Ho Kon Kim v Betsy Lim Gek Kim and Others
[2001] SGHC 75

Case Number : Suit 165/2000/Q

Decision Date : 16 April 2001

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : James Ponniah with Leong Sue Lynn (Wong & Lim) for the plaintiff; M Dass (M Dass & Co) for the first defendant; Tan Kok Quan SC with Chia Boon Teck (Tan Kok Quan Partnership) for the second defendants; Leslie Chew SC with Lionel Tay & Esther Ling (Khattar Wong & Partners) for the third defendants; Chelva Rajah SC with Chew Kei-Jin (Tan, Rajah & Cheah) for James Ponniah and Wong Ann Pang

Parties : Ho Kon Kim — Betsy Lim Gek Kim; William Lai & Alan Wong; RHB Bank Berhad

JUDGMENT:

Grounds of Judgment

1. At the conclusion of the trial, I dismissed the plaintiff's claim against all three (3) defendants. Subsequently, at a hearing pursuant to O 59 r 8(2) of the Rules of Court, I ordered that the costs payable by the plaintiff to the second and third defendants were to be borne by the plaintiff's solicitors James Ponniah and Wong Ann Pang personally but, the costs of the first defendant would be borne by the plaintiff herself. The plaintiff as well as the aforesaid solicitors have now appealed against my decision (in Civil Appeals Nos. 164 and 167 of 2000 respectively).

The facts

2. The plaintiff was at the material time, the owner of a piece of land with a house standing thereon, situated at No. 124, Branksome Road (the property) with an area of 15,173 sq ft. She was widowed in June 1989 and has amongst her six (6) children, sons Robert and Leslie and a daughter, Jeanette. She had been residing at the property since it was purchased by her late husband Foo Chee Guan in 1947.

3. In 1992, at Robert's request, the plaintiff mortgaged the property to Keppel Finance Limited (Keppel) to obtain credit facilities for him/his businesses. In 1996, Robert informed her that he had defaulted in servicing the interest on the facilities; as such Keppel intended to recall the loan they had extended to him. The plaintiff consulted her lawyer Victor Wong Ann Pang (WAP) who informed her that if Keppel foreclosed on the property as mortgagees, the price that could be realised may be less than if the property was sold in the open market. Consequently, the plaintiff was advised to sell the property before Keppel took any action.

4. In April/May 1996, Jeanette brought Betsy Lim (the first defendant) to see the plaintiff, together with Wee Woon Chuan Joseph (Wee) the first defendant's husband. At that time, both the first defendant and Wee were directors of a property company known as Derby Development Pte Ltd (Derby). The plaintiff was informed that Derby was interested in developing the property jointly with the plaintiff.

5. At a preliminary meeting held on 25 May 1996, the plaintiff asked for $6m for the property in addition to one (1) of the three (3) bungalows that Derby proposed to erect thereon after the existing house had been demolished. The plaintiff was told it would cost about $2m to erect three (3) bungalows of reasonably good finish. Subsequently, the first defendant counter-offered $4.2m for the property and added that the plaintiff had to mortgage the property for the parties' joint development. The plaintiff decided she did not want to participate in redeveloping the property. In July 1996, Derby offered to buy of the property from the

plaintiff for $4.2m in addition to which, the company would construct a bungalow on the remaining for her costing at least $700,000; the plaintiff accepted the offer.

6. On or about 15 July 1996, the plaintiff instructed WAP to prepare the option for her in favour of Derby. She further instructed him to ascertain from Keppel the redemption sum as she intended to redeem the property on 1 November 1996. On 17 July 1996, the first defendant paid to the plaintiff who duly receipted, the sum of $88,000 as deposit. On 25 July 1996, the plaintiff gave written authorisation to Derby to apply for redevelopment of the property.

7. On 4 September 1996, the plaintiff was informed by the first defendant/Wee that Derby could not obtain financing for purchase and redevelopment of of the property. However, she was also told that the first defendant had been offered a loan by Overseas Chinese Banking Corporation (OCBC) to finance the purchase as well as to complete the redevelopment. The plaintiff was informed that the terms of OCBC's construction loan of $2,200,000 (the construction loan) ensured that the monies were utilised solely for the erection of three bungalows on the property. Consequently, the first defendant proposed that she replace Derby as the purchaser. The plaintiff, after consulting WAP, accepted the first defendant's proposal. WAP made the necessary amendments to substitute the first defendant for Derby in the draft option. OCBC as well as the first defendant, were represented by William Lai & Alan Wong (the second defendants) and in particular by Jennifer Leong (JL).

8. Later, when she discussed the draft option with WAP, the plaintiff was told that JL/the second defendants would not agree to the inclusion of a clause in the draft option allowing the plaintiff to lodge a caveat which would take precedence over the mortgage of OCBC. WAP informed the plaintiff that he would suggest a revised clause to the second defendants to replace the unacceptable clause but warned her that if she insisted on the inclusion of a caveat clause, the financing from OCBC may not go through. As the plaintiff did not want to jeopardise the sale or delay the completion beyond November 1996, she agreed to compromise. Hence, the option dated 24 September 1996 (the Option) contained as a Special Condition the following clause which was what was ultimately acceptable to OCBC/the second defendants:

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

Clause 18 of the Option had defined 'the Vendor's Unit' as any one (1) of the three (3) units of bungalows which the first defendant would erect on the property (approved by the relevant authority) chosen by the plaintiff, which land area should not exceed 5,030 sq ft and in any event not exceeding 5% of the land area of the other two (2) units.

9. Contrary to the agreement reached between the plaintiff and the first defendant/Wee and contrary to the plaintiff's instructions to him (see N/E 25), WAP did not draft the terms of the Option to reflect a sale by the plaintiff of only of the property. Instead, the heading of the Option (see 1AB101) referred to *No. 124 Branksome Road, Singapore 439640* and in the body of the Option, the plaintiff offered to sell to the first defendant *the above mentioned property upon the terms set out below*. Neither was there any clause in the Special Conditions to restrict the sale by the plaintiff to of the property. Similarly, in the statutory declaration (see 1AB112) made by the plaintiff on 16 October 1996 (required of transferors for every sale or disposal of immovable property after 15 May 1996), there was no mention that she was only transferring of the property to the first defendant.

10. The first defendant exercised the Option on 14 October 1996 (well before the expiry date of 31 October 1996) by paying to the plaintiff's solicitors the sum of $332,000 (being the balance 10% of the purchase price [$4.2m] less the deposit paid of $88,000). On 15 November 1996, the first defendant completed her purchase by paying the balance of $3,773,050.16 of the purchase price in exchange for an executed Transfer from the plaintiff together with a discharge of the mortgage of Keppel. The property was mortgaged to OCBC by the first defendant in turn. In the Transfer, under the column *Property Address* it was stated:

> (a) the whole.
>
> (b) No. 124, Branksome Road, Singapore 439640.

