$3.5m. The other unit will be sold and is expected to fetch at least S$4m.

Further, in the internal memo dated 5 May 1997 and written by Mr Choong Siew Meng, the branch manager, to Ms Fadlum A Kadir, the manager of the legal department, the following observation was made:

> (1) OD is not meant for construction loan.
>
> (2) Note that T/L of S$3m is to be repaid upon the issuance of TOP, i.e. one unit will be sold to repay the T/L.
>
> (3) Balance S$2m will therefore be secured by the last unit valued for S$4.2m upon completion. Currently, there is an offer to buy over the 2nd unit for S$3.9 million.
>
> (4) Whilst the 3rd unit is to be transferred to the previous land owner free of payment.
>
> Therefore we do not see the need to impose any condition in view that the borrowing is based on land prices valued for $8m and T/L to be repaid upon the issue of TOP.

Thus in their evaluation of the security RHB valued the property in a sum between $7m and $8m, excluding the value of the lot agreed to be re-transferred to Madam Ho.

32. Finally, in the Regulating Agreement made between Ms Lim as the mortgagor, Earling as the borrower and RHB as the mortgagee, which was expressed to be supplemental to the mortgage of the property and was dated the same date as the mortgage, i.e. 9 May 1997, cl 6 of the agreement provided as follows:

> 6. REPAYMENT
>
> (1) The Mortgagor and the Borrower hereby jointly and severally covenant to pay to the Bank in full the Term Loan on the expiry of three (3) months from issuance by the relevant authority of the Temporary Occupation Permit for the three (3) units of 2-storey detached houses on the land comprised in the Mortgaged Property or by the 31st day of March 1999 whichever is the earlier.
>
> (2) In the event that partial discharge of any of the three (3) units of 2-storey detached houses is required, all payments received by the Bank from the sale

price of the units shall be applied towards repayment of the Term Loan and any of the banking facilities or any moneys owing to the Bank in any manner deemed fit by the Bank subject as follows:-

> (a) A partial discharge of the Legal Mortgage will be given for the first unit upon the Banks receipt of eight-five percent (85%) of the sale price which shall have to be sufficient to make full payment of all moneys outstanding under the Term Loan;
>
> (b) A partial discharge of the Legal Mortgage will be given free of payment for the second unit provided that the second unit is transferred to the previous land owner or as he may direct in accordance with the agreement between the Mortgagor and the previous land owner;
>
> (c) The third unit will remain mortgaged to the Bank to secure the balance of the banking facilities and the Mortgagor and the Borrower shall seek the Banks prior consent in writing on the sale price prior to selling the third unit. A discharge of the third unit will be given upon the Banks receipt of eight-five (85%) of the sale price which shall have to be sufficient to make full payment of all the banking facilities then outstanding by the Mortgagor and the Borrower to the Bank under the Mortgage, this agreement and the loan Agreement.

33. Before we proceed further, we should deal with the construction of this clause. It provided for a partial discharge of the three units of detached houses intended to be built on the property and was expressed to be subject to the three paragraphs following, namely, (a), (b) and (c). It is quite clear from the contents of these paragraphs that each paragraph was independent of the others and each applied to a particular situation when it came to discharging the particular unit concerned. First, paragraph (a) applied to the unit which was to be sold. The bank would discharge the mortgage on this unit upon receipt of 85% of the proceeds of sale of that unit which would be sufficient to pay off the full amount of the term loan. As stated in the internal memo of 5 May 1997 (referred to in 31 above), the term loan of $3m was to be paid from the proceeds of sale of one of two units intended to be sold. Next, we come to paragraph (b). That paragraph applied to the second unit i.e. Madam Hos unit, and it provided specifically that a discharge of the mortgage over this unit was to be given free of payment, and the only condition or term attached to it was this: provided that the second unit is to be transferred to the previous landowner, i.e. Madam Ho, or as she may direct in accordance with the sale agreement. Lastly, paragraph (c) applied to the third unit, which was to remain mortgaged to the bank to secure the balance of the banking facilities and would be discharged only on certain terms and conditions. We are therefor unable to accept the contention advanced on behalf of RHB that the discharge of the mortgage of Madam Hos unit was subject to the payment of 85% of the proceeds of sale of first unit or the third unit.

34. Returning to cl 6(2) and in particular paragraph (b) thereof, we do not think that it is a term or condition which RHB on their own initiative offered or provided. They were advised by Ms Leong and they knew that Madam Ho had an equitable interest in the property and that interest was an unregistered interest. At least, Ms Leong acting for them certainly knew this, and this information must have been conveyed to them. The inference we draw is that Ms Leong must have advised the

bank accordingly. They could, as a mortgagee, have taken the mortgage of the property free of any unregistered interest. They did not have to acknowledge or recognise such interest. But the fact of the matter was that they did. Indeed, they did more than recognising it.

35. There was evidence that cl 6(2) was a term which was specifically negotiated and agreed to between Ms Lim and RHB which reflected their common understanding of Ms Lims obligations to Madam Ho under the sale agreement. Ms Lim in her affidavit evidence said that by that provision, namely cl 6(2) she had taken the necessary precautions to preserve the plaintiffs [Madam Hos] interest in obtaining one (1) bungalow unit free from encumbrances as was [Ms Lims] obligations under the agreement. She then said:

> This understanding is bolstered by the fact that Sime Bank [RHB Bank] was always aware of my said obligations to the Plaintiff. Sime Bank had clearly informed me that they would respect my said obligations within the Regulating Agreement between Sime Bank and me so that the Plaintiff would receive her bungalow unit free from encumbrances.

