

Focus Electronics Pte Ltd v Touch Universal Pte Ltd
[2000] SGHC 172

Case Number : OS 207/2000
Decision Date : 24 August 2000
Tribunal/Court : High Court
Coram : Judith Prakash J
Counsel Name(s) : Madan Assomull with Rathna Nathan and Vivian Chew (Assomull & Partners) for the plaintiffs; R Chandran (R Chandran & Co) for the defendants
Parties : Focus Electronics Pte Ltd — Touch Universal Pte Ltd

JUDGMENT:

Cur Adv Vult

1. This action started as an originating summons in which the plaintiffs as the registered proprietor of the property known as 42 Ceylon Road, Singapore ('the property') claimed against the defendants for the following:

- (1) a declaration that the alleged agreement dated 23 December 1999 between the plaintiffs and the defendants for the sale of the property be declared null and void and/or of no effect;
- (2) an order that the defendants do withdraw the caveat no. CV/51938H registered on 19 January 2000 by the defendants against the property;
- (3) alternatively, an order that the Registrar of the Singapore Land Registry be directed to cancel or otherwise remove forthwith the said caveat from the land register; and
- (4) an order restraining the defendants from lodging any further caveat against the property.

2. The originating summons was subsequently converted into a writ action with the affidavits already filed on behalf of the plaintiffs and the defendants ordered to stand as pleadings. The basic issue that emerged from the affidavits was whether the sale and purchase agreement dated 23 December 1999 ('the Agreement') whereby the plaintiffs purportedly agreed to sell the property to the defendants was a valid agreement capable of giving the defendants an interest in the property entitling them to lodge a caveat against it.

Background

3. On 20 August 1999, the plaintiffs exercised an option that they had previously been granted and agreed to buy the property from a company called Lian Huah Electrical Engineering Pte Ltd at the price of \$2,350,000. Ten percent of the purchase price was paid at that time and the remaining 90 percent was due on the anticipated completion of the purchase on 10 December 1999. The plaintiffs' original intention was to build an ashram on the property and they therefore applied for planning permission to do so. This was refused on 15 October as the proposed use was not in line with the residential zoning of the property.

4. The plaintiffs then decided to sell the property. They marketed it through various real estate agencies including one called Alister & Lee Properties ('ALP') run by Gary Lee Twe Jeat. As a result of Gary Lee's efforts, on 27 October 1999, the plaintiffs issued a document entitled 'Option' addressed to 'Amethyst Construction Pte Ltd and/or Nominees'. By this document, in consideration of the sum of \$24,000 paid by Amethyst Construction Pte Ltd ('Amethyst') to them as option fee, the plaintiffs irrevocably offered to sell the property to the addressees at the price of \$2,420,000 and subject to the 12 special conditions set out in the document. Special condition 1 of the option provided that the plaintiffs' offer could be accepted by the purchaser

signing the portion of the option marked 'Acceptance Copy' and delivering it with the sum of \$218,000 (being the balance of ten percent of the sale price) to the plaintiffs' solicitors at any time on or before 4pm on 22 December 1999. It also stated that if the option was not exercised within the time stipulated and in the manner required, it would be null and void and the option fee of \$24,000 would be forfeited to and retained by the plaintiffs. This sum of \$24,000 was just \$200 short of being one percent of the purchase price. The form of the option was such that once the Acceptance Copy had been signed and the deposit money paid, the option would become the contract for the sale and purchase of the property between the plaintiffs as vendors and Amethyst, or such other party as Amethyst might nominate and who signed the Acceptance Copy, as purchasers.

5. The plaintiffs did not complete their own purchase of the property on 10 December as required under their contract with Lian Huah Electrical Engineering Pte Ltd. They were given a short extension of time by the sellers but were not able to complete within the extended period either and on 21 December the sellers served the plaintiffs with a 21-day notice to complete.

6. The next day, 22 December, was the day on which Amethyst had to exercise the option granted by the plaintiffs or forfeit the option fee. The plaintiffs were anxious that the sale go ahead. Their director, Gulab Bhojraj (also known as Sam) was in frequent contact that day with Gary Lee who was in turn liaising with Chan Kee Chiang Philip, Amethyst's managing director, to ascertain Amethyst's intentions with regard to the option.

7. What exactly happened that day and the next is a matter of dispute between the parties. It is clear that at some stage Amethyst indicated that it was not going to exercise the option. Thereafter, on the instructions of Sam Bhojraj, Gary Lee asked Amethyst to consider whether it would be willing to enter a sale and purchase agreement in respect of the property at the same price but on the basis that instead of the usual deposit of ten percent being required, the deposit would be only one percent and the balance of the purchase price would be payable on completion. The plaintiffs say that this offer meant that Amethyst or its nominee had to pay the one percent deposit on signing the sale and purchase agreement whereas Philip Chan understood the offer to mean that the option fee which Amethyst had paid would be used as the deposit and that the sale and purchase would proceed without the purchaser having to pay the remaining nine percent of the purchase price that would have been payable had the option been exercised in the normal manner.

8. There is no dispute that when Gary Lee first put the plaintiffs' proposition to Amethyst, Philip Chan said that he would have to discuss it with his partners. Subsequently, Philip Chan informed Gary Lee that he wanted to go ahead with the purchase on the new terms but that the purchaser would be Touch Universal Pte Ltd, the defendants herein, rather than Amethyst. There is a loose association between the defendants and Amethyst: Leow Koon Huat Danny, the defendants' director, and Philip Chan are business partners in other businesses. Danny Leow does not have any interest in Amethyst, however, nor does Philip Chan have any interest in the defendants.

9. There is a dispute as to when the plaintiffs' new offer was accepted. The defendants say that it was accepted on the afternoon or evening of 22 December whereas the plaintiffs say that it was not accepted till the morning of 23 December. It is not in doubt that on that morning Sam Bhojraj and Gary Lee went to the office of Messrs Joseph Hoo Morris & Kumar, the plaintiffs' then solicitors, where Sam Bhojraj gave instructions for the drafting of a sale and purchase agreement. A clerk in the solicitors' office prepared this document. Sam Bhojraj dated it 23 December and then signed it (in duplicate) on behalf of the plaintiffs. Gary Lee witnessed his signature. Sam Bhojraj then handed the two copies of the Agreement to Gary Lee and instructed him to take it to the defendants for their signature.

10. The defendants did execute the Agreement. Danny Leow signed it on their behalf. Gary Lee acted as his witness. The defendants say that the act of signing took place in the late morning or around noon of 23 December. The plaintiffs say that the defendants were elusive throughout 23 December and that they did not sign the Agreement until 24 December. The plaintiffs also say that it was a condition of the sale that the Agreement be signed and returned to them together with the deposit on the 23rd itself and that as this did not happen, the Agreement was of no effect. The defendants admit that they did not pay any money to the plaintiffs by way of deposit but assert that no payment was necessary as it had been agreed that the \$24,000 option fee paid by Amethyst would be treated as the deposit.

11. On 24 December, the plaintiffs granted one Mr Lim Chai Huat and/or his nominees an option to purchase the property at a

price of \$2,350,000. Sea Union Developments Pte Ltd ('Sea Union') validly exercised the option on 27 December. Sea Union paid the plaintiffs ten percent of their purchase price as a deposit. On 28 December, they lodged a caveat against the property.

12. After signing the Agreement, the defendants took no further action on it, as far as the plaintiffs were aware, until 10 January 2000. On that day, their then solicitor Ms Lourdesamy spoke with the plaintiffs' then solicitor Mr Lee Boon Teck and this was followed by a letter confirming that Messrs Lourdes Chen & Lee had been instructed to act for the defendants in their purchase of the property pursuant to the Agreement. The letter further stated that a title search had disclosed the existence of a caveat filed by Sea Union claiming an interest in the property as purchaser and asked for clarification on this. The plaintiffs' solicitors replied that the defendants had not signed the agreement and returned it to them within the agreed time or with the required deposit and the sale to the defendants was therefore deemed to be aborted by the plaintiffs.

13. On 19 January, the defendants lodged caveat CV/051938H against the property. By the caveat, the defendants claimed an interest in the property as purchaser derived from the interest which the plaintiffs had obtained as purchaser from Lian Huah Electrical Engineering Pte Ltd and under the heading 'Grounds of Claim' stated 'By a Sale and Purchase Agreement dated 23rd December 1999 entered into between the [defendants] and [plaintiffs]'. The plaintiffs commenced this action on 11 February 2000. They had in the meantime completed their purchase of the property and become its registered proprietors.

Issues

14. The plaintiffs brought this action pursuant to s 127(1) of the Land Titles Act (Cap 157) ('the Act') which permits them as caveatee in relation to the caveat lodged by the defendants, to summon the defendant caveators to attend before the court to show cause why the caveat should not be withdrawn or otherwise removed. They rely also on s 128(1) of the Act which imposes a liability to pay compensation on any person who wrongfully, vexatiously or without reasonable cause lodges a caveat with the Registrar or refuses or fails to withdraw such a caveat after being requested to do so.

