

Mohamed Ali s/o Abdul Razak v Tan Ah Bee
[2009] SGHC 279

Case Number : Suit 568/2009
Decision Date : 09 December 2009
Tribunal/Court : High Court
Coram : Philip Pillai JC
Counsel Name(s) : R Narayanan and Alvin Chia (Hilborne & Co) for the plaintiff; Patrick Chin (Chin Patrick & Co) for the defendant
Parties : Mohamed Ali s/o Abdul Razak — Tan Ah Bee
Land – Option to Purchase – Exercise of Option – Specific Performance

9 December 2009

Judgment reserved.

Philip Pillai JC:

1 The Plaintiff is the grantee of an Option to Purchase signed by the Defendant, dated 4 June 2009 (“Option”) a property situated at and known as 1 C Riviera Drive, Singapore 467196 (the “Property”). The Plaintiff’s claim against the Defendant in this action is for specific performance of the Option, together with ancillary orders required to effect the same.

The Sequence of Events leading to the Exchange of Option and Option money

2 The Defendant entrusted all decisions relating to this transaction to her brother, Mr Tan Chin Gee (“Eric Tan”), a property valuer who owned a property valuation and commercial real estate company - Global Realty Pte Ltd. In the entire transaction she fully authorised him to take all decisions as he saw fit and signed all documents approved by him. In short, Eric Tan had the full conduct of this transaction on her behalf.

3 Between 1 January 2009 and 12 May 2009, Eric Tan placed regular sales advertisements for the Property, inserting his mobile telephone contact number and description as “owner” for prices varying initially at S\$1.5m and reduced to S\$1.45m from 8 February 2009 onwards. On 26 May, 2 June and 5 June 2009, sales notices were placed by Phyllis Ng of Harvest Realty Consultants Pte Ltd (“Harvest Realty”) for viewing/offer of premises described as “Parbury Vicinity for S\$1.3m” and listing her mobile telephone contact number.

4 The Plaintiff responded to Phyllis Ng’s advertisement and arranged to view the Property on 3 June 2009. Upon viewing the Property, the Plaintiff offered S\$1.27m. He was told that the owner’s asking price was S\$1.3m but that Phyllis Ng would revert. She called him the next morning at about 9 am confirming the owner’s price of S\$1.3m and informed him that the owner had given her a signed Option on the Property in exchange for the 1% payment, should he agree to the unchanged offer price of S\$1.3m. At around 3 pm on 4 June 2009, the Plaintiff sent a telephone text message (“sms”) to Phyllis Ng of his acceptance of the offer price of S\$1.3m and requested a meeting to deliver the cheque. She called back and they arranged to meet at the Property. Whilst they had arranged to meet around 6 pm, he met her at around 6.45 pm that evening and handed her a DBS Cheque No. 000412 dated 4 June 2009 for the sum of S\$13,000, issued in favour of Tan Ah Bee. He received the signed Option dated 4 June 2009 in exchange.

5 It is the Plaintiff's evidence that at no time in his conversations and meetings with Phyllis Ng was there any mention of a time deadline imposed by Eric Tan on Phyllis Ng for the option money to be given by 4 pm on 4 June 2009. It is his evidence that he first learnt of this time deadline when he received a telephone call from Phyllis Ng on 6 June 2009 informing him that Eric Tan was refusing to accept the option cheque because it had not been delivered to Eric Tan by 4 pm on 4 June 2009. It is his evidence that he was also then informed by Phyllis Ng that the same cheque had been hand delivered by her to the Defendant on 5 June 2009 at the Defendant's residential address. It is also his evidence that the cheque was returned to Harvest Realty and delivered by registered post on 8 June 2009 to the Defendant's residential address and was later confirmed by the Defendant's solicitors to have been returned to Harvest Realty.

The Option and the Commission Agreement

6 There are 2 documents signed by the Defendant in this transaction: (i) the Option to Purchase and (ii) the Commission Agreement, the relevant material terms of which are extracted hereafter:

(i) The Option to Purchase*

"To: *Ali Mohamed A. and/or nominees Mohamed Ali s/o Abdul Razak i/c 1809187-1* [hand inscription]

Property known as: *1 C Riviera Drive (S) 467196* [handwritten]

In consideration of the sum of Singapore Dollars: thirteen thousand only DBS (000412) (hereinafter called ("the option money") paid by you to me/us the receipt of which I/we acknowledge, I/we *Tan Ah Bee i/c SC 6916716-J* (hereinafter called "the Vendor") hereby make the following offer which remains open for acceptance until 4.00 p.m. on the 18.06.09.