In her evidence in court she said that if cl 6(2) were not inserted in the Regulating Agreement, she would not have taken the loan from RHB. There was no finding by the judge below on this point; however, it seems to us that what she said was substantially the truth. We think that the term was specifically negotiated and agreed to between Ms Lim and RHB. In that respect, Ms Leong, as the lawyer acting for both parties, must have played her part in advising on the requirement of that clause. Her understanding of the purpose of this clause is also significant. In her letter to Mr Wong on 23 August 1999, Ms Leong said:

> Sime Bank acknowledges that one unit (your clients) will be discharged free of payment on condition that the said unit is transferred to you client being the previous land owner or as she may direct in accordance with the agreement between you client and Madam Betsy Lim.

36. Therefore in taking the mortgage on the property RHB not only had notice and full knowledge of the equitable interest of Madam Ho in the property but also acknowledged and recognised her interest. In their evaluation of the property as security for the facilities granted to Earling, they had discounted the value of her interest and was quite prepared to discharge the mortgage over her lot free of any payment. In addition, by the Regulating Agreement they not only acknowledged the interest of Madam Ho in the lot earmarked for her but also agreed (with Ms Lim) that the lot would be discharged without any payment. In these circumstances, the question that arises is whether it is unconscionable for the bank to assert their absolute rights as a mortgagee over the whole of the property and repudiate that interest of Madam Ho in respect of which they had earlier acknowledged and agreed with Ms Lim, and whether a constructive trust should be imposed on RHB in respect of Madam Hos interest.

Land Titles Act

37. If the property is not held under the Land Titles Act, the position is very clear. As RHB took the mortgage with the full knowledge of Madam Hos interest in the property, and also acknowledged her interest, their interest as the mortgagee would be subject to the prior interest of Madam Ho. Equity would impose a constructive trust on RHB to protect the interest of Madam Ho. As the property is registered land held under the Land Titles Act, the question is whether such a constructive could and should be imposed in the circumstances.

38. The main argument advanced on behalf of RHB is that there was no entry in the register of titles of Madam Hos interest, and therefore they took the property as a mortgagee free of that interest. They rely on the absolute character of their title as the registered mortgagee. The relevant provisions of the Land Titles Act which they invoke are ss 46 and 47 which, so far as relevant, are as follows:

> 46. (1) Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the State or otherwise, which but for this Act might be held to be paramount or to have priority, and notwithstanding any failure to observe the procedural requirements of this Act, any person who becomes the proprietor of registered land, whether or not he dealt with a proprietor, and notwithstanding any lack of good faith on the part of the person through whom he claims, shall hold that land free from all encumbrances, liens, estates and interests whatsoever except such as may be registered or notified in the land-register .
>
> (2) Nothing in this section shall be held to prejudice the rights and remedies of any person
>
> (a) to have the registered title of a proprietor defeated on the ground of fraud or forgery to which that proprietor or his agent was a party or in which he or his agent colluded;
>
> ..
>
> 47. (1) Except in the case of fraud, no person dealing with a proprietor or with a person who is entitled to become a proprietor shall be required or in any manner concerned to inquire or ascertain the circumstances in or the consideration for which the current proprietor or any previous proprietor is or was registered, or to see to the application of the purchase money or any part thereof, or is affected by notice (actual or constructive) of any bankruptcy proceeding, trust or other unregistered interest whatsoever, any rule or law or equity to the contrary notwithstanding; and the knowledge that any unregistered interest is in existence shall not of itself by imputed as fraud.

39. It is clear that both these sections are designed to provide for indefeasibility of title of a registered proprietor of the land held under the Land Titles Act. On the basis of these provisions, persons dealing with the registered proprietor are not required to go behind the title in order to investigate the history of the latters title and to satisfy themselves of its validity: per Lord Watson in *Gibbs v Messer* [1891] AC 248 at 254.

40. There are of course exceptions to the indefeasibility of title. In *Teo Siew Peng and Anor v Neo Hock Pheng and Ors* [1999] 1 SLR 293, Lai Siu Chiu J considered two of such exceptions as relevant to the case before her. She said at p 302:

> 18 [T]here are two exceptions to the indefeasibility of title conferred on the plaintiffs that are of relevance here. Firstly, s 38(2) provides for the fraud exception and makes clear that the fraud necessary to defeat the title of a proprietor must be brought home to the proprietor or his agent. In *Grgic v Australian and New Zealand Banking Group Ltd* (1994) 33 NSWLR 202, while commenting on similar Torrens legislation, the New South Wales Court of Appeal

reaffirmed (per Powell JA at p 221):

> the position still remains that, for the purposes of s 42 of the [Real Property] Act, fraud comprehends actual fraud, personal dishonesty or moral turpitude on the part of the registered proprietor of the subject estate or interest or that registered proprietors agents
>
> Although it is now accepted that not all species of equitable fraud stand outside the concept of fraud those species of equitable fraud which are regarded as falling within the concept of fraud are those in which there has been an element of dishonesty or moral turpitude on the part of the registered proprietor or his agent.