15. The defendants in response to the show cause aspect rely on the Agreement and contend that as it has been executed by both parties it is a valid agreement for purchase and sale of the property and, as purchaser thereunder, they have an equitable interest in the property which entitled them to lodge and maintain the caveat. The principle issue therefore, as stated above, is whether the Agreement is valid and binding on both parties. There are a number of sub issues. These are:

- (1) whether the option granted to Amethyst lapsed without being exercised;
- (2) whether the option was validly exercised by the defendants;
- (3) what proposition was put to Philip Chan by Gary Lee in connection with the purchase of the property;
- (4) when exactly the Agreement was signed by the defendants and if they did not sign it until 24 December whether the late signature affected the validity of the Agreement;
- (5) whether the plaintiffs had agreed that the option fee would be treated as the deposit under the Agreement and if not:
 - (a) whether it was a condition precedent to the validity of the Agreement that the deposit had to be paid by the defendants; or
 - (b) if not a condition precedent, then whether payment of the deposit was a fundamental term of the agreement such that non-payment permitted the plaintiffs to repudiate the Agreement and if so whether the plaintiffs did in

fact repudiate the Agreement;

The evidence

(i) The plaintiffs' story: (a) Gulab Bhojraj @ Sam Bhojraj

16. Sam Bhojraj's evidence-in-chief was given by way of two affidavits. In the first, he set out the circumstances under which the plaintiffs agreed to purchase the property and then went on to deal with the option granted to Amethyst. His account was brief. He stated that the option was to be exercised by 4pm on 22 December 1999 but it was not duly exercised within the stipulated period and therefore '[t]he option lapsed and the option fee was accordingly forfeited by the Plaintiffs'. He then stated that the plaintiffs had paid their agents, ALP, a commission of \$10,000 for services rendered. In support, he exhibited copies of the plaintiffs' payment voucher, the agents' invoice and the plaintiffs' cheque for the amount paid, all of which were dated 22 January 2000.

17. The Agreement was dealt with, briefly, in paras 6 and 7 of the first affidavit. Sam Bhojraj stated that on 23 December 1999, pursuant to the defendants' request, the plaintiffs agreed to enter into a sale and purchase agreement with the defendants for the sale of the property to the defendants at a price of \$2,420,000 on condition that the defendants signed and returned the Agreement and made payment of the sum of \$24,000 on the same day failing which there would be no sale. In para 7 he stated that the defendants did not return the Agreement duly signed nor did they pay the sum of \$24,000 to the plaintiffs. Accordingly, no binding contract was concluded between the plaintiffs and the defendants for the sale of the property. He went on to say that this account was confirmed by the agents' letter dated 22 January 2000.

18. A copy of that letter was exhibited. It reads:

'Re: 42 Ceylon Road

I, Gary Lee Twe Jeat I/C 1412520E, am the agent for the vendor of the above mentioned property. I have sold the said property to Amethyst Construction Pte Ltd which option was dated 27th Oct 1999 and the validity expires on 22nd Dec 1999 if not exercised. It was not exercised on the date fixed for exercise.

Thereafter the vendor i.e. Focus Electronics Pte Ltd issued a Sale and Purchase Agreement to Touch Universal Pte Ltd with the condition that the said Sale and Purchase Agreement must be returned on the same day i.e. 23rd Dec 1999.

As the buyer, Touch Universal Pte Ltd did not sign and gave me back the Sale and Purchase Agreement on the same day of which I informed the vendor who told me that now the Sale and Purchase Agreement is null and void (*sic*).

On the 24th of December 1999, the vendor informed me that they are issuing a new Option to another Buyer.

I confirm that the above to be true and correct.

Yours sincerely

Gary Lee'

19. Sam Bhojraj went on to say that as there was no sale contract between the plaintiffs and the defendants, the plaintiffs had

granted an option to Mr Lim Chai Huat and/or his nominee on 24 December for the sale of the property. The option had been exercised on 27 December 1999 by Sea Union as Mr Lim's nominee and completion of that sale was scheduled to take place on 10 February 2000.

20. On 28 December 1999, Sea Union had lodged a caveat against the property and on 10 January 2000, the defendants' then solicitors had written to the plaintiffs' solicitors to seek clarification on this caveat. In response, the plaintiffs' solicitors by their letter dated 14 January 2000 had informed the defendants' solicitors that as the defendants did not sign and return the Agreement to the plaintiffs within the agreed period with the required deposit, the sale was deemed aborted.

21. On 19 January the defendants lodged a caveat against the property and the next day their solicitors wrote to the plaintiffs' solicitors stating that concurrently with the signing of the Agreement the defendants had handed over a deposit of \$24,000 representing one percent of the purchase price.

22. The affidavit then continued with further details of correspondence between the parties and stated that despite demand the defendants had failed to withdraw the caveat. They had also failed to provide any evidence to show that they had returned the agreement and made payment of \$24,000 on 23 December 1999 to the plaintiffs or their solicitors.

23. Sam Bhojraj's second affidavit was basically a reply to Danny Leow's affidavit. Much of it consisted of denial of points made by Danny Leow and explanations for the stand taken by the plaintiffs. Among these was Sam Bhojraj's assertion that the plaintiffs did not agree nor did they authorise Gary Lee to agree to vary the terms of the option given to Amethyst such that the option fee would be treated as full consideration for a binding contract and that the plaintiffs would waive their rights to the balance ten percent. They also did not agree that the variation of the terms of the option would be reduced to writing in a freshly issued sale and purchase agreement to be prepared by the plaintiffs' solicitors. He also stated that the defendants had allegedly signed the Acceptance Copy of the Amethyst option after its expiry.

24. During cross-examination, Sam Bhojraj stated that on 22 December he had telephoned Gary Lee many times to ask him whether Amethyst would be exercising the option. By 4pm nothing had occurred. Later that evening, he called Gary Lee again to reproach him for Amethyst's non-exercise of the option. Sam Bhojraj asked whether money was a problem for Amethyst. Gary Lee then said that he would talk to Amethyst. Later that night Sam Bhojraj called Gary Lee for the fourth time and was told that Amethyst was involved in some projects and their cash flow was pretty tight. Sam Bhojraj then asked whether Amethyst would still be interested in the deal if the plaintiffs required a lower deposit, maybe one or two percent, instead of the usual ten percent. However, this time around they would go straight to a sale and purchase agreement instead of having an option first.

25. The next morning, 23 December, Gary Lee telephoned him and told him that Amethyst was agreeable to the plaintiffs' proposal of having a fresh sale and purchase agreement issued. However, they had indicated that they wanted this agreement to be in favour of the defendants, Touch Universal Pte Ltd, as the buyer. Slightly later in his cross-examination, Sam Bhojraj stated that on that morning Gary Lee went to his office and told him that the intended buyers were the defendants. He raised no objections to this proposal even though he had not previously heard of the defendants. This was at about 10am. He and Gary Lee then proceeded to the plaintiffs' solicitors' office to have the Agreement prepared. During re-examination Sam Bhojraj stated that it was only when they were in the solicitors' office that he learnt that the defendants and not Amethyst were to be the purchasers of the property and this was because he overheard Gary Lee informing the solicitors' clerk who the purchasers were.

26. The Agreement was ready by 11am. After signing it on behalf of the plaintiffs, Sam Bhojraj gave Gary Lee two copies of the document telling him that they were handed over on condition that they were to be returned the same day duly signed by the defendants together with a consideration of \$24,000 and the names of the defendants' lawyers so that the plaintiffs could immediately confirm the sale. He also told Gary Lee that if he did not get the documents back with the cheque by the end of the day he would take it for sure that the defendants had no further interest in the property. By 'the end of the day', he meant by 9 or 10pm.

27. Gary Lee left with the Agreement but nothing came back. Sam Bhojraj called Gary Lee throughout the day to find out the status of the matter. He kept asking the agent whether the deal was on or off and the reply that was given was that the agent

was still talking to the defendants. The last conversation was some time after midnight of 23 December. Gary Lee told Sam Bhojraj that he was still meeting the defendants and that he would talk to the plaintiffs later that day. At that point, Sam Bhojraj did not tell Gary Lee that the deal was off.

28. I asked Sam Bhojraj when he had told the agent that he was calling off the deal. The reply was 'on 24 December'. When questioned whether he had asked Gary Lee to give him back the two copies of the Agreement, the answer was 'No'. He went on to say that he had told Gary Lee that the deal was off around noon of that day. It was pointed out to him that in Gary Lee's affidavit the latter had said that the Agreement had been signed by the defendants on the morning of 24 December but Sam Bhojraj testified that Gary Lee had not told him this during their conversation at noon. He asserted Gary Lee had not reacted at all to the information that the deal was off. Later the witness changed his testimony on the time at which he had told Gary Lee that the deal was off: he brought that time forward to 11am instead of noon.

29. Sam Bhojraj went on to say that he had never received from Gary Lee the copy of the Agreement signed by the defendants. This was despite Gary Lee having testified in his affidavit that that document had been slipped under the door of the plaintiffs' office on 24 December itself. Sam Bhojraj asserted that on that day, he and three employees had worked till 5pm and the office was open all the while yet he had not received the document. Yet the witness was reluctant to assert that Gary Lee had lied on the point until he was pressed to confirm this.