In item (F) of the Transfer headed **CONSIDERATION** (see 1AB140) it was stated:-

> Transferor ACKNOWLEDGES RECEIPT of Singapore dollars four million and two hundred thousand only ($4,200,000) cash consideration and one (1) detached house to be constructed by the Transferee for the Transferor (emphasis added).

while in the column (D) headed PRIOR ENCUMBRANCES, the word NIL appeared. In cross-examination (N/E47), the plaintiff said she understood the word Nil to mean no obstructions/no other interests on the property.

11. On or about 1 July 1997, the plaintiff received a copy of the grant of written permission dated 19 June 1997 issued by the Urban Redevelopment Authority (URA) to Derby for *the proposed erection of 3 units of 2-storey detached dwelling houses each with a basement*. Noting that Derby and not the first defendant was named by URA as the developer, the plaintiff through WAP raised her objections to the first defendant as which result the latter agreed to apply to the relevant authorities to be named as the developer in place of Derby.

12. On 17 July 1997, the plaintiff vacated the property as requested by the first defendant; WAP duly informed the second defendants of the fact and requested the latter for OCBC's permission to lodge a caveat on the plot (plot no. 3) the plaintiff had previously selected.

13. Pursuant to a demolition permit dated 20 August 1997, the existing house on the property was demolished in October 1997 and piling/construction works started in the following month, after the issuance of the permit to carry out building works by the Public Works Department on 13 October 1997. Under cl 20 of the Option, the first defendant had to deliver to the plaintiff plot no. 3 with a bungalow within 16 months from obtaining written permission to commence works. Notice of grant of written permission was given on 1 October 1997 (see 1AB223) by the Chief Planner of the URA. Hence, the deadline to the first defendant to deliver the plaintiffs bungalow would be 31 January 1999 and not December 1998 as pleaded in the statement of claim.

14. In July and August 1997, at the plaintiff's request, her solicitors wrote to the second defendants for OCBC's consent (and for a site plan) to lodge her caveat; however no consent was forthcoming from OCBC. Hence, on 11 June 1998, on the plaintiff's instructions, WAP lodged a caveat CV/42087G (the caveat) on the property without any site plan. It was then the plaintiff discovered, from a title search conducted by her solicitors, that on 9 May 1997, the mortgage of OCBC had been discharged and, the property had been re-mortgaged to Sime Bank Berhad (which subsequently changed its name to RHB Bank Berhad [the third defendants]). The plaintiff confronted the first defendant/Wee. The first defendant confirmed the third defendants' mortgage and told the plaintiff she needed additional funds to complete the construction of the three (3) bungalows; this she managed to secure from the third defendants. The first defendant assured the plaintiff that notwithstanding the re-mortgage of the property to the third defendants, she would transfer to the plaintiff plot no. 3 with a bungalow as agreed.

15. In September 1998, when the plaintiff visited the property, she found it deserted. Her son Leslie visited the first defendant's residence at No. 57, Namly Gardens but found it padlocked and apparently vacant. When finally contacted, Wee informed Leslie that he was arranging for additional financing to enable the first defendant to finish the construction on the property. Despite Wee's promises however, construction work did not re-commence on the property.

16. The plaintiff then visited the third defendants' head office; she was referred to the bank's Geylang branch which had disbursed the loan to the first defendant. There, on or about 7 January 1999, she was told (by the deputy branch manager) that the branch did not know the first defendant's whereabouts. However, the third defendants were aware of the plaintiff' interest in the property. The plaintiff was further informed that:

> a. the third defendants had extended facilities up to a limit of $6m (the loan) to a company called Earling Builders Pte Ltd (Earling) secured by a mortgage on the property; the facility was not for the purpose of construction and development of the property;

b. part of the loan ($3,881,000) was used to discharge the mortgage of OCBC;

c. Earling owed the third defendants in excess of $5m as at 9 May 1997;

d. the terms of the loan did not provide for the plaintiff to lodge a caveat on the bungalow she had selected nor on plot no. 3.

17. Subsequently, the plaintiff ascertained through her solicitors that Earling was incorporated on 3 May 1997 with the first defendant and Wee as two (2) of the three (3) directors; it had a paid-up capital of $3.00 and three (3) shareholders (holding one [1] share each) namely the first defendant, Wee and one Lim Ah Bah. The second defendants (again through JL) acted for the third defendants in the loan documentation which included, a Regulating Agreement and joint and several guarantees from the three (3) shareholders for all monies owing by Earling.

18. On 5 March 1999 (unbeknownst to the plaintiff), in Companies Winding up No. 45 of 1999, Supermix Concrete Pte Ltd (Supermix) had obtained a winding-up order against Earling. This was pursuant to a (default) judgment in the sum of $102,122.96 obtained on 11 July 1998 in DC Suit No. 50607 of 1998 (against both the first defendant and Earling) by Supermix. Subsequently, again on a petition presented by Supermix, the first defendant was adjudicated a bankrupt on 23 April 1999 in Bankruptcy no. 406 of 1999 (the bankruptcy proceedings).

19. On 30 April 1999, the plaintiff lodged a police report (see 1AB303) seeking assistance to locate the whereabouts of the first defendant. This was followed by her complaint on 3 June 1999 (see 1AB229-232) to the Monetary Authority of Singapore (MAS), requesting an investigation into the conduct of the first and third defendants as well as Wee. MAS extended a copy of the complaint to the third defendants with a request that the latter correspond direct with the plaintiff. The third defendants replied to the plaintiff (with a copy to MAS) on 15 July 1999 (see 3AB165) to say that the loan they had extended to the first defendant was not for the purpose of construction and development of the property. The third defendants denied any wrongdoing pointing out (inter alia) that they were not party to any prior agreement made between the plaintiff and the first defendant, there was nothing suspicious to put them on notice and, the loan had been approved in accordance with their own guidelines as well as those, of MAS.

20. The plaintiff's solicitors wrote to the second defendants at length (8 pages) on 10 July 1999 setting out their version of the transaction and contending (amongst a host of allegations), that the first defendant had acted in fraudulent breach of trust when she discharged the OCBC mortgage and re-mortgaged the property to the third defendants, alternatively, that the first defendant jeopardised the plaintiff's interests by using the property as security for unspecified facilities for a company (Earling) which only had $3.00 as its paid-up capital. The plaintiff's solicitors further asserted that JL knew that the first defendant actually purchased only of the property and that thereof was held on trust for the plaintiff.