19 Secondly, cases such as *Frazer v Walker* [1967] 1 AC 569 and *Bahr v Nicholay (No 2)* (1988) 62 ALJR 268 established that the indefeasibility of title conferred by s 38 does not prevent claims in personam being made against the registered proprietor by reason of his own conduct. Such an exception was accepted by the recent local decision in *United Overseas Finance Ltd v Victor Sakayamary & Ors* [1997] 3 SLR 211 as being consistent with the scheme of registration under the Act.

Her decision on appeal was reversed in part; however, the above passage of her judgment remained unaffected.

41. For our purposes, we need to consider only these two exceptions. In this regard, we find helpful the decision of the High Court of Australia in the case of *Bahr and Anor v Nicolay and Ors* 164 CLR 604, 78 ALR 1. It is necessary to deal with this case in some detail and consider the judgments there in extenso. The facts were not too complicated. The appellants had a licence to occupy certain Crown land known as Lot 340. The licence carried with it the right to call for a Crown grant of Lot 340 upon the erection of commercial premises by 14 August 1980. In order to finance the building on Lot 340, the appellants entered into an agreement with the first respondent (the first agreement) under which they would sell Lot 340 to the latter, lease it back for three years and thereafter buy it back. Clause 6 of the first agreement provided as follows:

> 6 The vendors hereby further agree that upon the expiration of the lease contained in cl 5 hereof they will enter into a contract with the purchaser for the purchase by the vendors of the land for a sum of FORTY FIVE THOUSAND DOLLARS ($45,000) payable by way of TEN (10) per cent deposit with the balance of the purchase moneys to be paid at settlement. Settlement is to be effected thirty (30) days after payment of the deposit.

The appellants interest was never at any material time noted on the register of titles. On 26 December 1981, the first respondent sold Lot 340 to the second respondents under an agreement (the second agreement). Clause 4 of this agreement merely provided that the second respondents acknowledged that an agreement exists between the appellants and the first respondent. The second respondents subsequently became the registered proprietors of Lot 340. Soon thereafter, the second respondents through their solicitors wrote to the appellants solicitors confirming that they would sign an offer to sell Lot 340 to the appellants for $45,000 plus any improvement at cost. Prior to the lease expiring, the appellants solicitors confirmed that their clients intended to purchase the land and sent

a cheque for $4,500 by way of deposit. This was not accepted by the second respondents who then refused to sell the land to the appellants. The appellants brought an action against the first and second respondents claiming, inter alia, specific performance of the first agreement. The claim was resisted, and ss 68 and 134 of the Australian Transfer of Land Act 1893 (the equivalent of ss 46 and 47 of our Land Titles Act) were relied upon in the defence. The High Court of Australia held unanimously that in the circumstances a trust arose in favour of the appellants and the second respondents held Lot 340 subject to the rights of the appellants. However, the reasoning of the judges in arriving at this conclusion differed.

42. Mason CJ and Dawson J in their joint judgment held that cl 6 of the first agreement created an equitable estate or interest in Lot 340 enforceable against the first respondents and the second respondents. Turning to cl 4 of the second agreement, they construed it as follows (164 CLR 604 at 612, 78 ALR 1 at 4-5):

> By cl 4 of the agreement between the first respondent and the second respondents, the second respondents "acknowledged that an agreement exists" between the appellants and the first respondent, that agreement being the undated 1980 agreement. The clause does not purport to create in favour of the appellants new rights over and above those previously existing. In terms it acknowledges the existence of the earlier agreement. Although the precise effect of the clause must be left for later consideration, it necessarily involves an acknowledgment of such rights as the appellants may have had under the earlier agreement.

Their Honours later considered the matrix of circumstances and said (164 CLR 604 at 616, 78 ALR 1 at 7):

> Viewed in this setting, cl 4 of the later agreement was designed to do more than merely evidence the fact that the second respondents had notice of the appellants rights. If that were the only purpose to be served by the acknowledgment it would achieve nothing. It would enable the second respondents to destroy the appellants interest and would leave the first respondent exposed to potential liability for breach of contract at the suit of the appellants. In the circumstances outlined it is evident that the purpose of cl 4 was to provide that the transfer of title to Lot 340 was to be subject to the appellants rights under cl 6 of the 1980 agreement in the sense that those rights were to be enforceable against the second respondents.

Their Honours found that cl 4 of the second agreement constituted an express trust, and held (164 CLR 604 at 619, 78 ALR 1 at 9):

> The trust is an express, and not a constructive, trust. The effect of the trust is that the second respondents hold Lot 340 subject to such rights as were created in favour of the appellants by the 1980 agreement [the first agreement]:
>
> Even if we had not reached this conclusion, we would not have regarded the registration of the transfer in favour of the second respondents as destroying the appellants rights. Having regard to the intention of the parties expressed in cl 4 of the later agreement, the subsequent repudiation of cl 6 of the 1980 agreement constituted fraud. The case therefore fell within the statutory exception with the result that the appellants prior equitable interest prevails over

> the second respondents title, the second respondents taking with notice of that interest.