30. There were several questions about the commission which the plaintiffs had paid ALP. At the beginning, Sam Bhojraj testified, the plaintiffs had agreed to pay the agent \$5,000 as commission for the sale of the property to Amethyst. Sam Bhojraj's explanation for this rather low commission (much less than the usual one percent) was that as he was making nothing from the sale of the land, he told Gary Lee that the plaintiffs would only pay him that amount. Eventually, however, the plaintiffs had paid \$10,000 as commission. The explanation for the increase was that Gary Lee had met Sam Bhojraj and said that since the plaintiffs had forfeited \$24,000 from Amethyst, they should be fair and pay the agent a bit more than what had been agreed on.

31. The agent's invoice for \$10,000 was dated 22 January 2000. By that time, the plaintiffs were aware that Gary Lee had got the defendants to sign the agreement and were also aware, as the witness conceded, that Gary Lee had acted against their instructions by proceeding to get the defendants to sign the agreement on 24 December 1999. The witness was asked why in that case he had paid the agent double the original commission. The reply was that \$10,000 had been paid because \$24,000 had been forfeited. It was then pointed out that the commission was supposed to be \$5,000 if the sale went through and double had been paid though the sale had not gone through. Sam Bhojraj's response was that he had no reason for doing this except that Gary Lee asked for \$10,000 and had told the plaintiffs to be fair as he had worked very hard.

32. It was pointed out to the witness that the agents' letter of 22 January contained untrue statements in that the third paragraph of the letter had stated that as the defendants did not sign the sale and purchase agreement on 23 December itself, the plaintiffs had told Gary Lee that the sale and purchase agreement had become void. This paragraph was inconsistent with Sam Bhojraj's testimony that he had not called the deal off until 24 December. The witness did not agree that the letter was inaccurate. Nor did he agree with the suggestion that he had paid the agent double commission as an incentive for Gary Lee to write the letter to help get the plaintiffs out of the difficult situation they were in due to having sold the same property to two different parties.

33. As regards the option given to Mr Lim, Sam Bhojraj testified that negotiations for this option had started at about 2pm on 24 December. ALP had not been the plaintiffs' agent for that transaction. The option had been handed to the prospective purchaser in the plaintiffs' office at about 5pm that day. Sam Bhojraj was asked why the plaintiffs had rushed to issue this option and preferred this sale at a price that was less than that offered by the defendants. His answer was that the defendants had not been serious buyers whereas the second buyer was a genuine buyer and this was so even though he first came to know about the second buyer on 24 December itself. It was put to him that the reason why the plaintiffs had granted the option to Mr Lim had been because they needed the deposit money of \$235,000 and an exercised option in order to get financing from Overseas Union Trust to complete their own purchase of the property. Sam Bhojraj disagreed though he admitted that a signed sale and purchase agreement would definitely help him and that when the plaintiffs did complete the purchase, the property was mortgaged by them to Overseas Union Trust.

34. The plaintiffs had first approached Overseas Union Trust for financing between 10 and 15 December 1999. When they were served with the 21 day notice on 21 December, they had sounded out three or four banks and had been told that if they could on-sell the property, the banks would finance up to 80 percent of the purchase price whereas if the plaintiffs intended to keep it, they would only be able to borrow 60 percent of the price. Sam Bhojraj agreed that by 24 December the plaintiffs were late in completing their purchase and the reason for this was because they were still arranging to obtain finance. He denied the suggestion made by defence counsel that the option granted to Mr Lim was attractive to the plaintiffs because it gave them an extra \$235,000 as deposit and the exercised option could be used to obtain bank financing. During re-examination, he was asked why the plaintiffs had not completed their purchase within the prescribed time. The reply given was that he had been in the midst of talking to a few banks and knew 'very surely' that he was capable of arranging for a loan within a week from the date of the notice to complete.

(b) Gary Lee Twe Jeat

35. In his affidavit of evidence-in-chief, Gary Lee stated that as the option granted to Amethyst had not been exercised by 4pm on 22 December it lapsed and the option fee was forfeited by the plaintiffs. He went on to say that on 23 December he was instructed by the plaintiffs that they were still prepared to sell the property at the same price but that the sale would have to be by way of a sale and purchase agreement and the agreement returned on the same day.

36. Thereafter he spoke to Philip Chan over the speaker phone at the plaintiffs' office in the presence of Sam Bhojraj to inform Philip Chan about the plaintiffs' proposal. Philip Chan agreed to the proposal and confirmed that the defendants would be the party who would enter into the sale and purchase agreement with the plaintiffs.

37. Gary Lee confirmed that Sam Bhojraj had instructed him to take the Agreement to the defendants for their execution and that after the defendants had signed the Agreement, one copy was to be kept by them and the other was to be returned to him. Gary Lee was told to ask the defendants to instruct their solicitors to correspond directly with the plaintiffs' solicitors. His role as the housing agent was merely to convey the Agreement between the parties.

38. During the course of that day, Gary Lee received many telephone calls from Sam Bhojraj to remind him that the Agreement had to be returned, signed by the defendants, on 23 December, failing which the plaintiffs would treat the sale of the property as null and void. Sam Bhojraj also informed him that the plaintiffs would allow the defendants up to 10pm that evening to return the signed Agreement. As Gary Lee was having difficulty getting the defendants to execute it, the plaintiffs granted an extension of time to 11pm. The Agreement was not signed within the extended period. According to his affidavit, the next conversation took place at about 1am and in it: 'Sam [Bhojraj] told me [Gary Lee] that as it was rather late and as I had yet to hear from the defendants and there was no confirmation that I cannot hand over the alleged agreement to the defendant the next day, I therefore believed that the deal was still on'. This garbled account was, unfortunately, typical of the type of evidence given by the witness.

39. Gary Lee averred that each time he was given instructions by the plaintiffs on 23 December, he conveyed those instructions to both Philip Chan and the defendants and even advised them that the plaintiffs might grant an option to another buyer if the agreement was not signed and returned the same day. But despite his 'relentless effort' he was not successful in procuring the defendants' signature.

40. On the morning of 24 December, Gary Lee contacted Philip Chan again to arrange for the execution of the Agreement. In contrast to what had happened the previous day this time he had no difficulty fixing an appointment with the defendants. He then went straight to Philip Chan's office and the execution took place. Gary Lee told the defendants that the respective solicitors must get in touch as soon as possible. Thereafter, at about 12pm on 24 December, Gary Lee went to the plaintiffs' office in High Street Centre and slipped the signed Agreement under the door of the office. Later that day Sam Bhojraj telephoned him to inform him that the plaintiffs were issuing a fresh option to sell the property to a new buyer. The men did not, however, discuss the Agreement. Under cross-examination on this point, Gary Lee said he had told Sam Bhojraj not to issue the

option to the new purchaser.

41. The last two paragraphs of Gary Lee's affidavit dealt with his commission and his letter on 22 January 2000. He said 'Since the sale of the property under the first option [ie the Amethyst option] was aborted and I assumed there was no sale of the property under the alleged agreement, I went ahead to issue an invoice for a sum of \$10,000 being commission for services rendered by ALP to the plaintiffs. I have also at the plaintiffs' request confirmed the events of my unsuccessful sale of the property in my letter dated 22nd January 2000 to the plaintiffs'.

42. It would be noted from the above account that even on paper there were a number of inconsistencies between Gary Lee's evidence and that of Sam Bhojraj. Also, Gary Lee's account was sparse and sometimes incomprehensible. The inconsistencies increased when he was cross-examined.

43. Gary Lee was asked first about the commission payable when ALP was appointed by the plaintiffs to look for a buyer for the property. He stated that he had expected to get one percent of the sale price but that what had been agreed between him and the plaintiffs at the time of the issue of the option to Amethyst was that ALP would be paid \$10,000 if the sale was successful. If the sale were to be aborted, however, the commission would be \$5,000. This was the exact opposite of Sam Bhojraj's testimony that the agreed commission was only \$5,000 for a successful sale and the additional \$5,000 had been paid because of the forfeiture of the option fee.

44. During the latter part of the cross-examination, Gary Lee was asked what was supposed to happen to his commission on the sale to the defendants. His response was that the plaintiffs would have to pay him and that this was because he had put in an effort to serve the parties. I then asked how much the plaintiffs were supposed to pay him and his reply was \$10,000. When asked why it was that amount, the response was 'because of goodwill'. Gary Lee then said that by 'goodwill' he meant his years of serving Sam Bhojraj. He went on to confirm that the original arrangement was that if the sale was aborted the plaintiffs would only need to pay him half the commission but stated that whilst the sale to Amethyst had been aborted, the sale to the defendants had not been completed. He admitted that although the amount of \$10,000 was only due if everything was completed, he had already been paid it. He justified having sent an invoice to the plaintiffs for \$10,000 prior to completion on the basis that he had told Sam Bhojraj that there had been so much more work to do than originally planned and also that he was jealous of another property agent to whom the plaintiffs always paid a one percent commission.

45. Gary Lee agreed that he had received his cheque for \$10,000 on the very day that the invoice was sent out and on the same day that his letter of 22 January was written. He confirmed he had prepared the letter at the request of the plaintiffs and that the contents of the letter had come from the plaintiffs. Payment of the \$10,000 was made to him after he signed the letter.