21. The plaintiff's solicitors wrote to all three (3) defendants on 16 August 1999 alleging as against the first defendant, that she had committed fraudulent/dishonest breach of trust and, as against the second and third defendants, that they were constructive trustees accountable to the plaintiff for damages and her losses which were:

(i) one lot of land of 5,030 sq. ft worth $2.1m;

(ii) loss of a bungalow worth $733,333.33 and

(iii) liquidated damages of $15,000 a month (effective from December 1998) by reason of the first defendant's failure to deliver and transfer the lot/bungalow within the time stipulated under cl 20 of the Option.

22. The reply from the first defendant (dated 23 August 1999) was to inform the plaintiff's solicitors of the bankruptcy proceedings and to request them to liaise with the Official Assignee (which the plaintiff's solicitors did on 30 August 1999). The third defendants' solicitors merely said they had instructions to accept service for their clients.

23. The second defendants' response however was sharp and to the point -- in their letter dated 23 August 1999 (see 1AB258) which they copied to the other two (2) defendants, they not only contended that the plaintiff had no cause of action against them, but also disputed that they were her constructive trustees; the letter added:

> .Sime Bank acknowledges that one unit (your client's) will be discharged free of payment on condition that the said unit is transferred to your client being the previous land owner or as she may direct in accordance with the agreement between your client and Madam Betsy Lim. We do not see any damage suffered by your client as a result of the refinance.
>
> Your client's damage, if any, results from your:
>
> > (i) failure to lodge a caveat on your client's behalf until 11 June 1998 which ought to have been filed just after completion i.e. 15th November 1996;
> >
> > (ii) failure to insert a clause prohibiting re-finance or further borrowing or change in mortgagees by Madam Betsy Lim in the agreement between your client and Madam Betsy Lim. The refinance is not a breach of agreement between your client and Madam Betsy Lim.

24. Further correspondence between the plaintiff's solicitors, the second defendants and the third defendants' solicitors until April 2000 came to nought as each party maintained its respective stand. In reply to the inquiry raised in the Official Assignee's letter dated 3 May 2000, the plaintiff's solicitors advised that they had obtained an Order of Court dated 1 October 1999 (in the bankruptcy proceedings) granting the plaintiff leave to institute proceedings against the first defendant, pursuant to s 76(1)(c)(ii) of the Bankruptcy Act Cap 20.

The pleadings

25. In her lengthy statement of claim, the plaintiff alleged inter alia, that the three (3) defendants knew or ought to have known that without her consent or knowledge, the first defendant would be acting in breach of trust and or placing the plaintiff's interests in the 5,030 sq.ft. of land at risk by discharging the OCBC mortgage, cancelling the construction loan and re-mortgaging the property as security for the third defendants' loan. She further alleged that in breach of the terms of the Option, the first defendant had failed to deliver the plaintiff's plot no. 3 and bungalow within the period agreed or at all. The plaintiff averred that when Earling became indebted to the third defendants in excess of $5m on 9 May 1997, the first defendant had fraudulently and or dishonestly committed breach of trust and fiduciary duty.

26. As against the second and third defendants, the plaintiff alleged that they were accountable to her as constructive trustees. Accordingly, the plaintiff prayed for a declaration that all three defendants as constructive trustees are accountable to her (and that they pay) for her loss and damages which repeated what has been set out in para 21 above. The plaintiff also prayed for a declaratory order that her beneficial interest over the said 5,030 sq.ft of land has priority over any interests of the first and or third defendants.

27. In her defence, the first defendant averred she had extended to the plaintiff, a copy of the plan prepared by the architects, submitted to and approved by the relevant authorities (indicating the three (3) plots for the bungalows) based upon which the plaintiff had chosen plot no. 3. Consequently, the plaintiff could have filed a caveat upon receipt of the plan so as to protect her interest in the property. Notwithstanding that the first defendant did not provide a site plan, the fact that the plaintiff was able to file the caveat proved that a site plan was not needed. As the plaintiff and or her legal advisors could have but failed to, file the

caveat earlier than 11 June 1998, the first defendant contended that the plaintiff was herself negligent.

28. The first defendant also pleaded that the completion of the bungalows was affected by the regional economic crisis which caused Earling (which carried out the development) to run into difficulties and ultimately to go into liquidation. Consequently, the failure to complete was beyond her control.

29. The first defendant denied that any form of trust, implied or otherwise, was created in favour of the plaintiff and that she held any or any undivided share of the said property on trust for the plaintiff. The first defendant averred she owed no duty to the plaintiff to notify the plaintiff/obtain the plaintiffs consent to, the discharge of the mortgage of OCBC or the re-mortgage of the property to the third defendants; there was no clause in the Option which prohibited the first defendant from re-mortgaging the property to the third defendants in particular or, generally to any other financial institution. The first defendant put the plaintiff to strict proof she had acted in any breach of trust by herself or in collusion with either the second or the third defendants.

30. The first defendant contended that cl 19 of the Option would only operate as and when a private lot number is allotted. As no such allotment was made, the first defendant's obligation to obtain the consent of the paramount mortgagee for the lodgement of the plaintiff's caveat did not arise. This fact was known to the third defendants as, by their letter dated 7 May 1997 (see 1AB193) to the second defendants, the third defendants had agreed to the discharge of one (1) unit free of payment on condition that the same was transferred to the plaintiff or, as the first defendant may direct, in accordance with the agreement between the first defendant and the plaintiff. Consequently, the first defendant had preserved the plaintiff's rights.

31. The first defendant further pleaded that in or around September 1997, she had procured a purchaser (Tancho Properties) for one of the other 2 units of bungalows at a price of $3.6m but the plaintiff would not give her consent to the sale, pursuant to cl 22 of the Option. The first defendant therefore withdrew the offer to the prospective purchaser and thereby lost the opportunity to secure the necessary funding for completion of the construction of the bungalows.

32. As for the third defendants, they denied any knowledge of the plaintiff's alleged interest in the property as it was not registered in the land register as at 9 May 1997. The third defendants referred to cl 6(2) of the Regulating Agreement which stipulated that the third defendants would grant a partial discharge of their mortgage (on plot no. 3) once 85% of the sale price of one (1) unit was paid to the third defendants, provided plot no.3 was transferred to the plaintiff. As no monies were paid to the third defendants pursuant to cl 6(2) of the Regulating Agreement and one (1) unit of the bungalows was not even completed, plot no. 3 was not transferred to the plaintiff nor were the third defendants obliged to grant a partial discharge of mortgage thereon. The third defendants asserted that the terms of their mortgage, the Regulating Agreement and or loan agreement were not made subject to any rights which the plaintiff might be entitled to, under the Option. Neither did the terms of the Option prohibit the first defendant from subsequently granting security over the property (including a mortgage) to any creditor nor, that any security granted subsequently would be subject to any interests which the plaintiff may have arising from the Option.

33. The third defendants denied they had acted dishonestly or with knowing assistance or with any knowledge as alleged, or at all. They further denied they were/are constructive trustees as alleged or that they are accountable to the plaintiffs as constructive trustees.