I/We hereby offer to sell to you or your nominee the above-mentioned property upon the terms set out hereunder. This offer may be accepted by you or your nominee signing the portion of this Option marked "ACCEPTANCE COPY" and delivering the same duly signed together with the 5% of the purchase price less the option money (hereinafter referred to as "the deposit") to my/our solicitors M/S *Abraham Low LLC Attn: Ms Tan Ter Yee*

Who are authorised to acknowledge receipt of the deposit on or before the above date and shall hold the deposit as stakeholders pending completion of the sale and purchase therein.

In the event that "the Option Money" is not honoured on first presentment the Vendor shall be entitled to either treat the contract as having been repudiated by the Purchaser and to rescind the same forthwith and to resell the Property without prejudice to its right of damages against the Purchaser or (at the Vendor's option) to affirm the contract and proceed in accordance with the terms and conditions herein contained.

Under the Terms of Sale, the sale price is inscribed by hand as being "One Million three Hundred Thousand Only" with *inter alia* the following extracted terms:

Terms of Sale

cl. 6 The sale and purchase shall be completed at the office of the vendor's solicitors

on or before 12 (Twelve) weeks from the date of acceptance of this Option.

cl. 9 The Vendor hereby confirms that the Vendor's solicitors have been appointed as the Vendor's agents for the collection of the balance of the purchase price and any other monies due under this Option and the Vendor acknowledges that payment to the vendor's solicitors or payment as directed by the vendor's solicitors shall constitute a full discharge of the payment obligations of the Purchaser to the Vendor.

cl. 10 If this Option is properly exercised within the period aforesaid, then the option money will be treated as part payment of the purchase price. However, if this option is not properly exercised within the aforesaid period, then the option money shall forthwith be forfeited to the Vendor and the Vendor will pay HARVEST REALTY CONSULTANTS PTE LTD a commission of Singapore Dollars: *Nineteen thousand only (S\$ 19,000)*. The Vendor's solicitors shall accept this as the Vendor's irrevocable authority to retain the said commission and the 7% GST from the sale proceeds and to pay the same directly to HARVEST REALTY CONSULTANTS PTE LTD forthwith on completion of the sale.

Dated this 04 day of June 2009.

* bold = printed text

Italics = handwritten inscription

(ii) The Commission Agreement

Date:

HARVEST REALTY CONSULTANTS PTE LTD

80 Marine Parade Road #18-02/03

Parkway Parade

Singapore 449269

Reg. No. 19804154Z

GST Reg.No M2-0067912-1

Dear Sir,

RE: IC Riviera Drive

In connection with the Sale of the aforesaid property, I/we herein irrevocably confirm(s) to pay HARVEST REALTY CONSULTANTS PTE LTD a commission of Dollars: *Nineteen thousand only (S\$ 19,000/-)* for services rendered, only if option money is given by 4 pm, 4th June 2009. [initialled]

The said commission shall be due and payable upon Completion of Sale/Exercise of Option. If the Purchase(s) fail(s) to exercise the purchase for whatever reason(s) and the option fee is forfeited by me/us, I/we hereby further agree(s) to pay you half of the

forfeited amount unconditionally.

I/we warrant(s) that i/we have the authority to execute this letter of payment and further declare(s) that this letter of payment have been signed freely and voluntarily without any duress or misinterpretation.

Dated this day of 20 .

Signed: signature

Tan Ah Bee S6916716J

* bold = printed text

Italics = handwritten inscription

The Legal Issues

7 The legal issues are simply stated as follows:

(a) Whether the exchanged Option remains exercisable, where the Option grantor returns the Option cheque after the grant but prior to the exercise of the Option?

(b) Whether the Option grantee is bound by the condition "only if option money is given by 4 pm, 4 June 2009" (hereinafter referred to as the "Time Condition") contained in the Commission Agreement but not contained in the Option? and

(c) Whether the Acceptance and tender of the balance payable in exercise of the Option, constitutes a valid exercise of the Option in light of the prior return of the Option cheque?