46. The witness was cross-examined extensively on the events of 22 and 23 December. He stated that on the morning of 22 December, he called Philip Chan to ask whether the option would be exercised and reminded him that the balance of the deposit was payable on that day. Philip Chan's response was that Amethyst might or might not exercise the option. This was conveyed to Sam Bhojraj who asked him to speak with Philip Chan again. On the second occasion Philip Chan was equally non-committal and when this attitude was conveyed to the plaintiffs, the response was that they should wait until the time for exercising the option had expired.

47. Gary Lee said that he did not speak to Sam Bhojraj again until the next day, 23 December, when the latter asked him to go to the plaintiffs' office. This was some time in the late morning. At the office, the agent was scolded for introducing a buyer who had failed to exercise the option. Then Sam Bhojraj said 'can you call the buyer and ask him whether or not buyer is prepared to take one percent and pay 90 percent on completion but on condition that he signs a sale and purchase agreement'. The witness explained that by 'take one percent' what was meant was that the buyer would pay one percent initially and pay 99 percent on completion. There and then Gary Lee called Philip Chan and put the proposition to him. Philip Chan asked for time to speak with his partners. Ten minutes later Gary Lee called Philip Chan again and the latter then said 'Okay we will go through with that'.

48. Gary Lee was asked whether the agreement that he discussed with Philip Chan over the telephone about the one percent deposit and the 99 percent completion payment required Amethyst to make another payment of \$24,000 as the deposit. His

response was a flat 'No'. I asked him why not and his reply was a rather evasive 'Because Mr Bhojraj told me, you bring this to the buyer, get the lawyer to talk to me and specify who the lawyer is'. I asked again why Amethyst was not required to pay the one percent deposit. This time the reply was 'I wasn't very clear in my mind at that time but all that Sam said to me was get the buyer to specify a lawyer and write to me'. Gary Lee pinpointed this conversation as having taken place after the issue of the Agreement in the lawyer's office. He said that at this time Sam Bhojraj had also told him that Philip Chan must pay the 99 percent upon completion.

49. Then followed a significant piece of evidence. I will set out the questions and answers in full.

Q The \$24,000 deposit that is stated in the agreement would it then be taken to be paid by the option fee paid by Amethyst?

A I have 2 interpretations here during that time.

Q I am talking about the time when you and Philip were talking before you went to the lawyers' office. Was it understood by you, Philip and Mr Bhojraj at that time that the 1% deposit was to be treated as paid by Amethyst option fee?

A I wasn't sure.

Ct

What did you tell Philip?

A I said if supposing the seller were to issue you a sale and purchase agreement and you only paid 1% and not more than that and you paid 99% on completion, what would you say. Philip and I speak in Hokkien. He said he would discuss with his partners.

Ct

What did he ask you about the 1%?

A He said are you sure. I said that I would speak to Mr Bhojraj. Mr Bhojraj confirmed he would issue the sale and purchase agreement taking the 1% and 99% later.

...

Q As far as Philip was concerned, what was he to pay for the deposit?

A \$24,000.

Q When was he supposed to make this payment?

A I have 2 interpretations. One of which was that Philip could through his lawyer pay to Mr Bhojraj and that's why Mr Bhojraj emphasised to me again and again to get the lawyer's name. The other one that I thought was that the \$24,000 could come from the option money that was forfeited.

Q At the time when you told Philip about plaintiffs' proposal you were not sure about what the position was because you had 2 interpretations.

A Yes.

Q You were not clear because Mr Bhojraj did not make it clear to you how this deposit was supposed

to be paid.

A Yes.

Q Philip could have understood, because of your lack of clarity on the deposit, that it was your 2nd interpretation that was agreed, that it is the option fee be treated as the deposit.

A Could be.'

50. In subsequent testimony, Gary Lee confirmed that from the things he had told Philip Chan, the latter may have understood that although the option fee had been forfeited, the new arrangement had revived the option fee to be used as the deposit. He also agreed that on 23 December Sam Bhojraj did not tell him that he must collect a deposit of \$24,000 on the signing of the Agreement.

51. Gary Lee confirmed that the plaintiffs were desperate to sell the property on 23 December. By desperate he meant that they were willing to sell it to anyone. He was aware that the plaintiffs were late in their completion of the purchase of the property and Sam Bhojraj told him that this was why they were desperate to sell it. He also informed Gary Lee that the plaintiffs needed a sale agreement to help them get financing to complete the purchase.

52. When Sam Bhojraj first handed over the Agreement to the agent to convey to the defendants, he did not give the latter any time limit for its signing and redelivery. It was only a few hours later that Sam Bhojraj said that the Agreement had to be returned on the same day. It was quite late at night, at about 10pm that this information was conveyed to Gary Lee. This was the first time the time limit was mentioned. About an hour later, Sam Bhojraj repeated this instruction to Gary Lee. The witness was not quite clear in his evidence on this point because at first he indicated that another time limit was given to him at 11pm but subsequently he said that during the 11pm conversation he was just told to get the defendants to sign and return the document as soon as he could and no specific time limit was imposed. He was clear, however, that throughout 23 December, Sam Bhojraj did not also mention to him that he had to collect a deposit from the defendants at the time when he gave them the signed copy of the Agreement.

53. Gary Lee maintained that the Agreement was not signed by the defendants on 23 December and that he was not able to meet them that day. He maintained that immediately the Agreement was in his hand, he called Philip Chan and told him the document was ready for signing. Philip Chan then said he would speak to his partners and call the agent back when they were ready to meet the latter. He spoke to Philip Chan several times that day and every time he was given a similar reply.

54. Gary Lee's evidence on what happened on 23 December was, in portions, incoherent. He was obviously having great difficulty in trying to account for the non-signing of the Agreement that day. Take this passage from his evidence where he was talking about what had happened that night. He said:

'Subsequently at around 10pm, Mr Bhojraj said if the sale and purchase was not signed by him the deal should be off. Then I told Philip about it ie the deal was off (about 10pm also) and Philip said I understand that. In my mind, however, I was not sure whether that was what Mr Bhojraj wanted ie for the deal to be off. So I told Philip, I said it could be on, it could be off, so you get it signed and lawyer will write about it and that will solidify it. Philip said okay. I asked him when I could see him and he said he would discuss with his partner.'

55. Gary Lee went on to say that he had a series of conversations with Sam Bhojraj between 11.05pm and shortly after midnight of 23 December. In the final conversation they agreed to talk again the next day. The next morning, he was finally able to arrange to see the defendants for the signing of the Agreement. Up to the time the Agreement was signed on 24 December, Sam Bhojraj did not tell him that the deal was off and Gary Lee's understanding based on his final conversation with Sam Bhojraj was that the deal was still on.

56. There was also some evidence given on two meetings in early 2000 between Gary Lee and the defendants and their friends. One meeting took place at the office of one Mike Kalwani who was financing the defendants' proposed development of the property. According to Gary Lee, he went to that meeting at Sam Bhojraj's suggestion in order to try and settle the defendants' claim. However, this was impossible as the defendants wanted \$1 million to be paid to them in settlement.

57. The other occasion was when Gary Lee attended a meeting at the defendants' solicitors' office. There a statement was taken from him. When it came to the point, however, he refused to sign it. His position was that the statement contained untruths and he could not sign it. It was put to him that he had demanded \$50,000 for his signature and it was only when this demand was rejected that he had refused to sign the statement. Gary Lee denied this suggestion.

(ii) The defendants' story: (a) Leow Koon Huat Danny

58. In the affidavit which Danny Leow filed as his evidence-in-chief, he first set out the circumstances in which the option was granted to Amethyst. He also stated that ALP had acted for both the plaintiffs and Amethyst in the matter and exhibited a copy of a commission agreement between ALP and Amethyst whereby Amethyst had agreed to pay ALP a brokerage fee of \$5,000 for the brokerage service rendered in Amethyst's purchase of the property. He went on to state that as Amethyst had assigned its option to the defendants, it was understood that this commission would be paid by the defendants upon the completion of the purchase.

59. According to him, some time on 22 December 1999 and before the expiry of the deadline for the exercise of the option, the defendants were informed by ALP acting for and on behalf of the plaintiffs that the option could be exercised by a party other than Amethyst and that the plaintiffs had agreed to vary the terms of the option in that the one percent option fee would be treated as full and sufficient consideration for a binding contract and that the plaintiffs were waiving their rights to the balance ten percent.

60. Amethyst then assigned the option to the defendants and authorised the latter to exercise it. On behalf of the defendants, the witness signed the Acceptance Copy and the entire option was handed to ALP for its onward transmission to the plaintiffs. The defendants were informed that the variation to the terms of the sale and purchase contract would be reduced to writing in a freshly issued sale and purchase agreement to be prepared by the plaintiffs' solicitors.

61. On 23 December 1999, ALP handed Danny Leow two sets of the Agreement duly signed by Sam Bhojraj. Danny Leow signed both sets and on the same day returned one set to ALP for its onward transmission to the plaintiffs. His execution was witnessed by Gary Lee. Gary Lee did not at any time tell him that the Agreement must be signed and returned on the same day nor was he at any time thereafter informed by either Gary Lee or the plaintiffs that the Agreement was null and void.