43. Wilson and Toohey JJ in their joint judgment held also that cl 6 of the first agreement created an equitable estate or interest in favour of the appellants. Their Honours did not find that there was sufficient evidence to impute fraud on the part of the second respondents, but they found that the second respondents bought the property on the understanding that they would be bound by the obligation to the appellants as contained in the agreement between the appellants and the first respondent, and held (164 CLR 604 at 638-639, 78 ALR 1 at 24):

> The second respondents bought Lot 340 on the understanding common to vendor and purchasers that they were so bound and cl 4 was included to give effect to that understanding. Clause 4 may have been, of itself, insufficient for that purpose but the second respondents letter of 6 January 1982 and their two offers of 8 January 1982 put beyond doubt their acknowledgment of their obligation to the appellants.
>
> By taking a transfer of Lot 340 on that basis, and the appellants interest under cl 6 constituting an equitable interest in the land, the second respondents became subject to a constructive trust in favour of the appellants: *Lyus v Prowsa Developments Ltd; Binions v Evans* [1972] Ch 359 at 368. If it be the position that the appellants interest under cl 6 fell short of an equitable estate, they none the less had a personal equity enforceable against the second respondents. In either cases ss 68 and 134 of the TLA would not preclude the enforcement of the estate or equity because both arise, not by virtue of notice of them by the second respondents, but because of their acceptance of a transfer on terms that they would be bound by the interest the appellants had in the land by reason of their contract with the first respondent.

44. Brennan J (as he then was), the fifth member of the Court, like the other four judges, held the same view that cl 6 of the first agreement conferred on the appellants an equitable interest in the land, and went on to hold (164 CLR 604 at 647-648, 78 ALR 1 at 31) as follows:

> The consequence of inserting cl 4 into the Thompsons contract [second agreement] was that the Thompsons [the second respondents] acknowledged not only the fact that the Bahrs contract existed but also that the interest which they were purchasing was subject to the interest which the Bahrs had under cl 6 of the Bahrs contract. But cl 4 is more than an acknowledgment of a fact; in its context it appears to be a contractual stipulation. It is one of a number of "Conditions" in the Thompsons offer to purchase Lot 340 which Nicolay, by his attorney Robertson, accepted, and the offer was expressed to be "subject to the Conditions". By reference to the Bahrs contract (to which cl 4 refers), it would have been apparent to the parties to the Thompsons contract or, more realistically, it ought to have been apparent to their legal advisers that Nicolay would be in breach of cl 6 of the Bahrs contract unless cl 4 of the Thompsons contract is a contractual stipulation that the Thompsons title on completion was to be subject to the Bahrs interest. Having regard to the context in which cl 4 is found in the Thompsons contract and the relationship between the vendor Nicolay and the Bahrs which appears on the face of the Bahrs contract, I construe cl 4 not as a mere acknowledgment of a fact but as a term of the contract limiting the purchasers interest by defining the interest to which

the purchasers title should be subject.

Dealing with the argument based on the indefeasibility of title under ss 68 and 134 of the Transfer of Land Act, Brennan J held (164 CLR 604 at 653, 78 ALR 1 at 35) that the title of a purchaser who not only had notice of an antecedent unregistered interest but who purchased on terms that he would be bound by the unregistered interest was subject to that interest. Equity would compel him to perform his obligation.

Concept of fraud

45. We consider first the concept of fraud in relation to the conduct of RHB and determine whether there was any fraud committed by RHB in disregarding the interest of Madam Ho in the property. The term fraud in the Land Titles Act means actual fraud, i.e. dishonesty of some sort, and not constructive or equitable fraud: *Assets Company Limited v Mere Roihi and Ors* [1905] AC 176, 210, and *Waimiha Sawmill Company, Limited (in liquidation) v Waione Timber Company, Limited* [1926] AC 101, 106. In *Bahr v Nicolay* (supra), Mason CJ and Dawson J said (164 CLR 604 at 614, 78 ALR 1 at 6) that these authorities do not mean that all species of equitable fraud stand outside the statutory concept of fraud, and in their view the statutory concept of fraud means actual fraud, personal dishonesty or moral turpitude. Their Honours held that fraud could arise both from dishonest repudiation of a prior interest which the registered proprietor had acknowledged or had agreed to recognise as the basis for obtaining the title, as well as for fraudulent conduct which enabled him to obtain the title by registration. The Court of Appeal of New South Wales in *Grgic v Australian and New Zealand Banking Group Ltd* (1994) 33 NSWLR 202 at 221 said:

> [F]or the purpose of s 42 of the Act, "fraud" comprehends actual fraud, personal dishonesty or moral turpitude on the part of the registered proprietor of the subject estate or interest or of that registered proprietors agents: see *Bahr v Nicolay [No 2]* (at p 614) per Mason CJ and Dawson J; (at 631-632) per Wilson J and Toohey J. Although it is now accepted that not all species of equitable fraud stand outside the concept of "fraud" which has been adopted for the purposes of s 42 of the Act (see, eg, *Latec Investments Ltd and Hotel Terrigal Pty Ltd (In Liq)* (1965) 113 CLR 265 at 273-274 per Kitto J; *Bahr v Nicolay [No 2])* those species of "equitable fraud" which are regarded as falling within the concept of "fraud" for the purposes of s 42 are those as for example, a collusive and colourable sale by a mortgagee company to a subsidiary (*Latec Investment Ltd v Hotel Terrigal Pty Ltd (in Liq)* (at 273-274)) in which there has been an element of dishonesty or moral turpitude on the part of the registered proprietor of the subject interest or on the part of his or its agent.