The Evidence

8 The Defendant in her affidavit evidence in chief ("AEIC") confirms that she fully authorised her elder brother Eric Tan to represent her in the sale and that she had signed the Option and the Commission Agreement. By the express terms of the Option and the Commission Agreement, both of which are in the standard form issued by Harvest Realty, it is clear that the Defendant had appointed the latter as agent with respect to the granting of the Option. Eric Tan had upon cross examination explained that he did not appoint any exclusive agent for the sale of the Property. He had inserted the advertisements as owner for the purpose of ensuring that any agent would be best motivated if he would not have to share his commission with another agent. Eric Tan asserts that Harvest Realty's Phyllis Ng is not the Defendant's agent by reason of his prior advertisements to sell the Property as owner. Whatever Eric Tan's assumptions may have been, in the circumstances, it is beyond question, that when the Defendant signed and handed the Option and Commission Agreement to Phyllis Ng on 3 June 2009, Harvest Realty acting through Phyllis Ng was duly authorised as agent of the Defendant to exchange the Option against receipt of the Option cheque.

9 The Time Condition is not inscribed in the Option but is to be found in the Commission Agreement which is a standard form commission agreement of Harvest Realty. The Commission Agreement is between Harvest Realty and the Defendant and was signed by the Defendant. The Time Condition requires the "option money to be given by 4 pm, 4 June 2009". It does not by its express terms prescribe to whom the option money is to be given.

10 It is not disputed that the Time Condition was conveyed by Eric Tan to Phyllis Ng verbally, that it was inscribed in the Commission Agreement on 3 June 2009 and confirmed by Phyllis Ng by text message to Eric Tan. It is not disputed either that the Option cheque was delivered by the Plaintiff to Phyllis Ng by hand at the Property around 6.45 pm on 4 June 2009. In the event that the Plaintiff were to be held bound by the Time Condition, the option money would not have been "given by 4 pm, 4 June 2009".

11 The Plaintiff denies knowing of the existence of the Time Condition in the Commission Agreement at any material time. Eric Tan under cross examination gave evidence that he assumed that Phyllis Ng had notified the Plaintiff. Both parties had the opportunity to call Phyllis Ng as a witness but the first Defendant's counsel and then the Plaintiff's counsel each declined to do so although she was present in court.

12 Eric Tan in his AEIC confirmed that the Time Condition was inserted by him in the Commission Agreement and that he had also inserted the word "Ali" in the Option to Purchase in order to ensure that the Option was only for the Plaintiff and no one else. It is also his evidence that Phyllis Ng had expressed her understanding that if she did not comply with the Time Condition she was prepared to forego or reduce her commission. When asked under cross examination to explain why he had insisted on the 4 pm Time Condition even though any cheque given at or after the prescribed time on 4 June 2009 could only be banked the following day, Eric Tan explained that he did not want Phyllis Ng to have in hand an open-ended Option and be able to shop around. He had agreed to insert the Time Condition in the Commission Agreement and not in the Option because he agreed with her suggestion at the time that were it to be placed in the Option, a potential purchaser would be likely to consult his lawyers and this would delay matters and he might lose the sale.

13 In Eric Tan's AEIC he recounts a sequence of text messages between Phyllis Ng and him on 4 June 2009 and his actions, *inter alia*:

... I sms'd her at 2.30 pm and asked her when she could bring the option money since she said she would talk to the buyer that morning. She did not reply till 2.48 pm that day when she said that she had spoken to him, meaning the buyer, and that the buyer was waiting for his bank to reply."

I replied to Phyllis's sms at 2.51 pm and told her that I would allow an extension till 4.30 pm at which time the cheque is to reach me on that day. She replied almost immediately and said she understood.

I left the matter as it was and she sms'd me at 3.59 pm and asked me what is happening. She messaged me at 4.10 pm saying that she is on the way to the buyer's office and would send the cheque to my sister's house."

At 4.59 pm I sms'd her and told her that I have already made it clear that there would be no sale if the option money is not delivered by 4.30 pm.

I sms'd her at 5.05 pm and told her that she would have to keep to her words as per the

agreement.

She sms'd to me at 5.15 pm and wanted to go to my mother's home at 7.00 pm to deliver the cheque ...