62. After the conclusion of the Agreement, the defendants approached a firm of solicitors to act on their behalf in the purchase. The solicitor in charge of the matter was, however, busy with his personal matters and did not do any work on the file. The matter was subsequently transferred to another law firm, Messrs Lourdes Chen & Lee, which conducted a title search and then lodged a caveat over the property on behalf of the defendants. The delay by the original solicitor and the change of solicitors explained the delay in the lodging of the caveat. Danny Leow emphasised that the defendants were genuinely interested in acquiring the property in order to redevelop the same and had engaged a firm of architects to produce drawings for a pair of three-storey semi-detached houses to be built on the property. They had also obtained provisional permission from the Urban Redevelopment Authority for this project.

63. Under cross-examination, Danny Leow explained the relationship between the defendants and other persons whose names came up in the action. One Alan Lim Kwee Kian was mentioned as a shareholder in the defendant company though the only directors of it are Danny Leow and his wife. There is no direct relationship between the defendants and Amethyst. Rather, Philip Chan and Danny Leow are both directors of two other companies that are involved in the real estate investment business. Further, Danny Leow had previously been in joint ventures with Mike Kalwani in which the former's role had been to purchase

properties whilst the latter financed the development of such properties. At some stage after obtaining the agreement for the purchase of this property, Danny Leow also procured Mike Kalwani's involvement in the development project as the sole financier.

64. The Agreement was first discussed between the defendants as purchaser and the plaintiffs as vendor on 22 December when they were supposed to be preparing for the exercise of the option to purchase the property. Discussions were held amongst Philip Chan, Alan Lim and Danny Leow and it was the last of these who suggested that the defendant company should be the purchaser. Danny Leow pointed out that the defendants were an investment company holding a Land Dealing Unit permit enabling it to purchase landed property whilst Amethyst was a builder and did not have such a permit available. At that stage, Mike Kalwani was not involved, as the parties had not decided whether they were going to on-sell or redevelop the property.

65. On 22 December, Danny Leow and his associates were undecided about whether to exercise the option because Philip Chan had not been able to secure a bank loan to finance the purchase. That morning, therefore, nothing was done to exercise it. In the early afternoon, Danny Leow received a call from Philip Chan who told him that the agent had offered to allow them to exercise the option without having to pay the remaining nine percent of the price as the balance of the deposit. He was told that the plaintiffs had agreed to a sale and purchase agreement with the defendants without payment of the nine percent or any payment at all. Amethyst then assigned the option to the defendants and the Acceptance Copy was signed by Alan Lim on Danny Leow's behalf. The witness asserted that the statement in his affidavit that he had signed the Acceptance Copy was true because he had given Alan Lim an instruction to sign the document on his behalf and he had made that statement in order to take responsibility for the signature. Danny Leow confirmed that on 22 December he did not speak directly to Gary Lee or the plaintiffs and that all information that he had on the offer made by the plaintiffs had come from Philip Chan.

66. The witness reasserted during cross-examination that the Agreement had been signed by him on 23 December at about noon. The signing took place at the car park at Toa Payoh Stadium and at that time Philip Chan and Alan Lim were also present. When the Agreement was given to him, Danny Leow saw it had been dated 23 December. He also noted that it had been signed by the plaintiffs. He did not read the Agreement but only glanced through it. He was told by the agent that everything was in order.

67. Danny Leow was questioned about the appointment of solicitors for the defendants. He stated that originally Amethyst had appointed its own solicitor to handle the purchase but when in early January he went to see that lawyer he found the latter to be tied up with personal matters. He was not comfortable with the solicitor's ability to handle the purchase. This on the very same day he decided to change solicitors and instructed Lourdes Chen & Lee instead. It should be noted that by this time the defendants had discovered that Sea Union had lodged a competing caveat against the property. Danny Leow admitted that before his visit in January 2000, the defendants had not given the first set of solicitors any instructions on the transaction and that this firm did not have conduct of the matter for the defendants at all. He explained that he had not gone to see the lawyer before early January because he assumed the matter was being handed by Amethyst's solicitors and that Philip Chan would ask those solicitors to continue with the transaction. It was put to him that the defendants had not been serious purchasers of the property and that when they accidentally discovered the existence of the competing caveat they saw an opportunity to cash in. Danny Leow denied this suggestion.

68. He confirmed that the new law firm Lourdes Chen & Lee were instructed on 10 January 2000 but could only explain the nine day lapse before the firm lodged the caveat on behalf of the defendants by stating that the lawyers had delayed the lodgement. He also asserted that it was a coincidence that the defendants' application for approval to build a pair of semi-detached houses on the property was also lodged on 19 January. He did not agree that as soon as the defendants found out about the Sea Union caveat they had proceeded to do everything in order to lay a foundation for a claim against the plaintiffs for vast damages or that the defendants had not had the financial resources to contemplate such a purchase.

69. Danny Leow confirmed that at a meeting at Mike Kalwani's office at Peninsula Plaza the latter had demanded that the plaintiffs pay the defendants \$1 million to settle the matter. He did not know why that amount was demanded and conceded that there was no basis for making it. Subsequently, in re-examination, he elaborated that if the defendants' purchase and redevelopment of the property went ahead as planned, they would incur costs of around \$3.5 million (including \$800,000 in

construction cost). The defendants had also estimated that they would be able to sell each of the pair of semi-detached houses for \$2.3 million giving them a gross income of \$4.6 million and therefore about \$1 million in profit. Danny Leow believed that that was the reason why Mike Kalwani had demanded \$1 million in damages.

70. The witness confirmed that he had been present at the meeting held at the premises of the defendants' new solicitors, Messrs Fong & Partners, where Gary Lee had given a statement. He averred that Gary Lee had been asked to tell the truth. No threats had been made and the only reason why this statement had not been signed was because Gary Lee had wanted \$50,000 which the defendants had refused to pay.

(b) Philip Chan

71. In Philip Chan's affidavit of evidence-in-chief, he stated that on 22 December 1999, Gary Lee telephoned him to enquire whether Amethyst intended to exercise the option and his reply was that they might not. Gary Lee telephoned again and told him that the plaintiffs were agreeable to Amethyst proceeding with the option/purchase of the property without requiring payment of the balance ten percent of the sale price and that Amethyst's nominee could exercise the option. When he asked why the plaintiffs were prepared to do this, the reply was that they needed to have a sale agreement in respect of the property in order to get financing from the bank. Philip Chan told Gary Lee that he would discuss the offer with his associates and later, when Gary Lee telephoned him for the third time, he informed Gary Lee of their acceptance and that the defendants would replace Amethyst as the purchaser.

72. He continued that he had met Gary Lee on the evening of 22 December at his work site in Toa Payoh. He handed to Gary Lee the option with the Acceptance Copy executed by the defendants and Amethyst's letter authorising the defendants to exercise the option. As the option provided that it was to be exercised by payment of the balance ten percent of the sale price, it was agreed that Gary Lee would arrange for a fresh sale and purchase agreement to be prepared and signed by the plaintiffs and the defendants to reflect the variations agreed to. He then went on to give evidence similar to that of Danny Leow regarding the signing of the agreement on the morning of 23 December. It should be noted that Gary Lee agreed the Acceptance Copy and Amethyst's letter of authority had been handed to him by Philip Chan although he asserted this had happened on 24 December and not on 22 December.

73. Philip Chan agreed that neither Amethyst nor the defendants had returned the option duly accepted to the plaintiffs' lawyers by 4pm on 22 December as stipulated by the terms of the document. I asked whether that meant that the option money was forfeited. His reply was no because he had been told by Gary Lee that the agent would come and collect the option with a new condition that only one percent would be needed to exercise it and the \$24,000 would be the deposit as stated in the fresh agreement. He explained that he handed over the Acceptance Copy to Gary Lee because Gary Lee had asked him for it in order to show the plaintiffs that the defendants intended to purchase the property.

74. Philip Chan maintained under cross-examination that he had met Gary Lee on 23 December at around 11am in the company of Danny Leow and Alan Lim. This was the occasion when the Agreement was signed. He denied Gary Lee's allegation that he had had numerous conversations with the latter on the evening of 23 December. He was definite that the signing of the Agreement took place on 23 December and not 24 December because the latter date was Christmas Eve.

75. Philip Chan was asked why Amethyst had ignored the plaintiffs' solicitors' letter of 30 December. By this letter, the plaintiffs had put forward the position that Amethyst had allowed the option given to it by the plaintiffs to lapse without exercising it in the specified manner. The letter went on to state that the option fee of \$24,000 had accordingly been forfeited to the plaintiffs and that neither party would have any claim or lien on the property. It was suggested to him that the letter reflected a position that was the opposite of that which he had agreed with Gary Lee. Philip Chan maintained that he had not considered the letter to be important. It had been sent to him only by fax seven days after the agreement had been signed and whilst it sounded strange to him that the plaintiffs were asserting that the option money had been forfeited, he did not act on it as he was very busy trying to complete his project at Toa Payoh.

(c) Other witnesses

76. Evidence for the defendants was also given by Mike Kalwani (officially Bharat Dharmadas Kalwani) and Mrs Phyllis Fong (Tan Guat Neo, Phyllis), the defendants' solicitor. I need not recount their evidence at this stage since neither of them was involved in the events of the 22, 23 and 24 December 1999 except to say that Mike Kalwani confirmed the story told by both Danny Leow and Philip Chan that Gary Lee had refused to sign the statement taken from him at Mrs Fong's office because the defendants were not willing to pay him \$50,000. Mrs Fong was not present when this refusal took place. She confirmed, however, that the statement had been given voluntarily by Gary Lee to her assistant in her presence at her office and that he had read over the first draft and made minor corrections to it. Thereafter he had asked her to leave the room because he wanted to talk to Danny Leow and his associates privately. When she returned to the room she was told that Gary Lee had refused to sign the document.