34. Although Replies were filed by the plaintiff to the defences of all three (3) defendants, I do not propose to review them as essentially those pleadings reiterated the plaintiffs position in her statement of claim.

35. I should point out that on 10 November 2000, after the plaintiff had closed her case and when Wee was being cross-examined by counsel (Mr Ponniah) for the plaintiff, her counsel applied to further amend the statement of claim to inter alia, include references to the third defendants Regulating Agreement. I overruled the strenuous objections of all three (3) counsel for the defendants and allowed some (only) of the amendments proposed, on terms of costs to the defendants (in any event) and granted the defendants leave to make consequential amendments to their pleadings.

The evidence

(i) the plaintiffs case

36. I proceed next to review the evidence adduced at the trial starting with the testimony of the plaintiff and that of her witnesses (2). In paras 2 to 18 above, I have more or less set out the plaintiffs version of the facts which was largely undisputed by the other two (2) defendants; I turn my attention therefore to her cross-examination.

37. Questioned by counsel for the first defendants, the plaintiff agreed she had been extended a copy of the terms of the construction loan and had discussed it with WAP. Although she was not aware of OCBCs second letter of offer, she knew that the bank wanted to cap the area of land for her unit and, that it resulted from the exchange of correspondence between her solicitors and the second defendants in finalising the terms of the Option.

38. Cross-examined by counsel for the second defendants, the plaintiff insisted that the mortgagee of the property must be OCBC notwithstanding that the words in cl 19 of the Option contained the words *paramount mortgagee* replacing *OCBC* in the initial draft prepared by WAP

39. Further cross-examination revealed that the plaintiff had lent the first defendant $700,000 as evidenced in a personal loan agreement dated 24 November 1996 (see 1AB462) prepared by WAP. The plaintiff explained that she lent the sum at the first defendants request because the latter/Wee needed some cash (N/E 37) but she did not ask them why. Under the terms of the option [see cl 7(a)and (b)] the first defendant was obliged to pay $3.08m by the completion date (15 November 1996) or within one (1) month from the date of in-principle approval whichever is applicable; another $700,000 was payable within one (1) week of the issue of written permission to commence construction which, being only granted on 19 June 1997 meant that it was not due until 26 June 1997. The plaintiff however requested the first defendant to pay this second instalment together with the completion sum; the latter obliged. The plaintiff then lent the $700,000 to the first defendant nine (9) days later.

40. The plaintiff admitted receiving a copy of the third defendants letter dated 7 May 1997 to the second defendants (1AB193) which contained the following paragraphs:-

> (a) A partial discharge of the mortgage will be given for one unit upon full settlement of the term loan;
>
> (b) One unit will be discharged free of payment on condition that the said unit is transferred to the previous land owner or as he may direct in accordance with the agreement between the mortgagor and the previous land owner;
>
> (c) The third unit will remain mortgaged to the Bank to secure the overdraft facility. The mortgagor is to seek the banks consent on the selling price prior to selling the unit.
>
> As such, the partial discharge upon receipt of 85% of the purchase price stated in clause 4 of the letter of offer is on condition that the debt to the Bank is fully settled.

41. Cross-examined, the plaintiffs son Leslie (PW2) also agreed that when Wee handed him a copy of OCBCs letter of offer dated 4 September 1996, he noted that it contained under the heading *Security* (see 1AB38) this condition:-

> The facilities shall be secured against first legal mortgage of $6,100,000 of a piece of land at 124 Branksome Road and proposed 3 units of 2 storey bungalow to be erected thereon.

(MK 25 lot 117-31)
Tenure: freehold
Land area: 15,172 sf

Leslie was unaware that the plaintiff had lodged a caveat after the property had been sold/transferred to the first defendant nor of the change of mortgagees from OCBC to the third defendants, until after the events.

42. The plaintiffs last witness was her lawyer WAP (PW3); I take judicial notice of the fact that he is a senior practitioner (called to the Singapore Bar in September 1978) and a conveyancer. Notwithstanding the pivotal role he played (indeed it can be said that the Option he prepared was the genesis of these proceedings), WAPs written testimony was brief to the extreme. His affidavit of evidence consisted of three (3) short paragraphs in one (1) of which he merely confirmed that the matters deposed to in the plaintiffs affidavit were true in respect of her instructions to his firm (which included preparing the Option) and in respect of his firms conduct on those instructions, including the correspondence with the various parties referred to. However, the brief affidavit was good enough to waive solicitor and client privilege (without qualification I would add, contrary to Mr Ponniahs assertion that such waiver excluded WAPs attendance notes) as it has to be read in conjunction with para 28 of the plaintiffs affidavit evidence-in-chief which stated:-

> From the inception, M/s Wong & Lim on my instructions and as my solicitors corresponded with Keppel and their solicitors, Derby, the second defendants as solicitors for Betsy [the first defendant] and OCBC and M/s Khattar Wong & Partners as solicitors for the third defendants. I waive the solicitor and client privilege that I am entitled to in relation to my instructions to M/s Wong & Lim pertaining to the correspondence relating to the above matters.(emphasis mine).

43. Questioned by counsel (Mr Tan) for the second defendants, WAP admitted the plaintiff had indeed instructed him to sell only of the property; he contended that he did comply with her instructions notwithstanding that the Option did not say so (when questioned by the court [N/E161]). He said it was implied from the fact that in addition to the cash consideration of $4.2m, the plaintiff would receive one (1) bungalow with a land area of 5,030 sq. ft, which approximated of the total area of the property. He had not objected when OCBCs (original) letter of offer was shown to him stating that the security for the same would be a mortgage over the entire property. As his initial draft giving the plaintiff liberty to lodge a caveat over the land before the bank's mortgage was registered was not acceptable, WAP agreed with JL/the second defendants that legal title to the whole property would be transferred to the first defendant and upon construction of the bungalows, one (1) unit would be re-transferred to the plaintiff. Asked why he had not stated expressly in the Option that of the land would be returned to the plaintiff, WAP said it was *not necessary* (N/E82). Neither did he think it necessary to draw up a supplemental agreement to protect the plaintiff interests in retaining of the property. As Keppel was breathing down his clients neck, he said there was no time to subdivide the land so as to enable the plaintiff to sell only thereof. Hence, he took a calculated risk by having her sell the entire property on the implied condition that thereof would be returned to her with a bungalow. WAP admitted quite candidly (N/E92) that it did not occur to him to try and protect the plaintiffs interests by selling the property to the first defendant by way of a tenancy-in-common in unequal ( ) shares; however he speculated that the sale might not have gone through using that method.