I told her to return the cheque to Waterloo street, what I meant was that she should return the option to my office. She understood and replied that she ha already given the original option to the buyer and just needed to pass me the option money and asked to go down to her office at Parkway Parade at 7.00 pm.

At 5.28 pm I replied and told her that I did not want to meet her and asked her to return the option to me.

She replied at 5.31 pm and said that the option has already been exchanged and cannot be taken back and she would be sending the cheque to my mother's home at Ang Mo Kio that evening.

At 5.44 pm I replied to her sms and told her that the option money was to be given by 4.30 pm that day and this was not fulfilled and thus she had not done her part and told her that if she wanted to see me at my Waterloo Street Office she could come down. As far as I was concerned the sale was off.

Phyllis Ng met with me in my office that evening at about 8.30 pm thereabouts. She wanted to hand me the cheque being the 1% option money. I asked her for the return of the original option as well as the commission agreement signed. She said the option was not with her and that she did not even have a copy of it and that it was with the buyer. I told her that there was no longer any option as the option given was no longer valid because of the non compliance with the condition of payment by 4.30 pm she cried and begged me and offered to cut her commission by 50% to ½% and admitted that is her mistake.

On the 5th June 2009, Phyllis came again to my office at about 12.00 noon and she came alone and I was not in the office. She insisted in passing the cheque to my staff. My staff refused to accept the cheque from her. She left at about 12.30 pm.

On the same day of 5th June 2009, Phyllis Ng personally sent the cheque for 1% together with the option to my mother's house at Ang Mo Kio at about 3.30 pm thereabouts. She had merely left it on the living room floor when my mother refused to accept delivery of the items.

On the 8th June 2009 I sent the cheque back to her office at Marine Parade with a covering letter repudiating the option to sell.

14 The Plaintiff instructed Hilborne & Co to act on his behalf and on 16 June 2009 they sent the Defendant's named Option solicitors Abraham Low LLC, the duly completed Acceptance Copy dated 16 June 2009 together with their cheque for S\$52,000 representing the balance of the payable upon the exercise of the Option.

15 This letter and payment were returned on the same day by Abraham Low LLC, with a covering letter stating that:

We have confirmed with Tan Ah Bee's representative that we do not act for her in this sale.

16 On 17 June 2009, the Plaintiff's solicitors sent the letter dated 16 June 2009 marked "Exercise

of Option" by hand to the Defendant.

17 The Defendant's current solicitors, Patrick Chin & Co, sent the Plaintiff a letter dated 19 June 2009 referring to the letters and cheque delivered to the Defendant and returning the same and stating, *inter alia*:

We are instructed to return the said cheque and all accompanying documents to you. Our client is of the firm view that there is no valid option and your clients have no right to exercise the option. In the circumstances, your client's purported exercising of the option is misconceived.

Our client instructs that the 1% option fee was not paid in exchange for the option in that it was not according to the time stipulated by the seller according to the condition precedent set by the seller communicated to the agent of the buyer, that is by latest 4.00 pm extended to 4.30 pm on the 4th of June 2009. The said 1% was paid after the expiry of that time. The 1% payment by way of cheque was rejected by our client and notice in writing of the same was given to the buyer through their agent, which notice also enclosed the cheque for the 1% option price paid out of time.

Your client was aware of these circumstances indicating that the option was at all times invalid and chose to purportedly "exercise" the option. Further and a fortiori your client has not even paid the initial 1% option fee to exercise the option and this sum is not apparent in any of the enclosures forwarded by hand to our client.

In the circumstances our client therefore disagrees that your client has duly and properly exercised any option relating to the above captioned property.

18 The Plaintiff's solicitors replied by letter on 22 June 2009 stating *inter alia*:

The agent whom you refer to in paragraph 3 of your letter as "the agent of the Buyer" is indeed your client's property agent, namely, Harvest Realty Consultants Pte Ltd, who was engaged by your client to market the said property. Our client did not engage any agent for that matter to secure the Option in respect of the abovementioned property. At all material times our client dealt with your client through the said property agent's representative on Ms Phyllis Ng and further ...

Our client denies the allegations raised in paragraphs 3 and 4 of your aforesaid letter. The exchange of the Option to Purchase for the 1% option fee was not subject to any timeline or condition precedent as alleged by your client. Even if such a timeline or condition precedent had been imposed, which is denied, it was completely waived or varied by your client's agent's acceptance of the 1% option fee in exchange for the duly signed Option to Purchase.