77. I note here for completeness that the prepared statement gave an account of the events leading up to the signing of the Agreement which reflected the defendants' version of events. It contained an averment by Gary Lee that he had been instructed by Sam Bhojraj on 22 December that the option could be exercised by another party and then converted to a sale and purchase agreement with the option fee being used as the consideration for the sale and purchase agreement. He also said in the statement that the purchasers had signed the Agreement on 23 December and after this was done he had informed the plaintiffs of the signing.

Findings of fact

78. I find, on the evidence, that by 22 December 1999, the plaintiffs were desperate to have a concluded contract for the sub-sale of the property. This was because they were already late in completing their own purchase from Lian Huah Electrical Engineering Pte Ltd and, having been served with a 21 day notice on 21 December, were facing not only payment of interest for late completion but also the chance of being sued for damages if they were not able to complete within the 21 days. The non-completion must have been due to the plaintiffs' inability to raise sufficient finance as they did not, up to 21 December, have evidence of a concrete sub-sale of the property.

79. I do not accept Sam Bhojraj's testimony that there was no difficulty in him procuring a loan when he wanted it and that the only difference that having a sub-sale would make would be in the quantum of the loan. Even if this assertion was true, the non-completion of their own purchase must have meant that the loan quantum that was available to the plaintiffs (approximately 60 percent of the purchase price) in the absence of a confirmed sub-sale would not have provided them with sufficient funds to pay the 90 percent of the price due on completion.

80. In those circumstances, the plaintiffs were extremely anxious that the option be exercised by Amethyst. I hold that when it became clear to the plaintiffs some time in the late afternoon of 22 December that Amethyst was not proceeding, Sam Bhojraj must have recognised the possibility that Amethyst was being held back by an inability to come up with the \$218,000 required for the exercise of the option. He was also all too aware of the plaintiffs' pressing need for a sale contract in order to obtain the maximum possible financing. The plaintiffs admitted that he then put a proposition to Gary Lee for the latter's onward transmission to Amethyst.

81. I hold that the proposition put forward was that notwithstanding the lapse of the option, the plaintiffs were prepared to sell the property to Amethyst at the previously agreed price but on altered payment terms. Instead of having to pay a deposit of ten percent, Amethyst would only have to pay a deposit of one percent and the remaining 99 percent of the purchase price would be payable on completion. Further, the one percent deposit would be taken as having been satisfied by the payment of the option money in October 1999. The quid pro quo for this arrangement was that Amethyst would have to enter into a sale contract rather than be granted a new option so that there would be an immediately binding agreement which the plaintiffs

would be able to show to their bankers. In my judgment, Sam Bhojraj would have realised at the time that even his new proposition would not have been attractive to Amethyst if he had told them that he was forfeiting the option fee and that for the new arrangement they would have to pay another \$24,200 in cash as the initial deposit.

82. Further, the plaintiffs' official version is that the terms of the new arrangement called for an immediate payment of \$24,200 is not supported by the evidence of Gary Lee. This was the person who had to convey that information to Amethyst on the plaintiffs' behalf. As shown by the extensive quotations from his evidence set out in para 49, Gary Lee did not convey such a term to Philip Chan. He should have done so as he was acting as the plaintiffs' agent in putting forward the proposals. Gary Lee sought to explain the omission to properly convey the proposition by saying that at the time he spoke to Philip Chan he thought that two interpretations could be given to the term relating to the one percent deposit. Due to his confusion on the matter, he did not clearly notify Philip Chan of the payment requirement. I find this evidence incredible.

83. I do not accept that Gary Lee had two interpretations of the term. He knew what the plaintiffs wanted to propose and that was that the deposit would be met by the option fee even though that option fee was slightly short of one percent of the purchase price. That is the proposal that he put forward to Philip Chan. He could not admit it in court because that would undermine the plaintiffs' case but on the other hand he was not willing to lie outright and say that he had told Philip Chan that the deposit had to be paid in cash when the agreement was signed. The reluctance to tell such an outright lie on this aspect (a reluctance which was not reflected in some other aspects of his evidence) was probably because if he had told it he would then have had to explain why he had not collected the deposit at the time the defendants signed the Agreement and had yet left one completed copy of the Agreement with them.

84. Further evidence of the plaintiffs' intention may be garnered from the Agreement itself. This provided for \$24,000 to be the quantum of the deposit. That figure was identical to the option fee. It was not the equivalent of one percent of the purchase price. That would have been \$24,200. If the plaintiffs had been expecting to collect one percent on the signing of the Agreement they would surely have drafted the clause using the figure of \$24,200. The only reason they used \$24,000 as the deposit was that they already had this amount.

85. The new proposition was put to Philip Chan in the late afternoon or the evening of 22 December. As he testified, he consulted with his associates and having done so, informed Gary Lee that he and they were willing to accept this proposition on the basis that the buyer would be the defendants rather than Amethyst. Although the plaintiffs had contemplated entering into the new arrangement with Amethyst, when the defendants' name was put forward and Sam Bhojraj was told by Gary Lee that the defendants were associated with Amethyst, he accepted them as the buyer though he did require some evidence of a commitment on the defendants' part and this was the reason why the defendants signed the Acceptance Copy of the option even though it had expired. In the desperate situation in which the plaintiffs found themselves, they were happy to have someone willing to enter a legally binding contract with them and were not fussy about who it was.

86. I hold that all these events happened on 22 December. I do not accept Gary Lee's and Sam Bhojraj's testimony that it was only on 23 December that Philip Chan conveyed the defendants' agreement to buy to the plaintiffs. There were several inconsistencies in the evidence of the plaintiffs' witnesses on this point. For example, Sam Bhojraj himself pinpointed three different times on 23 December as being the times when he was told that the defendants rather than Amethyst were the buyers. First, he said that he was told that over the telephone on the morning of 23 December. Next he said that he was told that by Gary Lee when the latter was in his office that morning and finally he asserted that it was only when he was in his lawyer's office drawing up the agreement that he learnt the name of the purchaser. Additionally, there is concrete supporting evidence for 22 December in the form of the date of Amethyst's letter of authorisation and the date inserted in the Acceptance Copy. Both these were dated 22 December and I see no reason why the defendants and Amethyst would, if they had made their decision to buy in the defendants' name only on 23 December, have backdated those documents since they knew in any case that the contract would be evidenced by the new Agreement and not by the exercised option.

87. I accept that on the morning of 23 December, Sam Bhojraj and Gary Lee proceeded to the plaintiffs' solicitors' office for the purpose of having a sale and purchase agreement between the plaintiffs as vendors and the defendants as purchasers drawn up. This visit must have been arranged between the two men some time on 22 December after Philip Chan had indicated the

defendants' acceptance of the plaintiffs' new proposition. Once the Agreement was ready, Sam Bhojraj signed it on behalf of the plaintiffs and handed it to Gary Lee. In my judgment, the only instruction given to Gary Lee at that time was to take the documents to the defendants, have them sign both and bring back one signed copy for the plaintiffs' further action. The very fact that Sam Bhojraj signed and dated the Agreement before handing it to Gary Lee shows that at the time he was quite confident that the defendants had accepted the plaintiffs' proposition and that he was willing to commit the plaintiffs to a legal contract with the defendants. If he had been at all unsure of their reaction or was not willing to commit the plaintiffs until the deposit was paid, he would not have signed the sale and purchase agreement. In fact by that time he had most probably seen the signed Acceptance Copy and that was why he was willing to draw up and pre-sign the Agreement.

88. I do not accept that Gary Lee was, as asserted by the plaintiffs, instructed to collect the one percent deposit referred to in the Agreement. Here, I note that Gary Lee himself at more than one point of his testimony, indicated that no such instruction had been given and that he had no idea that he was supposed to collect any cash from the defendants. At one stage, following the plaintiffs' line that the one percent deposit was to be paid at about the time of the signing, Gary Lee indicated that he expected the defendants' lawyers to make this payment to the plaintiffs' lawyers. He was certain that he himself was not supposed to receive the money.

89. I do not accept either that Gary Lee was instructed by the plaintiffs that the Agreement had to be signed by the defendants on that same day, 23 December, or else the plaintiffs would no longer be willing to sell the property to the defendants on the proposed terms. In this respect, there was a major inconsistency between the evidence given by Sam Bhojraj and that of Gary Lee. The former asserted that he told Gary Lee, at the time the documents were handed over at the solicitors' office, that if he did not get them back with the cheque on the same day he would take it that the defendants had no further interest in the property. Gary Lee, however, stated that no such instruction was given to him when he first received the documents and it was only much later that Sam Bhojraj issued those instructions.