It has also been held that merely to take a transfer of land with notice of an existing unregistered interest or with actual knowledge that its registration will defeat such an interest is not fraud: see *Mills and Anor v Stockmand and Anor* (1966) 116 CLR 61, 78; *Friedman v Barret, Ex p Friedman* [1962] Qd R 498, 512.

46. There is no doubt that RHB repudiated the unregistered interest of Madam Ho and reneged from the agreement made with Ms Lim with regard to Madam Hos interest as provided in cl 6(2)(b) of the Regulating Agreement. However, such repudiation does not amount to fraud, personal dishonesty or moral turpitude on their part. The facts in the instant case do not justify a finding of dishonest repudiation of an unregistered interest. In our judgment, what RHB did certainly did not amount to fraud.

Claim in personam

47. The next question is whether Madam Ho has a claim in personam against RHB founded in law or in equity. In *Alan Frederic Frazer v Douglas Hamilton Walker ([1967 1 All ER 649 at 655, [1967] AC 569 at 585), Lord Wilberforce said:*

> [T]heir Lordships have accepted the general principle that registration under the Land Transfer Act, 1952, confers upon a registered proprietor a title to the interest in respect of which he is registered which is (under sections 62 and 63) immune from adverse claims, other than those specifically excepted. In doing so they wish to make clear that this principle in no way denies the right of a plaintiff to bring against a registered proprietor a claim in personam, founded in law or in equity, for such relief as a court acting in personam may grant. That this is so has frequently, and rightly, been recognised in the courts of New Zealand and of Australia: see, for example, *Boyd v Mayor, Etc of Wellington* [1924] NZLR 1174, 1223, and *Tataurangi Tairuakena v Mua Carri* [1927] NZLR 688, 702.

48. Similar pronouncements were made by the judges of the High Court of Australia in *Bahr v Nicolay* (supra). Mason CJ and Dawson J said (164 CLR 604 at 612, 78 ALR 1 at 5):

> Sections 68 and 134 give expression to, and at the same time qualify, the principle of indefeasibility of title which is the foundation of the Torrens system of title. ..
>
> Neither the two sections nor the principle of indefeasibility preclude a claim to an estate or interest in land against a registered proprietor arising out of the acts of the registered proprietor himself: *Breskvar v Wall* (1971) 126 CLR 376 at 384-5. Thus, an equity against a registered proprietor arising out of a transaction taking place after he became registered as proprietor may be enforced against him: *Barry v Heider* (1914) 19 CLR 197. So also with an equity arising from conduct of the registered proprietor before registration (*Logue v Shoalhaven Shire Council* [1979] 1 NSWLR 537 at 563), so long as the recognition and enforcement of that equity involves no conflict with ss 68 and 134. Provided that this qualification is observed, the recognition and enforcement of such an equity is consistent with the principle of indefeasibility and the protection which it gives to those who deal with the registered proprietor on the faith of the register.

And Wilson and Toohey JJ, having referred to *Frazer v Walker*, said (164 CLR 604 at 638, 78 ALR 1 at 23-24):

> The reference to ss 62 and 63 is a reference to the Land Transfer Act 1952 (NZ), roughly corresponding to ss 68 and 199 of the TLA. The point being made by the Privy Council is that the indefeasibility provisions of the Act may not be circumvented. But, equally, they do not protect a registered proprietor from the consequences of his own actions where those actions give rise to a personal equity in another. Such an equity may arise from conduct of the registered proprietor after registration: *Barry v Heider* (1914) 19 CLR 197. And we agree with Mahoney JA in *Logue v Shoalhaven Shire Council* [1979] 1 NSWLR 537 at 563 that it may arise from conduct of the registered proprietor before registration.

Constructive Trust

49. We once again return to the facts. At the time, when RHB took the mortgage of the property, they had knowledge of the sale agreement made between Madam Ho and Ms Lim and recognised Madam Hos equitable interest in the property. They made an allowance of her interest and discounted it in their evaluation of the property as security for the overdraft facilities offered to Earling. By cl 6(2)(b) of the Regulating Agreement they not only expressly acknowledged and recognised the existence of Madam Hos equitable interest in the property but also committed themselves to discharging the mortgage on the plot of land of Madam Ho without any payment. As we have said, this was not a clause provided by RHB on their own initiative. It was obviously negotiated by Ms Lim with a view to protecting the interest of Madam Ho, and the bank agreed to it. That was certainly the understanding of Ms Leong the solicitor acting for both RHB and Ms Lim. Thus, cl 6(2)(b) was a stipulation of the bargain RHB made with Ms Lim that they would be bound by Madam Hos interest in the property. In our opinion, the effect of this stipulation is that RHB had accepted the particular plot of Madam Ho as not being subject to the mortgage, thereby preserving Madam Hos interest in the property. Having taken the mortgage of the property on that basis, it is, in our opinion, utterly inequitable for RHB to renege from their obligation and insist on the absolute nature of their interest as a mortgagee of the whole of the property and repudiate the equitable interest of Madam Ho in the property. Such a stand taken by RHB is certainly unconscionable, though not fraudulent or dishonest. In the circumstances, equity would compel them to honour their obligation and a constructive trust ought to be imposed. In our judgment, RHB took the mortgage of the property subject to the constructive trust in favour of Madam Ho.