19 Although the Option provides that the exercise of the Option is to be effected by payment of the balance to Abraham Low LLC, and that this was duly made by the Plaintiff's solicitors on 16 June 2009, Eric Tan in para 35 of his AEIC confirms that Abraham Low LLC were instructed not to accept the Option acceptance and the tendered balance of the purchase price.

20 By reason of the signed Option and the Commission Agreement, the Defendant has expressly appointed Harvest Realty as their agents with Phyllis Ng having the conduct of the agency. The process of delivery by a property agent of a signed Option in exchange for a cheque of the option money is the standard process in Singapore. Upon the delivery of the option money by cheque to Phyllis Ng and her delivery in exchange to the Plaintiff of the signed Option, there came into existence

a binding contract between the Plaintiff and the Defendant upon the terms set out in the Option.

21 There is no dispute as to the inscription of the Time Condition in the Commission Agreement and the absence of such a Time Condition in the Option entered into by the Plaintiff with the Defendant. The Commission Agreement is an agreement between the Defendant and Harvest Realty to which the Plaintiff is not a party.

22 It has not been established in evidence that the Plaintiff's attention had been brought to the existence of the Time Condition in the Commission Agreement. Even had it been brought to his attention, by its very terms, it has no obvious bearing on the grant of the Option to Purchase to the Plaintiff, upon his delivering to the agent, his 1% Option cheque and receiving from Phyllis Ng in exchange, the signed Option. It is not argued that there was any incorporation by reference of the terms of the Commission Agreement or the Time Condition into the Option. The Commission Agreement which is a contract between the Defendant and Harvest Realty provides for the payment of the commission of S\$19,000 by the Defendant to them, "only if the option money is given by 4 pm, 4 June 2009."

Issue (1): Whether the exchanged Option remains exercisable, where the Option grantor returns the Option cheque after the grant but prior to the exercise of the Option?

23 The Plaintiff's Option cheque was delivered to Phyllis Ng on 4 June 2009 in exchange for the delivery to him of the signed Option. It is a quite settled current practice in relation to options to purchase land in Singapore that the tender of a cheque in exchange for the grant of an option is good tender for the payment of the option money, whilst the exercise of an option is customarily effected by payment to the nominated solicitors. See *Wong Fook Heng v Amixco Asia Pte Ltd* [1992] 2 SLR 342 per Lai Kew Chai J "A bill of exchange, once given, is to be treated as cash and is to be honoured unless there is some good reason to the contrary." Equally, a tender of a cheque which is subsequently dishonoured, would no longer contractually bind the grantor to the Option. The objection by Eric Tan does not relate to the validity of the tender of a cheque as a cheque, but rather to the Timing Condition. See *Min Hong Auto Supply Pte Ltd v Loh Chun Seng* [1993] 3 SLR 498.

24 Phyllis Ng had brought the cheque to Eric Tan later that night. Eric Tan had refused to accept it then and the following day and also returned the cheque when it was later deposited at the Defendant's home. The question which arises is whether the tender of a cheque to the Defendant's agent in these circumstances creates a binding contract and thus entitles the Option grantee to thereafter exercise the Option by payment of the balance deposit payable in accordance with the terms of the Option.

25 No question arises that the Option cheque was ever dishonoured. Accordingly upon the tender of the Plaintiff's cheque to Phyllis Ng, the Option became thereupon operative and is binding against the Defendant upon its terms. Its subsequent return by Eric Tan and Tan Ah Bee or otherwise has no bearing on the validity and effectiveness of the Option. Otherwise a grantor of an option, would thereafter be able to frustrate the exercise of an option, by the simple expedient of not encashing the Option cheque, tearing it up or returning it.

26 This question has been considered in *Min Hong Auto Supply Pte Ltd v Loh Chun Seng* [1993] 3 SLR 498. The court there held that the return of the option cheque did not affect the binding legal effect of the option.

27 Accordingly I would find that the Option was effective and binding according to its terms upon the Plaintiff's tender of the Option cheque to Phyllis Ng, regardless of its subsequent return prior to

the exercise of the Option.