44. Despite the clear wording in the Consideration column (spelt out earlier in para 10) in the Transfer instrument, WAP insisted that the detached house stated therein did not form part of the Consideration even though he repeated the exact same wording for the *Grounds of Claim*, in the caveat he eventually lodged on 11 June 1998. However, he did agree that there was no prohibition in the Option against the first defendant changing mortgagees.

45. Although the significance of the change could not/should not have been lost on him, WAP surprisingly did not ascertain from JL/the second defendants why the word *OCBC* had been deleted and replaced by the words *paramount mortgagee* in cl 19 of the Option (see para 8 supra). He was equally candid in his admission (N/E98) that he could have made provision in the Option for a caveat to be filed after, not before, OCBCs mortgage but he did not. He opined that had he done so, it might have jeopardised the sale of the other two (2) bungalows. However, he acknowledged that had he done so, it would have ensured that the plaintiff was alerted should the first defendant change mortgagees. Neither did it occur to WAP to provide a vendors

lien to the plaintiff in the Option. WAP agreed with counsel that as the Option did not contain a prohibition against changing the nature of the loan, it could not be said that JL had participated in any dishonest transaction when the first defendant discharged OCBCs mortgage and re-mortgaged the property on different terms to the third defendants. He further agreed that his firm may have acted in a conflict situation (NE104) after it received the letter dated 23 August 1999 in 1AB258 (see para 23 supra) from the second defendants alleging that his firm (Wong & Lim) had been negligent. He said by then he had passed the plaintiffs file to his litigation partner (Mr Ponniah) and he was not aware of the second defendants letter nor of what transpired subsequently.

46. Pursuant to my direction to the plaintiffs solicitors (to give additional discovery to the defendants solicitors of documents with Wong & Lim), further documents were produced from the plaintiffs conveyancing file. Included therein was a letter dated 3 July 1996 (see 5AB47) from Derby to the plaintiffs solicitors forwarding a topographical survey drawing as well as the architects drawing on site calculation (see 5AB48). WAP however disagreed that the latter drawing was the site plan needed for lodging a caveat he understood from his conveyancing clerk it was not the plan required (N/E117). Hence, he made no attempt to lodge a caveat after 3 July 1996 but before 11 June 1998, based on either drawing Derby had sent to him.

47. Another document extracted from the plaintiffs file was a copy to the plaintiff of a letter dated 16 October 1997 written by the first defendants architects (Atelier Group Architects) to the Building Control Division of the Public Works Department applying for BP (building plan) approval. Amongst the documents forwarded with that letter was a site plan (item 2). WAP agreed he received the letter (via fax on 28 October 1997) from Leslie but, he could not recall what he did upon receipt thereof nor why he did not have a copy of the site plan, which would have enabled him to lodge a caveat.

48. Yet a third document extracted from the plaintiffs file was a draft caveat (without plan attached) dated 18 December 1996 which WAP (or some other solicitor in his firm) presumably prepared. In substance, it was no different from the caveat which the plaintiff lodged on 11 June 1998. WAP agreed there was nothing to prevent him from lodging that caveat as drafted; he maintained however that he wanted to adhere to the terms of the Option and not lodge a caveat over the entire property but, only over plot no.3.

49. Another significant piece of evidence which emerged from WAPs cross-examination was his statement (N/E 169-170) that the reason the third defendants gave a loan to the first defendant was because there was no caveat on record as at 9 May 1997. Had the plaintiffs caveat been filed by then, the third defendants would have requested for its removal and thereby alerted the plaintiff to the third defendants loan.

50. The following admissions were also extracted from WAP under cross-examination by counsel for the second and third defendants (N/E 185-189):-

> a. JL/the second defendants conduct in acting for the first and third defendants as well as for OCBC did not cause the plaintiffs interests to be put at risk; neither did JL act dishonestly or knowingly assist the first defendant in any breach of trust;
>
> b. had the sale by the plaintiff to the first defendant been by way of a tenancy-in-common in unequal shares (with the plaintiff holding) the plaintiff would have been informed of each and every step the first defendant took;
>
> c. if the Option had provided for no change in mortgagees or no re-financing or, that no re-mortgage could be by way of surety or, that re-financing would be for construction purposes only, the plaintiff would also have been protected;
>
> d. if the Option had stipulated a timeframe wherein consent from the paramount mortgagee must be given for filing of the plaintiffs caveat, the plaintiffs interests would again have been protected;

e. if indeed a caveat had been filed over of the land (before 11 June 1998 but after OCBCs mortgage) OCBC could not have challenged it;

f. the third defendants did not breach any trust, nor dishonestly assist any breach of trust nor, dishonestly receive trust property in breach of any trust.

(ii) the first defendants case

51. Wee (1DW2) was the first defendants principal witness. In her short testimony, the first defendant (1DW1) made it clear she left everything to Wee. Essentially, the first defendant was Wees nominee, for reasons best known to him. Under cross-examination, Wee contended it was the plaintiff who asked for completion earlier than the contractual date of 15 November 1996 she wanted to redeem Keppels mortgage by 1 November 1996, it was not because he or the first defendant wanted to get their hands on the OCBC loan sooner. Eventually, the completion date did not change but the plaintiff asked for the second instalment payment ($700,000) which was not yet due; when the first defendant obliged, the amount was lent back to the first defendant. Wee said it was purely a commercial decision why he decided to change mortgagees from OCBC to the third defendants (the interest rate was lower by 0.25%); he intended to use the loan from the third defendants to finance the construction of the three (3) bungalows on the property as well as construction at another site (Telok Kurau). It was not done for any other ulterior motives. In addition to the loan from the third defendants, his company (meaning Derby) had progress payments coming in for projects of which it was the main contractor. Further, if the remaining two (2) bungalows on the property could be sold, he/his company would have no cash flow problems. H was looking to sell the two (2) units at $3.8m each and if the sale price was more, he would split the profit with the plaintiff. He confirmed that the plaintiff turned down the offer of $3.6m from Tancho Properties (in September 1997) for one (1) of the two (2) remaining units. In fact, the second defendants/JL had prepared and forwarded to Tancho Properties on 3 September 1997 a draft sale and purchase agreement (see 1AB466-481). Apparently, the plaintiffs rejection was due to Leslies influence; Leslie claimed that the market price for bungalows in that area was around $4-$5m. Had the sale to Tancho Properties materialised, Wee said he would have used the proceeds to pay off the $3m then owing to the third defendants. Having lost this sale of $3.6m, it became increasingly difficult to source for buyers as the property market was on a down-turn thereafter.

(iii) the second defendants case

52. It would come as no surprise that JL (2DW1) was the second defendants principal and indeed only, witness. She left the firm on 31 March 2000 (where she was a partner) and now practises on her own. In acting for the first defendant, JL took her instructions from Wee, who first briefed/appointed her on 16 July 1996 while OCBC appointed her to act in the mortgage documentation by letter dated 8 October 1996.