50. The present case is in a way not distinguishable from *Bahr v Nicolay*. There the second respondents by cl 4 of the second agreement merely acknowledged the existence of the first agreement and subsequently through their solicitors they offered to transfer Lot 340 on certain terms. Wilson and Toohey JJ held that by taking a transfer on that basis they agreed to be bound by the interest of the plaintiffs in the land. In the present case, RHB in taking the mortgage acknowledged Madam Hos equitable interest in the property and by the Regulating Agreement made with Ms Lim agreed to be bound by that interest in the property.

51. Bahr v Nicolay is not the only authority in point. The case of *Binions and Anor v Evans* [1972] 2 All ER 70, [1972] Ch 359 is also of some assistance. There, the trustees of an estate, in which the defendants late husband had been working, entered into an agreement with the defendant whereby she was allowed to stay at the cottage in the estate as a tenant at will free of rent for the remainder of her life or until determined as provided in the agreement. Later, the trustees sold the estate to the plaintiffs and gave them a copy of the agreement so as to protect the defendants occupation, and as a result the plaintiffs paid a reduced price for the estate. Subsequently, the plaintiffs having bought the estate sought to recover vacant possession of the cottage from the defendant. The judge at county court dismissed the claim holding that the plaintiffs held the cottage on trust to permit her to stay there. On appeal, the Court of Appeal unanimously held that, when the cottage was sold to the plaintiffs subject to the defendants right under the agreement, the plaintiffs took the cottage on a constructive trust to permit her to reside there during her life or as long as she desired. Lord Denning MR in his judgment said ([1972] 2 All ER 70 at 76, [1972] Ch 359 at 368):

> Suppose, however, that the defendant did not have an equitable interest at the outset, nevertheless it is quite plain that she obtained one afterwards when the Tredgar Estate sold the cottage. They stipulated with the plaintiffs that they were to take the house "subject to" the defendants rights under the agreement. They supplied the plaintiffs with a copy of the contract: and the plaintiffs paid less because of her right to stay there. In these circumstances, this court will

> impose on the plaintiffs a constructive trust for her benefit: for the simple reason that it would be utterly inequitable for the plaintiffs to turn the defendant out contrary to the stipulation subject to which they took the premises. That seems to me clear from the important decision of *Bannister v Bannister* [1948] 2 All E.R. 133, which was applied by the judge, and which I gladly follow.
>
> This imposing of a constructive trust is entirely in accord with the precepts of equity. As Cardozo J once put it: "A constructive trust is the formula through which the conscience of equity finds expression," see *Beatty v Guggenheim Exploration Co* (1919) 225 N.Y. 380, 386: or, as Lord Diplock put it quite recently in *Gissing v Gissing* [1971] A.C. 886, 905, a constructive trust is created "whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired."

Later, in the same page, the learned Master of the Rolls said:

> Whenever the owner sells the land to a purchaser, and at the same time stipulates that he shall take it "subject to" a contractual licence, I think it plain that a court of equity will impose on the purchaser a constructive trust in favour of the beneficiary. It is true that the stipulation (that the purchaser shall take it subject to the rights of the licensee) is a stipulation for the benefit of one who is not a party to the contract of sale; but, as Lord Upjohn said in *Beswick v Beswick* [1986] A.C. 58, 98, that is just the very case in which equity will "come to the aid of the common law." It does so by imposing a constructive trust on the purchaser. It would be utterly inequitable that the purchaser should be able to turn out the beneficiary.

52. Another case in point is *Lyus and Anor v Prowsa Developments Ltd and Anor* [1982] 2 All ER 953, [1982] 1 WLR 1044. The plaintiffs there entered into a contract with the developer to purchase a plot of land, plot 29, together with a house to be built on it by the developer. The developer subsequently became insolvent and the bank as the mortgagee of the entire estate sold the land including plot 29 to the first defendant. The first defendants had full knowledge of the plaintiffs contract in respect of plot 29. Although the bank as the mortgagee was not in fact bound by the contract with the plaintiffs, they nevertheless sold the land which included the plot 29 subject to and with the benefit of that plaintiffs contract. However, the subsequent transfer contained no mention of the contract. The first defendant then sold plot 29 together with other parcels of land to the second defendants who were the builders. By a special condition in their agreement, plot 29 was also sold subject to and with the benefit of the plaintiffs contract. On completion of the sale, the second defendants became the registered proprietors of, inter alia, plot 29 and the register of titles was clear of any reference to the plaintiffs or their contract. The plaintiffs instituted proceedings against the first and the second defendants, claiming specific performance of their contract on the ground that the defendants by the special conditions in their respective contracts were bound by the constructive trust to complete their contract. Dealing first with the contract between the bank and the first defendant, Dillon J held that the special condition was not inserted for the protection of the bank but was a stipulation of the bargain between them that the first defendant would give effect, in relation to plot 29, to the plaintiffs contract. That being so, the first defendant having accepted the land under the agreement made with the bank and the consequent transfer, held plot 29 under a constructive trust to give effect to the plaintiffs contract. Such constructive trust was also imposed on the second defendants by virtue of the special condition in the contract with the first defendants. The learned judge said at p 961:

> I conclude that cl 11 was not inserted in the agreement of 18 October 1979 solely for the protection of the bank, like cl 7 of that agreement which sets out other matters subject to which the property was sold, and I conclude that it was a stipulation of the bargain between the bank and the first defendant that the first defendant would give effect, in relation to plot 29, to the contract which had been made between the vendor company and the plaintiffs.
>
> If that is correct, it would follow, in my judgment, from the judgment of Scott LJ in *Bannister v Bannister*, and from the judgment of Lord Denning MR in *Binions v Evans*, that, unless the Land Registration Act requires a different conclusion, the first defendant, having accepted the land under the agreement of 18 October 1979 and the consequent transfer, holds plot 29 on a constructive trust in favour of the plaintiffs to give effect to the plaintiffs contract. That trust is also imposed on the second defendants by virtue of condition (b) of their agreement with the first defendants.

53. Turning to the Land Registration Act, Dillon J held that although it was not fraud to rely on the legal rights conferred by the Act, the first and second defendants could not rely on the Act as an instrument of fraud to renege from the bargains which they had made in acquiring the land. He said at p 962:

> It seems to me that the fraud on the part of the defendants in the present case lies not just in relying on the legal rights conferred by an Act of Parliament, but in the first defendant reneging on a positive stipulation in favour of the plaintiffs in the bargain under which the first defendant acquired the land. That makes, as it seems to me, all the difference. It has long since been held, for instance in *Rochefoucauld v Boustead* [1897] 1 Ch 196, that the provisions of the Statute of Frauds 1677, now incorporated in certain sections of the Law of Property Act 1925, cannot be used as an instrument of fraud, and that it is fraud for a person to whom land is agreed to be conveyed as trustee for another to deny the trust and relying on the terms of the statute to claim the land for himself. *Rochefoucauld v Bouster* was one of the authorities on which the judgment in *Bannister v Bannister* was found.
>
> It seems to me that the same considerations are applicable in relation to the Land Registration Act 1925. If, for instance, the agreement of 18 October 1979 between the bank and the first defendant had expressly stated that the first defendant would hold plot 29 on trust to give effect for the benefit of the plaintiffs to the plaintiffs agreement with the vendor company, it would be difficult to say that that express trust was overreached and rendered nugatory by the Land Registration Act 1925. The Land Registration Act 1925 does not, therefore, affect the conclusion which I would otherwise have reached in reliance on *Bannister v Bannister* and the judgment of Lord Denning MR in *Binions v Evans*, had plot 29 been unregistered land.

In the result, the learned judge held that the second defendants held plot 29 on constructive trust to complete the house and he was ordered to convey the plot back to the plaintiffs for the price agreed in the original contract.

Conclusion

54. We therefore allow the appeal against the dismissal of Madam Hos claim against Ms Lim and RHB and set aside the judgment below in so far as it relates to such dismissal. We now turn to the question of the relief we should grant. Under the sale agreement, the lot earmarked for Madam Ho is the lot marked plot 3, the area of which is about one-third of the area of the property. As no subdivision approval has been obtained, it would be impracticable to grant a declaration of her equitable interest in this plot. We therefore make the declarations and orders as follows:

> (1) As against Ms Lim, we make a declaration that she holds an undivided one-third share of the property on trust for Madam Ho and further that Ms Lim committed a breach of trust and is accountable to Madam Ho for the loss she has sustained. There will be judgment for payment of damages for such loss. As Ms Lim is now a bankrupt, we do not think that any point will be served by directing an assessment of damages. We therefore give Madam Ho liberty to apply for assessment of damages, if she so wishes;
>
> (2) As against RHB, we make a declaration that RHB as the mortgagee of the property hold the undivided one-third share of Madam Ho in the property on trust for Madam Ho and that, as and when they exercise the power of sale, to account to her one-third of the net proceeds of sale after deducting all the expenses incurred in the sale.

There may be other orders we should make consequent on our decision given above. Parties are at liberty to tender written submissions on such further orders within seven days from the date hereof.

55. We award costs here and below to Madam Ho as against Ms Lim and RHB. There will be the usual consequential order for the refund to Madam Ho of the deposit in court, with interest, if any.

Civil Appeal No. 167 of 2001

56. We now turn to Civil Appeal No. 167 of 2001 which is an appeal by Mr Wong and Mr Ponniah against the learned judges order that they bear Madam Hos costs payable to WLAW and RHB.

57. The courts power to make such an order for costs against an advocate and solicitor is derived from O 59 r 8 of the Rules of Court. The relevant part of the rule states:

> (1) Subject to this Rule, where it appears to the Court that costs have been incurred unreasonably or improperly in any proceedings or have been wasted by failure to conduct proceedings with reasonable competence and expedition, the Court may make against any solicitor whom it considers to be responsible (whether personally or through an employee or agent) an order
>
> > (a) disallowing the costs as between the solicitor and his client; and
> >
> > (b) directing the solicitor to repay to his client costs which the client has been ordered to pay to other parties to the proceedings; or
> >
> > (c) directing the solicitor personally to indemnify such other parties against costs payable by them.