90. I find that once Gary Lee had the documents he proceeded straight to Philip Chan's office in Toa Payoh where he met Danny Leow and Alan Lim as well and procured the defendants' signature of the Agreement. I do not accept the plaintiffs' version that the defendants were elusive and undecided on 23 December and that despite chasing them the whole day, Gary Lee could not get an acceptance from them until the morning of 24 December. Even on the plaintiffs' story, Philip Chan had agreed, on the defendants' behalf, to the plaintiffs' proposition on the morning of 23 December before the plaintiffs' visit to the solicitors' office. Having agreed to the purchase in the morning, there was no reason for the defendants not to sign the Agreement immediately. If Gary Lee had said that the Agreement was not signed on the same day because Danny Leow was busy and Philip Chan could not procure his attendance at a convenient location, that would have been more believable than the story actually put forth which was that after accepting the deal the defendants had second thoughts and Gary Lee had to keep asking whether they were still agreeable to it and he could see them. It should be noted that no independent evidence (such as telephone records) was put forward of all the numerous calls that had purportedly taken place between Gary Lee and Philip Chan throughout 23 December or of the similarly numerous telephone calls between Sam Bhojraj and Gary Lee up to the early hours of 24 December.

91. Even if I were disposed to accept the plaintiffs' version that the Agreement was not signed until 24 December, I would have held that at the time of its signing the plaintiffs had not withdrawn their offer to the defendants. This was because Sam Bhojraj admitted that in his last telephone conversation with Gary Lee after midnight of 23 December, he had left the matter open. He also confirmed that he had not told Gary Lee on the morning of 24 December that the deal was off until around noon of that day although later on he changed this evidence and said he had told Gary Lee this at about 11am. Sam Bhojraj's evidence on this point is unreliable. He twisted and turned too much in his effort to establish that the defendants were late. It should be noted also that Gary Lee averred that up to the time he procured the defendants' signature at noon on 24 December, he had not been told by the plaintiffs that they had withdrawn their offer. Gary Lee was called as the plaintiffs' witness and thus this evidence is all the more damaging to the plaintiffs' case.

92. It would have been noted from the holdings above that where there has been a discrepancy between the story told by the plaintiffs and that told by the defendants, I have preferred the defendants' version of events. I am aware that the defendants' witnesses have not been totally consistent with each other and on occasion they were caught out in lies, for example, Danny

Leow's initial attempt to pass off the signature on the Acceptance Copy as his. Overall, however, their evidence was consistent and probable and the flaws in it are more likely to have been caused by lapses in memory than by deliberate attempts to embroider their case.

93. The same could not be said of the evidence given by Sam Bhojraj and Gary Lee. Both these persons changed their accounts to suit the plaintiffs' case and to fill up the gaps that became apparent as cross-examination proceeded. Gary Lee was the more obvious liar but Sam Bhojraj was equally at fault. Further, he tried to elicit untruthful evidence (but evidence that would be helpful to the plaintiffs) by paying Gary Lee more than the agreed commission in return for the letter of 22 January. Sam Bhojraj could not explain to my satisfaction why the fee of \$5,000 for a successful sale had turned into \$10,000 for an aborted sale which was boding to become a major legal problem for the plaintiffs. In my judgment, the extra \$5,000 was paid to Gary Lee to bring him squarely into the plaintiffs' camp for the purposes of the case. It was perhaps fortunate for the plaintiffs that the defendants were not equally willing to pay for evidence as if they had been the plaintiffs would have discovered that once bought, Gary Lee did not stay bought but was still willing to sell his testimony to a higher bidder.

Legal consequences of findings of fact

Status of option

94. The first issue is the status of the Amethyst option after 4pm on 22 December. That was an offer which had to be accepted in a stipulated manner by a stipulated date. If either of the stipulations was not met, then the offer lapsed and the option money was forfeited to the plaintiffs. In the event, neither stipulation was met and therefore on its face, at 4pm on 22 December the option came to an end. The defendants contended, however, that it continued to exist because its terms were varied by the proposition which the plaintiffs made to them that day ie that the option could be exercised without requiring payment of a deposit of ten percent of the purchase price as long as the parties entered into a sale and purchase contract straightaway and that the \$24,000 paid as option fee would serve as the deposit required under such contract.

95. The plaintiffs argued that in law there could be no such variation because there was no written document evidencing the same. They relied on the legal requirement that to be valid, contracts for the sale of an interest in land must be evidenced in writing and the ancillary rule that variations of such contracts must also be written. They went on to submit that oral evidence of the variation of the option was not admissible under s 94 of the Evidence Act (Cap 97). This section provides that, except in certain circumstances, when the terms of a contract which is required by law to be in writing have been proved by the admission of the written document evidencing the contract, no evidence of any oral agreement or statement can be admitted as between the parties to such instrument for the purpose of contradicting, varying, adding to or subtracting from its terms.

96. I accept the plaintiffs' argument on this point. I do not think that the option was varied. Even if the plaintiffs' intention at the time were to procure a variation of the option, the oral evidence to that effect would not be admissible under s 94 of the Evidence Act. In any case, in my judgment, the plaintiffs had no intention of varying the option. That brings us to the next issue which is what the plaintiffs' new proposition was.

Is the Agreement a variation of the option?

97. In my view, what in fact happened was that once it was clear to the plaintiffs that Amethyst would not be exercising the option in accordance with its terms, the plaintiffs decided to forget about the option altogether and put forward a new proposal. This proposal which was addressed to Amethyst was that provided Amethyst was willing to enter into a sale and purchase agreement with the plaintiffs immediately, the plaintiffs would sell the property to Amethyst at \$2,420,000 with this price being paid in two instalments: \$24,000 on signing of the contract (to be treated as satisfied by the payment of the option fee) and the balance on completion.

98. Sam Bhojraj was emphatic that what he wanted was to proceed to a sale and purchase agreement straightaway. His stand and that repeated by the plaintiffs in their submissions was that the Amethyst option and the Agreement were two entirely different contracts. He did not accept that the Agreement was a variation of the option. I agree. The proposal which Gary Lee put forward was intended for Amethyst. In the event Amethyst did not accept the proposal but put forward a counter offer that the defendants would be the purchaser. The plaintiffs could have refused at this point. They did not do so because they were desperate to sell and also because there was going to be an immediate contractual relationship between them and the new buyer which was distinct from the option. They therefore accepted the defendants as the buyer and drew up the Agreement to reflect this.

99. If the Agreement were to be considered a valid contract, it would be a valid contract which stands on its own independent and apart from the option which lapsed. In law, the Agreement cannot function as a variation of the option. First, the Agreement is between the plaintiffs and the defendants whereas if there had been a valid variation of the option that variation would have existed between the plaintiffs and Amethyst to whom the plaintiffs were addressing their proposals. Secondly, there are differences between the terms of the Agreement and the terms of the sale contract that would have arisen had the option been exercised. The difference in the terms is substantial and not limited to the difference in the mode of payment. Further, these different terms were not put forward to Philip Chan when the lapsing of the option was discussed and therefore had not been accepted by the defendants at the time Philip Chan conveyed their willingness to purchase the property on the new basis. The defendants did of course accept all the terms of the Agreement when they signed it but this would be acceptance of those terms as contained in a new and separate contract and not an acceptance of a varied option.

100. In my judgment, the purported signing of the Acceptance Copy of the Amethyst option by the defendants had no legal effect as there is no evidence of a valid variation whereby that signature alone would constitute a valid exercise of the option when the other stipulations were not met. In any case, by the time the defendants signed the option, the plaintiffs had by their offer made through Gary Lee, made it quite clear that they did not want a sale and purchase agreement on the terms contained in the option but wanted a new contract altogether.

Validity of Agreement: (i) condition precedent

101. The next issue that arises is as to the validity of the Agreement. The plaintiffs' position is that the Agreement is a nullity on various legal grounds. First, they say that a condition precedent to its validity was not met. This was that it was not signed on 23 December as specified by them. In view of the findings which I have made on the facts, this objection has no substance. I have found that there was no condition that the Agreement had to be signed on 23 December in order to be valid and that even if there had been that condition was fulfilled. Further, even if the Agreement was signed on 24 December despite the plaintiffs' imposition of the time limit, Sam Bhojraj had subsequently left the position open and had not withdrawn Gary Lee's authority to present the Agreement to the defendants for signing until after the document had in fact been signed. By then it was too late to re-impose the condition.

(ii) Consideration

102. The next set of legal objections is based on the non-payment of the deposit required by the Agreement. First, the plaintiffs rely on the well established principle that for a contract to be enforceable, it must be supported by valid consideration. They contend that the Agreement was not supported by valid consideration in that the sum of \$24,000 was not paid to the plaintiffs by the defendants as the defendants themselves openly admitted.

103. There are two difficulties with the plaintiffs' argument. The first is a factual one: that is that the plaintiffs themselves had proposed to apply the option money in payment of the deposit due under the option. Knowing that the defendants had agreed to purchase the property on the basis of that proposal, the plaintiffs cannot resile from it and argue that the defendants have not

given consideration for the Agreement because they did not physically pay the deposit. The second problem is that in this case the deposit cannot be regarded as the consideration for the Agreement. The consideration for the Agreement is the legally enforceable promise by the defendants to purchase the property at the price and on the terms set out in the Agreement. Just because the deposit may not have been paid in accordance with the terms of the Agreement does not mean that there was a total failure of consideration resulting in the Agreement being a nullity. Once signed the Agreement was an executory contract which bound both parties though not a cent may have changed hands at that stage.