53. When he commenced his cross-examination of her, counsel for the plaintiffs accepted (N/E 252) that JL owed no duty to the plaintiff. Despite that concession however, counsel then sought to extract from JL an admission that she knew as a fact that the OCBC mortgage afforded protection to his client unlike the third defendants mortgage. JLs response quite naturally was, that she saw no reason why she should have thought of the plaintiffs interests at all (then or even now) as, the plaintiff was not her client. She owed a duty to the first defendant as the purchaser and to OCBC as the first defendants mortgagees; she had negotiated the terms of the Option on the instructions of the first defendant just as she took the third defendants instructions for the re-mortgage.

54. Re-examined by counsel for the second defendants (N/E 264), JL opined that a private lot means a lot which is approved by the Chief Surveyor, usually when TOP (Temporary Occupation Permit) is being applied for. This is to be contrasted with the plaintiffs view (shared by her son Leslie), that there was no necessity to wait for the bungalows to be constructed before a survey can be done and a private lot number allocated to her unit. The plaintiff said it could be done as soon as the land was

subdivided. WAPs view also differed from JLs he had said that private lot numbers are allotted to land (which is to be subdivided eventually) when planning approval is given.

55. Despite pleading *in extenso* on the issue in the (re-amended) statement of claim (see para 29 thereof), it is noteworthy that in his cross-examination of JL, counsel for the plaintiff did not at all touch on her allegations that JL had dishonestly and knowingly assisted or was an accessory to, the first defendant in the latters breach of trust against the plaintiff.

(*iv) the third defendants case*

56. The third defendants had three (3) witnesses namely, the former and present deputy managers of their Geylang branch Liew Chia Wan (Liew) and Koh Ching Ching (Koh) respectively, as well as their legal manager Fadlun binte Hj Abdul Kader (Fadlun). Liew (3DW1) merely confirmed that the plaintiff called at his branch in November 1998 and what she told him and vice versa. As for Koh (3DW2), questioned (by counsel for the plaintiff) why the bank would take upon itself the responsibility to ensure that one (1) bungalow would be returned to the plaintiff, his response was (N/E 270) that the third defendants were not obliged to but, since they were informed by the first defendant, the bank was willing to give effect to the arrangement she had made with the previous owner, subject to the third defendants rights under the Regulating Agreement; it was not because there was a trust relationship between the first defendant and the plaintiff. He also explained that the third defendants did not earmark any part of their loan for construction of the three (3) bungalows because he understood from Earlings directors that they had their own resources to do so. Kohs testimony on the trust issue was reiterated by Fadlun (3DW3). She referred to cl 6(2)(a) of the Regulating Agreement and said the third defendants would have granted a partial discharge of their mortgage once they received 85% of the sale price for the first unit followed by a partial discharge for the second unit (without receiving payment) provided it was transferred to the plaintiff.

57. One of the plaintiffs allegations (se para 24 of her re-amended statement of claim) and which her counsel repeatedly raised with the various witnesses he cross-examined was, that Earling had a paid-up capital of only $3.00 and yet, the third defendants lent the company $5m. I wish to say that this argument is simplistic as that factor cannot be considered in isolation.

58. The third defendants had produced at the trial their credit application form (dated 14 April 1997) on Earling (see 3AB47) when the company applied for a loan. In addition to an open legal mortgage of the property, the third defendants required the companys three directors to furnish personal guarantees in which regard the creditworthiness and assets of each director was evaluated. The paid-up capital of the company was also required to be increased to $1m. I cannot therefore imagine that the third defendants would have extended any loan let alone $5-$6m to the company unless they considered Earlings proposed development on the property to be viable, based on the feasibility study (including projected costs) the company had submitted.

59. There was also an inter-office memorandum from the Geylang branch manager to Fadlun on 5 May 1997 (see 4AB6) to the effect that $3m of the banks facility would be re-paid upon issuance of the TOP. It was also stated therein that there was an offer of $3.9m to buy one (1) of the bungalows; further, that one unit (identified as the third unit) would be transferred to the previous owner free of payment. The note concluded with the comment that the branch saw no need to impose any condition (on Earling) in view of the fact that borrowing was based on land prices valued at $8m. The inter-office memorandum apparently prompted Fadlun to write the third defendants letter dated 7 May 1997 (1AB193) to the second defendants stating inter alia, that a unit would be transferred to the plaintiff without payment (see para 40 above).

The findings

(i) duty of care

60. It was clear from the plaintiffs own testimony and that of her lawyer (WAP) that her claims against the second and third defendants were completely unsustainable from the very outset. As conceded by Mr Ponniah, there was no duty owed to the plaintiff by the second defendants and JL in particular as, the second defendants acted for the first defendant, OCBC and the third defendants. Consequently, even if JL knew as a fact (as Mr Ponniah repeatedly raised in cross-examination) that the OCBC mortgage provided protection to the plaintiff, how does that evidence help to advance his clients case? It was WAP who owed a duty to the plaintiff to protect her interests. Equally, it is apparent from his testimony and the documentary evidence (especially the Option) before the court, that he failed in that regard. Yet, when alerted of the possibility that they themselves may have been negligent by the second defendants letter dated 23 August 1999 (at 1AB258 see para 23 above), Wong & Lim chose to continue to act for the plaintiff and to point the finger at others for the plaintiffs predicament, rather than take stock of the situation and consider whether they themselves may not be at fault.

61. In his cross-examination by Mr Tan (see para 45 supra) on the second defendants aforesaid letter, WAP had said he was not aware of the same (until he reviewed the documents for this trial) as by then, he had passed the plaintiffs file to his litigation partner. Mr Ponniah (who is also a senior practitioner) then proceeded (first in his letters and then in the plaintiffs statement of claim) to blame everyone else involved with the property (except for OCBC and his own firm) for the plaintiffs loss. What WAP and Mr Ponniah did was a great disservice to the plaintiff and their fellow solicitors the second defendants, and contravened the following five (5) provisions of the Legal Profession (Professional Conduct) Rules Cap 161(2000 ed) (hereinafter referred to as the Rules):-

> Adverse interest
>
> 27. Where the interest of the advocate and solicitor or any member of his family is adverse to the interest of the client, the advocate and solicitor shall decline to represent or withdraw from representing the client, unless the client having been fully informed, and advised that he should seek independent legal advice, consents to the advocate and solicitor acting or continuing to act on his behalf.
>
> Withdrawal
>
> 42(1) Subject to rule 41, an advocate and solicitor may withdraw from representing a client
>
> > (e) if an advocate and solicitor has an interest in any case or mater in which the advocate and solicitor is concerned for the client which is adverse to that of the client;
> >
> > (f) where such action is necessary to avoid a contravention by the advocate and solicitor of the Act or these Rules or any other subsidiary legislation made under the Act or
> >
> > (g) where any other good cause exists.
>
> Relationship with other advocates and solicitors
>
> 47. An advocate and solicitor shall treat his professional colleagues with courtesy and fairness.
>
> Facts, arguments and allegations
>
> 59. An advocate and solicitor shall not contrive facts which will assist his clients case or draft any originating process, pleading, affidavit, witness statement or

notice or grounds of appeal containing

> (b) any allegation of fraud unless he has clear instructions to make such allegations and has before him reasonable credible material which as it stands establishes a prima facie case of fraud.