Issue (2): Whether the Option grantee is bound by the condition "only if option money is given by 4 pm, 4 June 2009" (hereinafter referred to as the "Time Condition") contained in the Commission Agreement but not contained in the Option?

28 Where the agent has been given the signed Option which does not contain the Time Condition, and is authorised to exchange the Option against receipt of the option cheque, she would have had actual authority to do so. It was argued that she was by the Commission Agreement not authorised to do so and accordingly could not have bound the Defendant to any Option grantee without the satisfaction of the Time Condition.

29 In the first place, the limitation of authority was not to the effect of precluding the exchange of the Option against receipt of the Option cheque, but was *ex facie* the Commission Agreement, with respect only to the agent's entitlement to commission if payment was not made by 4 pm. Further that a principal is nevertheless bound to the third party who has no knowledge of any limitation of authority, such limitation being known only by the principal and the agent, is well settled. See *Re Coffey Bartel* [1995] QSC 67.

30 In any case, the principal cannot escape liability for acts done by the agent which fall within the apparent scope of his authority. This position is neatly summarised in *Halsbury's Laws of Singapore* vol. 15 (LexisNexis 2004, Reissue) at para 180.273.

where a principal, in conferring authority upon his agent to act on his behalf, imposes conditions or limitations on its exercise, no act done by the agent in excess of the conditional or limited authority is treated as the act of the principal as regards such persons as have or ought to have notice of such excess of authority, or have had notice of an irregularity placing them upon inquiry as to whether the agent's authority was being exceeded. In the absence of notice however, the principal cannot escape liability for acts done by the agent which fall within the apparent scope of his authority, by any particular instructions to his agent limiting his authority.

31 The circumstances here further provide ample evidence of apparent authority to the Plaintiff. No corroborative evidence has been adduced to establish that the Plaintiff was aware of the Time Condition at the time he tendered the Option cheque in exchange for the Option.

32 Finally even if the Time Condition in the Commission Agreement had been brought to his attention at the time of the exchange of Option against delivery of the Option cheque, it would have by its terms not have affected his rights or obligations arising from the Option itself.

33 In these circumstances, I would hold that the Plaintiff is not bound by the Time Condition contained in the Commission Agreement.

Issue (3): Whether the Acceptance and tender of the balance payable in exercise of the Option, constitutes a valid exercise of the Option in light of the prior return of the Option cheque?

34 Clause 9 of the Option provides:

The Vendor hereby confirms that the Vendor's solicitors have been appointed as the Vendor's agents for the collection of the balance of the purchase price and any other monies due under this Option and the Vendor acknowledges that payment to the vendor's solicitors or payment as

directed by the vendor's solicitors shall constitute a full discharge of the payment obligations of the Purchaser to the Vendor.

35 By its express terms, the Vendor appoints its named solicitors as its agent for the collection of the "balance of the purchase price". This is defined in the preamble to mean "5% of the purchase price less the option money". The structure of the Option process as set out in the Option, is that the Option money is received directly by the Option grantee or his agent and the balance of the purchase price upon exercise of the Option is by the express terms of the Option to be received by his nominated solicitors. The reference to "other monies due under the Option" would in this context refer to all monies thereafter payable by the purchaser upon exercise of the Option.

36 A unilateral repudiation by the Option grantor which is not accepted by the Option grantee, results in the option surviving and being exercisable in accordance with its terms. See *Aldrich Development Pte Ltd v Rafiq Jumabhoy* [1995] SLR 401. In short, "the exercise of an option to purchase creates the relationship of vendor and purchaser from the date of the expiry of the notice exercising the option." See *Halsbury's Laws of Singapore* vol 14(2) (LexisNexis Reissue, 2004) at para 170.1192.

37 It is not disputed that Eric Tan had not accepted the 1% option cheque brought to him by Phyllis Ng on 4 June 2009, nor the next day or to the Defendant. By the letter dated 8 June 2009 Eric Tan returned the Option cheque to Harvest Realty. As the return of the option cheque does not terminate the Option with respect to the Option grantee who has validly received the Option in exchange for the tender of the Option cheque, the subsequent exercise of the Option by the Option grantee in full compliance with the terms expressed in the Option for the exercise of the Option will be binding upon the Option grantor.