58. The scope of this jurisdiction was comprehensively considered by the English Court of Appeal in *Ridehalgh v Horsefield & Anor* [1994] 3 All ER 848, [1994] Ch 205 which dealt with a corresponding provision in the English Rules of Supreme Court. There, the court approved the three-stage test as conceived in the earlier case of *Re A Barrister (Wasted Costs Order) (No 1 of 1991)* [1992] 3 All ER 429 at 435, [1993] QB 293 at 301. The Court laid down the three-stage test, ([1994] 3 All ER 848 at 861, [1994] Ch 205 at 231):

> (1) Has the legal representative of whom complaint is made acted improperly, unreasonably or negligently? (2) If so, did such conduct cause the applicant to incur unnecessary costs? (3) If so, is it in all the circumstances just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs? (If so, the costs to be met must be specified and, in a criminal case, the amount of the costs.)

The tests and propositions of law laid down in that case were cited with approval by this Court in *Tang Liang Hong v Lee Kuan Yew & Anor and other appeals* [1998] 1 SLR 97, and it is not necessary to repeat them here.

59. The question here is whether Mr Ponniah and Mr Wong can be said to have acted improperly, unreasonably and negligently in advising Madam Ho to claim against WLAW and RHB and also in acting for her in pursuing the claim. It is submitted on their behalf that their actions in so advising Madam Ho and acting for her in pursuing her claim against WLAW and RHB were not improper, unreasonable or negligent. Madam Ho had a prima facie case against Ms Lim for breach of trust or for the imposition of a constructive trust. Since WLAW and RHB both knew about the agreement between Madam Ho and Ms Lim, and in view of what was provided in the security documents executed by Ms Lim and RHB, it is contended that there was also a prima facie case against them and as such it could not be said that the institution of proceedings against WLAW and RHB had no legal basis.

60. In so far as the claim against RHB is concerned, as we have held that Madam Ho has a claim against RHB as a constructive trustee of her equitable interest in the property, it follows that Mr Ponniah and Mr Wong had not acted improperly, unreasonably or negligently in advising Madam Ho to claim against RHB and also in acting for her in pursuing the claim against the bank.

61. We need to consider whether they had acted improperly, unreasonably or negligently in advising Madam Ho and acting for her in pursuing her claim against WLAW. As we have held, Madam Ho certainly has a claim against Ms Lim for a breach of trust. The law firm of WLAW through Ms Leong acted for the following parties: first, for Ms Lim in the sale and purchase of the property, secondly, for both Ms Lim and OCBC in the mortgage of the property to OCBC, and finally for both Ms Lim and RHB in the mortgage of the property to RHB. It must have been clear to Ms Leong that Madam Ho under the sale agreement has an equitable interest in the property and that Ms Lim holds the property on trust to protect that interest. She was also involved as a solicitor in the discharge of the OCBC mortgage and the re-mortgage of the property to RHB by Ms Lim. It must have been obvious to her that these transactions were carried out by Ms Lim surreptitiously without the knowledge of Madam Ho and the mortgage of the property to RHB could jeopardise Madam Hos interest in the property in that the property was being used to secure loans and advances to a three-dollar company of Ms Lim and not for the specific purpose of financing the construction of the proposed development on the property. In such circumstances, it is arguable that equity may well impose liability on Ms Leong for having been involved as an accessory to or having assisted in Ms Lims disposition of a property in breach of trust. A third party knowingly assisting a trustee in the disposition of a trust property in breach of trust may be held liable as a constructive trustee. On this, we need go no further than quote the classic statement of Lord Selborne LC in *Barnes v Addy* (1874) 9 Ch App 244 at 251-252:

> strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or *unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees*. [Emphasis added]

62. In these circumstances, it cannot be said that Mr Ponniah and Mr Wong had acted improperly or unreasonably in advising Madam Ho and acting for her in pursuing a claim against WLAW. It is impossible for us to second-guess now what course of action another firm of lawyers might have advised Madam Ho to take, had they been consulted at the start. The mere failure of Mr Ponniah and Mr Wong to advise Madam Ho to seek independent legal advice or to discharge themselves could not be said to have caused Madam Ho to incur the costs of the action against WLAW and RHB, as it cannot be said with reasonable certainty that any other independent or prudent or reasonable lawyer would not have given the same advice.

63. It may be that for obviously good reasons Mr Ponniah and Mr Wong should not have acted for her in these proceedings. First, they knew fully well that Mr Wong himself would be a material witness in the proceedings to be taken against Ms Lim, and second that they had a personal interest in the case as it was their firm which had acted for Madam Ho in the sale of the property and mortgage to OCBC. Without expressing any view on this matter, we would just mention that it may be said that prima facie the problem that had arisen could be said to have been caused by the way in which Mr Wong had handled the transaction for Madam Ho. Both Mr Wong and Mr Ponniah should have discharged themselves from acting for Madam Ho and should have advised her to seek independent legal advice. That, however, is a different matter and for the purpose of O 59 r 8 is not quite relevant.

Conclusion

64. We therefore allow this appeal and set aside the order below. Before we make an order for costs we would like to hear arguments on costs here and below, and the relevant parties are invited to submit written arguments on such issue within 7 days from the date hereof.

Sgd:	Sgd:	Sgd:
YONG PUNG HOW	L P THEAN	CHAO HICK TIN
Chief Justice	Judge of Appeal	Judge of Appeal