(iii) Was payment of the deposit a condition precedent or a fundamental term?

104. The plaintiffs' alternative argument was that payment of the deposit was either a condition precedent to the validity of the Agreement or a fundamental term of it. In the former case, non-payment would result in the Agreement not taking effect as a valid contract whereas in the latter case non-payment would be a breach of contract entitling the plaintiffs to treat the Agreement, although valid, as having been repudiated.

105. The legal status of a deposit clause in an agreement for sale and purchase of property has been considered in several cases. In *Myton Ltd v Schwab-Morris* [1974] 1 All ER 326, an agreement for the underlease of a maisonette provided by cl 2 that the defendant 'shall on or before the signing hereof pay ten per centum of the premium of 70,000 due on the said underlease as a deposit' to the plaintiff. This clause came up for consideration in proceedings between the plaintiff and the defendant after the defendant's cheque in purported payment of the deposit was dishonoured by non-payment. It was held by Goulding J that as a general rule a deposit was demanded and paid on the signing of a contract for the sale of land, or grant of a lease at a premium, as an earnest of the purchaser's ability to complete the contract in due course; the vendor did not in the normal case, intend to be bound by the contract without having the deposit in his own or his stakeholder's possession as a protection against possible loss from default by the purchaser. Since there was nothing in the language of cl 2 of the agreement, or the special circumstances of the case, to displace the general rule, it followed that cl 2 stated a condition precedent to the agreement taking effect and, the deposit not having been paid, the plaintiff was not bound by the agreement. It was held in the alternative that if cl 2 did not express a condition precedent, payment of the deposit under that clause was a fundamental term of the contract, so that the defendant's failure to comply with it entitled the plaintiff to renounce further performance.

106. The decisions in *Myton Ltd* and succeeding cases were cited to the English Court of Appeal when it heard *Damon Cia Naviera SA v Hapag-Lloyd International SA* [1985] 1 All ER 475 a case involving a contract for the sale of three vessels. One of the issues there was the effect of cl 2 which provided 'As a security for the correct fulfilment of this contract, the Buyers shall pay a deposit of 10% ... of the Purchase Money on signing this contract ...'. The court held that actual payment of the deposit was not necessarily a condition precedent to the formation of the contract. The parties had entered into an executory sale agreement, all the terms of which had been finalised, and there was no reason to infer that a contract did not arise until the deposit was paid, since the provision for such payment was a fundamental term of the contract itself.

107. Fox LJ in the course of his judgment considered various authorities which had been cited on the question of the effect of a clause providing for payment of a deposit in a contract for sale. He said (at pp 483 to 484):

'In *Millichamp v Jones* [1983] 1 All ER 267, [1982] 1 WLR 1422 there was a written agreement for the purchase of land. It included a provision for payment of a deposit. The purchaser failed to pay the deposit. Warner J held that the payment of the deposit was not a condition precedent to the creation of a contract. Having referred to the authorities which I have mentioned he said ([1983] 1 All ER 267 at 274, [1982] 1 WLR 1422 at 1430):

"... it seems to me that unless a distinction is to be made between sales by auction and sales by private treaty, the weight of authority is in favour of the view that a requirement in a contract for the sale of land that a deposit should be paid by the purchaser does not constitute a condition precedent,

failure to fulfil which prevents the contract from coming into existence, but is in general to be taken as a fundamental term of the contract, breach of which entitles the vendor, if he so elects, to treat the contract as at an end and to sue for damages including the amount of the unpaid deposit. Nor do I see that anything, either in the authorities or in principle, calls for a distinction to be made in that respect between sales by auction and sales by private treaty."

In *Portaria Shipping Co v Gulf Pacific Navigation Co Ltd, The Selene G* [1981] 2 Lloyd's Rep 180 the written agreement followed the Norwegian sale form but with some amendments. Clause 2 provided:

"As security for the correct fulfilment of this contract the Buyers shall pay a deposit of 10%... of the Purchase Money within 48 hours ... after signing this Memorandum of Agreement ..."

The buyers did not pay the deposit and the sellers rescinded. It was held by Robert Goff J that the obligation to pay the deposit was an essential term of the contract. It was not suggested that the payment of the deposit was a condition precedent to the existence of the contract.

Of the cases to which I have referred the condition precedent question was only directly in issue in *Myton Ltd v Schwab-Morris and Millichamp v Jones*. While I differ with hesitation from the view of Goulding J, who has much experience in matters relating to the sale of land, I do not feel able to agree that in general, where the agreement provides for the payment of a deposit, such payment is necessarily a prerequisite to the formation of a contract. It may well be that in practice a vendor's solicitors would refuse to exchange contracts until the deposit was in their hands or that of a stakeholder. But in my view, if the parties, as in the present case, actually enter into an executory agreement for sale all the terms of which are finalised, one of them being that a deposit shall be paid, and which objectively is a contractual agreement, I see no reason for inferring that no contract arises until the deposit is paid. The provision for the payment of a deposit is simply a term of the contract. In the absence of special provision it does not seem to me to carry with it any implication that it is a condition precedent to the existence of contractual relations. And in none of the cases to which I have referred, except *Myton Ltd v Schwab-Morris and Millichamp v Jones* (in which it failed), does such a suggestion appear to have been advanced at all. It seems also to have been raised before Goulding J in *Beck v Box* (1973) 231 EG 1295 but he did not have to decide it.

Accordingly, I prefer the view of Warner J in *Millichamp v Jones* and hold that the provision for payment of the deposit was not a condition precedent to the formation of a contract. It was in my view a fundamental term of the contract. I entirely agree with the view of Goulding J in *Myton Ltd v Schwab-Morris* [1974] 1 All ER 326 at 331, [1974] 1 WLR 331 at 337 (expressed on the alternative basis that he was wrong as to the condition precedent) that the provision for payment of the deposit was 'a term of so radical a nature that the defendant's failure to comply with it would entitle the plaintiff company to renounce further performance'. (See also *Millichamp v Jones and The Selene G*.) The result, in my opinion, is that the provision for payment of the deposit was not a condition precedent to the formation of the contract but was a fundamental term of a concluded contract.'

It should be noted that Goff LJ who was also a member of the Court agreed with this view of the effect of a deposit clause although he was in the minority on the question of the damages due to the plaintiff in that case. With due respect I agree with the views expressed in *Damon Cia Naviera SA* case.

108. In the present case, cl 2 of the Agreement provided:

'Upon the signing of this Agreement the Purchaser shall pay to the Vendor a sum of Dollars Twenty-four thousand (\$24,000) as and by way of deposit herein (the receipt whereby the Vendor hereby acknowledges)'.

There was nothing else in the Agreement which reflected on the status of the deposit clause which would distinguish it from the ordinary deposit clause that, as Fox LJ pointed out, does not operate as a condition precedent but is simply a term of the contract. In my judgment, the clause here was not a condition precedent either. It was a fundamental term of the contract and if it had not been complied with, could have permitted the plaintiffs to repudiate the contract for breach on the part of the defendants. The clause was, however, complied with in that the plaintiffs had already agreed to treat the option fee as the deposit.

109. In any case, if one is going to repudiate a contract because of fundamental breach on the part of the other party, one must do so quickly or one loses that right. In this case, the plaintiffs did not repudiate the contract expressly until 14 January 2000 when their solicitors wrote that the sale was deemed to be aborted because the defendants had not signed and returned the Agreement within the agreed time and with the required deposit. By that time the defendants had taken various steps in relation to the property in the belief that the contract was valid and existing and in my view it was too late for the plaintiffs to so elect. In their closing submissions, the plaintiffs argued that the defendants had had early constructive notice of repudiation of the Agreement in that Gary Lee was informed on 24 December that the plaintiffs had that day granted an option to Mr Lim in respect of the property. This proposition would only be maintainable if Gary Lee was at the time the defendants' agent so that notice to him was notice to them.

110. The plaintiffs did make an argument that Gary Lee was acting as the defendants' agent by virtue of the commission agreement that he had signed with Amethyst. I do not accept that argument. The document only related to Amethyst's agreement to pay ALP a commission for broking the deal. It did not appoint ALP as Amethyst's agent much less the defendants' agent for any other purpose. It was clear from Gary Lee's evidence that in relation to everything that happened once Amethyst had made it apparent that it would not exercise the option, he was acting solely as agent for the plaintiffs. When Sam Bhojraj informed Gary Lee of the option to Mr Lim, the information was imparted and received by the latter as the agent of the plaintiffs and his position as such was appreciated by both parties.

111. I am satisfied that on 23 December 1999, there was a valid and enforceable contract for the sale of the property by the plaintiffs to the defendants. This contract was embodied in the Agreement, a document that is legally binding on both parties. Nothing that happened thereafter changed the legal position. The defendants acquired an interest in the property by reason of the Agreement and were entitled to place their caveat against it in January 2000. It might have helped matters had they put in a caveat immediately after signing the document but a caveat reflects an equitable interest, it does not create one. The defendants' failure to lodge the caveat for some weeks could not change their equitable position as purchasers.

Conclusion

112. In the circumstances, the defendants have shown cause why they should not be ordered to remove their caveat. The plaintiffs' action must fail. I therefore dismiss it with costs.

Judith Prakash

Judge

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