Solicitor not to act if he is a witness

64(1) An advocate and solicitor shall not accept instructions in a case in which the advocate and solicitor has reason to believe that he is likely to be a witness on a material question of fact.

(2) An advocate and solicitor shall discharge himself from representing a client if it becomes apparent to the advocate and solicitor that he is likely to be a witness on a material question of fact.

62. I could neither condone nor overlook the conduct of WAP and Mr Ponniah; their actions did not arise out of errors of judgment for which, like any other human beings who are not infallible, they can be excused. In this case, their firm should have (but did not) immediately cease acting for the plaintiff in accordance with Rule 27 of the Rules or at all, and they did not advise her to consult another firm of solicitors. Had the plaintiff been given such advice, another law firm may have made a far more objective and independent assessment of the situation and, advised the plaintiff whether she did indeed have the claims she put forward in this suit.

63. Even if Wong & Lim did not discharge themselves immediately after receipt of the second defendants letter dated 23 August 1999, Rule 64(2) of the Rules should have prompted them to do so when it became obvious that WAP would be a material witness for the plaintiff. That Rule is not complied with merely by WAP passing the plaintiffs file smartly on to his litigation partner as there is a danger, which was the case here, that the brief by WAP to Mr Ponniah was very much coloured by the formers perception of what he thought was the plaintiffs grievance and who caused it and which, as it turned out, was completely off the mark.

64. As a consequence, what Mr Ponniah did was to raise the most serious allegations of fraud against the second defendants and JL in particular, disregarding Rule 47 of the Rules, when there was not one iota of evidence to substantiate such accusations, contrary to Rule 59(b) of the Rules. The words used against the second defendants in the re-amended statement of claim (para 30) were, that they had dishonestly and knowingly assisted or were an accessory to the first defendant breach of trust who, it was alleged (in para 28 of the statement of claim), had fraudulently and dishonestly and or otherwise committed breach of trust and fiduciary duty.

65. The gravamen of the plaintiffs case of fraud was based on an implied trust grounded on cll 18(a), 19 and 20 of the Option. In cross-examination, WAP repeatedly maintained that although those clauses did not state that the plaintiff was selling only but in fact the whole, of the property, it was to be implied. Such an argument goes against the very grain of s 93 of the Evidence Act Cap 97 which states:-

> When the terms of a contract or of a grant or of any other disposition of property have been reduced by or by the consent of the parties to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.

66. I had found that the plaintiffs loss arose as a direct result of WAPs shortcomings as an experienced conveyancer. I need only refer to his own testimony (set out in para 50 above) to support this finding. Coupled with his agreement to allow the word *OCBC* to be changed to *paramount mortgagee* in cl 19 of the Option and his omission to lodge a caveat immediately or soon after OCBCs mortgage was registered (on 4 March 1997), WAPs conduct caused the plaintiff to lose her priority against the mortgage of the third defendants. WAPs excuse that he did not file the plaintiffs caveat soon after OCBCs mortgage because he did not receive the appropriate site plan was unsustainable as, he managed to file the caveat on 11 June 1998 (albeit too late) without any plan at all. He could not explain let alone satisfactorily, why he did not use the plan prepared by the first defendants architects and forwarded to him by Leslie in October 1997. Neither was I prepared to accept his cavalier explanation that his conveyancing clerk told him the topographical survey drawing Derby forwarded to him in July 1997 could not be used. It would have been a different matter had he tried to lodge a caveat using that drawing and the Land Titles Registry had rejected the same; I would accept a rejection by a government authority but not that of his unqualified clerk, however experienced. As WAP did not even try to submit the latter drawing for lodgement purposes, we will never know whether he would have succeeded. Similarly, as WAP did not make the attempt, we will never know whether the suggestion from counsel for the second defendants, that the sale to the first defendant could have been by way of a tenancy-in-common in unequal shares, would have been acceptable to the Registry of Titles.

67. What then would have been achieved if the plaintiff had lodged her caveat immediately after OCBCs mortgage? According to N Khublalls *The law of real property and conveyancing* (3 ed at p 641), an authority cited by the third defendants:-

> A caveat is a document which, when lodged in the land registry, gives the caveator, ie the person who has lodged it, the opportunity of protecting an existing right or of establishing an existing claim. A caveat is similar in effect to an injunction, though it is not an order of the court
>
> Without debasing the registered title, a private caveat is intended to perform two interrelated functions. Firstly, it prevents a registered proprietor from entering into any further dealing with his land, thereby ensuring that existing claimants on interests on such land are given temporary protection by maintaining the status quo, especially if the land is subject to litigation. On this point the Privy Council [in *T Damodaran v Choe Kun Hin* [1979] 2 MLJ 267 at 269 per Lord Diplock] observed:
>
> Claims to be entitled to the proprietorship of land or a registered interest in land, whether or not they are the subject of litigation, are not registrable as encumbrances on a registered title. Instead, they are protected by a system of private caveats which, while leaving the registered title unqualified and intact, have the effect of preventing any dealing with it by the registered proprietor so long as the caveat remains in force, that is, until it is removed from the registrar.
>
> Another function of a private caveat is that it gives notice to the world at large via the land registrar as to the existence of certain claims in respect of a particular parcel of land. The passage below from the Privy Council judgment in *Abigail v Lapin* [1934] AC 491 is of particular relevance:-
>
> For the protection of equitable interests or estates the Act provides that a caveat may be lodged with the Registrar by a person claiming as cestui que trust, or under any unregistered instrument or any other estate or interest; the effect of the caveat is that no instrument will be registered while the caveat is in force.until after a certain notice to the person lodging the caveat. Thus though the legal interest is in general determined by the registered transfer, and

> is in law subject only to registered mortgages or other charges, the register may bear on its face a notice of equitable claims so as to warn persons dealing in respect of the land and to enable the equitable claimant to protect his claim by enabling him to bring an action if his claim be disputed.

The above passage is self-explanatory of the serious consequence which resulted from WAPs omission to lodge a caveat for the plaintiff soon after the Transfer and OCBCs mortgage were registered.