38 It was conceded by both counsel, that the exercise of the Option by due completion of the Acceptance form and the tender of the solicitor's cheque for S\$52,000 comprising the balance payable was in full compliance with the express terms of the Option. Defence counsel was accordingly obliged to invite the court to imply a term into the Option. He thus submitted that a term should be implied that the Option cheque remains in the possession of the Option grantor and/or had been encashed before any exercise of the Option could be valid. Upon further questioning, he was obliged to concede that an implied term of encashing of the cheque would defeat the core function of the Option. With respect to possession, he was similarly obliged to concede that this would similarly defeat the core function of the Option and contented himself with the position that, in this case, the Defendant had not returned the cheque prior to the exercise of the Option for the purpose of preventing its exercise, but had returned it at the very outset. Defence counsel's difficulty in crafting a term to be implied let alone that such a term ought to be implied because it is necessary to give effect to the presumed intention of both parties are considerable obstacles which have not been overcome. Accordingly I would decline to imply such a term into the Option.

39 The Plaintiff's counsel submitted that the 1% Option money performs two functions. First it is consideration for the option and this has been satisfied. Its second function is that if and when option is exercised, it is to be treated as part payment of the purchase price. If the option is not exercised, the Option money is to be forfeited. He submitted that at time of exercise, what has become of the 1% option fee would be irrelevant.

40 Accordingly, it is my judgment that the exercise of the Option by the Plaintiff through his solicitors on 16 June 2009 to the Defendant's named solicitors in the Option, Abraham Low LLC, by delivery of a duly completed Acceptance Copy dated 16 June 2009 together with their cheque for S\$52,000 representing the balance of the purchase price payable was a valid and binding exercise of

the Option according to its terms.

41 Even if such tender of the balance purchase price in the context of the prior return of the Option cheque were not to constitute a valid and binding exercise of the Option according to its terms, that would not be the end of the matter. In *Tai Joon Lan v Yun Ai Chin* [1993] 3 SLR 129 [1993] SGCA 54, the Court of Appeal considered the situation in which the option grantor had failed to insert the name of the solicitors to whom the balance payment was to be made upon the exercise of the option and had accordingly returned the balance payment cheque as well as the retendered option cheque delivered by the grantee's solicitors upon the exercise of the option. The Court of Appeal held that courts will not allow vendors to take advantage of their own breach of contract but would undo the advantage gained by treating the purported exercise of the option as valid and compel the performance of the contract for the sale and purchase of the property. The foundational principle underlying this approach of the courts is the rule that no man shall take advantage of his own wrong which extends to undoing the advantage gained, where that can be done. See *Hooper v Lane* (1857) 6 HL Cas 443, ad pp. 460, 461, per *Bramwell B.*

42 This court will similarly, in such circumstances, not allow the Defendant to frustrate the Plaintiff's valid exercise of the Option according to its terms and would treat the purported exercise of the option as valid and compel the performance of the contract for the sale and purchase of the property arising thereby, subject to the Plaintiff's further payment of the 1%. The Defendant, would otherwise be able, by the simple expedient of returning or not encashing the option cheque, thereby frustrate the Plaintiff's exercise of the Option according to its terms.

43 With respect to the remedy of specific performance in such circumstances, I would have adopted the language of Lai Siew Chiu JC in *Lim Bok Kek v Ken Thiam Siew* [1994] SGHC 45 at page 113 as equally applying:

specific performance is an equitable remedy and the court in deciding whether to grant such relief is entitled to look at the conduct of the parties. In so doing I think it would not be difficult to conclude that the defendants being the defaulting party, it would be both inequitable and unconscionable to allow them to renege on their contractual obligations.

Conclusion

44 I would order specific performance of the Option in particular as follows:

(1) That the Plaintiff pay S\$13,000 to the Defendant and

(2) That the Defendant

(i) executes all necessary documents and to take all necessary action to effectively transfer the Property to the Plaintiff, failing which the Registrar of the Supreme Court, be empowered to do so.

(ii) pays the Plaintiff interest for late completion in accordance with The Singapore Law Society's Conditions of Sale 1999.

(iii) pays the Plaintiff, in damages the sum of S\$2,500 per month being the rental from 11 September 2009 (the original date of completion) to actual date of completion pursuant to this Order.

(iv) pays the Plaintiff's costs and disbursements, with such costs and disbursements to be agreed or taxed.

Copyright © Government of Singapore.