68. Before a claim for breach of trust can succeed, it is established law that there must first of all be a relationship of trustee-beneficiary between the plaintiff and the defendants giving rise to a fiduciary relationship. I can do no better than to quote an authority from the plaintiffs own bundle in this regard, an extract from *Halsburys Laws of England* (4 ed [reissue] vol 48 p 343 para 501) where it is stated:

> Where a person has property or rights which he holds or is bound to exercise for or on behalf of another or others, or for the accomplishment of some particular purpose or particular purposes, he is said to hold the property or rights in trust for that other or those others, or for that purpose or those purposes, and he is called a trustee. A trust is a purely equitable obligation and is enforceable only in a court in which equity is administered.
>
> The trustee holds the property or must exercise his rights of property in a fiduciary capacity, and stands in a fiduciary relationship to the beneficiary.

69. The above principle of law is reinforced by the cases contained in the bundles of authorities of the plaintiff/defendants including*, Royal Brunei Airlines Sdn Bhd v Tan* [1995] 3 AER 97 and *Carl Zeiss Stiftung v Herbert Smith & Co* (No. 2) [1969] 2 Ch 276. In *Carl Zeiss Stiftung v Herbert Smith & Co,* the plaintiffs alleged that the assets and property of a defendant, which was a West German foundation bearing their same name, belonged to the plaintiffs or were held on trust for them. At a time when there had been and were pending interlocutory proceedings but before the trial of the main action, the plaintiffs brought these proceedings for an account against the West German foundations solicitors alleging that they had received money from their clients and, by reason of so acting, they knew all the facts and matters averred and proved or to be proved in the main action and they had notice that their clients money belonged to the plaintiffs. The plaintiffs made no allegation against the defendant solicitors integrity and honesty and at all times emphasised that no such allegation could or was being made. The defendant solicitors admitted receiving the money from the West German foundation on account of fees, costs and disbursements incurred or to be incurred in the main action and that they knew from time to time the averments made by the plaintiffs. Pennycuick J dismissed the action and the plaintiffs appealed.

70. The Court of Appeal (in dismissing the appeal) held that a solicitor acting honestly in his capacity as a solicitor for his client was in no different position from any other agent acting for his principal and was not to be imputed with knowledge of a trust merely because, in acting for his client, he knew that it was claimed that against his client that there was a trust and such knowledge could not be notice of a trust or notice of misapplication of trust funds. Accordingly, since the defendant solicitors had no notice of a trust or that they had received trust funds from their clients, they were not accountable to the plaintiffs for the moneys which had come into their hands on account of costs, fees and disbursements. In our case, there was not even the suggestion of a trust to begin with, before Mr Ponniah came into the picture.

71. The only fiduciary relationship in our case which could possibly give rise to a cause of action was

that of solicitor-and-client between the second defendants and the first/third defendants. Indeed, this was stated in the Particulars under para 31 of the statement of claim where the plaintiff alleged that:-

> the second defendants as solicitors for the first defendant and for Sime Bank [the third defendant] when instructed to discharge the OCBC mortgage and re-mortgage the said property to Sime Bank as security for the Sime Bank loan on terms thereof;-
>
> (a) Wilfully or recklessly failed to inquire from the plaintiff or her solicitors whether the plaintiff consents to the discharge and/or the re-mortgage of the said property, which included the plaintiffs interest in 5,030 sq. feet of the said property.

Given the admission in the plaintiffs own pleadings with herself being separately represented by WAP coupled with, Mr Ponniahs acknowledgement that the second defendants/JL owed no duty to the plaintiff, there was no basis for Wong & Lim to make the strong allegation which they did, more so in the case of the third defendants, with whom the plaintiff had no privity of contract.

72. As for the plaintiffs claim against the second and third defendants based on constructive trusts, I refer to yet another extract (at p 360) from *Halsburys Laws* (supra):-

> 525. **Resulting and constructive trusts**. Resulting trusts and constructive trusts arise, or are implied, by operation of law, and may or may not reflect the intention of the persons concerned, whereas express trusts arise from the intention of the disposer ascertained from the formal or informal words used by him.
>
> Resulting trusts are of two kinds. A presumed resulting trust arises from the application of a rebuttable presumption of intention that the property purchased wholly or partly by X but vested in Ys name should be held by Y on trust for X to the extent of Xs share in the purchase; likewise, where there is a voluntary transfer by X into the name of Y or the joint names of X and Y, there is a presumption of a resulting trust for X. An automatic resulting trust arises where X transfers property to Y on trusts which for some reason fail to dispose wholly of Xs beneficial ownership so that Y automatically and irrebuttably holds the property on trust for X to the extent of Xs undisposed of beneficial interest.
>
> A constructive trust is automatically imposed in circumstances where it is unconscionable or contrary to fundamental equitable principles for the owner of particular property to hold it purely for his own benefit.

In the words of Edmund Davies LJ ([at p 300] in *Carl Zeiss Stiftung v Herbert Smith*), what is required for a constructive trust to be imputed is the *want of probity.*

73. At the risk of repetition, I refer again to WAPs testimony in para 50 and to the facts set out in paras 9 and 10, above. Despite WAPs stubborn and unreasonable denial to the contrary, the Option and Transfer clearly stated that the plaintiff sold the <u>whole</u> property, not thereof, to the first defendant. Consequently, no resulting or constructive trust in favour of the plaintiff can arise; she had received good and valuable consideration for the <u>entire</u> piece of land from the first defendant, there was no evidence of a want of probity or any unconscionable conduct on the part of the

defendants which warranted a constructive trust being imposed on any or all, of them.

74. The plaintiff also failed to surmount the hurdle imposed by s 47 of the Land Titles Act Cap 157 which states:-

> (1) Except in the case of fraud, no person dealing with a proprietor or with a person who is entitled to become a proprietor shall be required or in any manner concerned to inquire or ascertain the circumstances in or the consideration for which the current proprietor or any previous proprietor is or was registered, or to see to the application of the purchase money or any part thereof, or is affected by notice (actual or constructive) of any bankruptcy proceeding, trust or other unregistered interest whatsoever, any rule of law or equity to the contrary notwithstanding; and the knowledge that any unregistered interest is in existence shall not of itself be imputed as fraud(emphasis added)

She also had to overcome s 49(2) of the same Act which states:-

> Knowledge of the existence of an unregistered interest which has not been protected by a caveat shall not of itself be imputed as fraud.

The underlined words in s 47 read with s 49(2) make it clear that even actual knowledge (which they admitted they had) on the part of the second and third defendants, that the first defendant had a contractual obligation to build a bungalow and transfer it to the plaintiff free of payment, does not amount to fraud.

75. It follows from the preceding paragraphs that the plaintiff did not have a cause of action against the first defendant either, based on breach of trust. From the documentary evidence, it was clear that the first defendant/Wee had done their best to comply with the first defendants obligations under cll 18 and 20 of the Option to build a bungalow for the plaintiff and indeed partly performed this obligation before they and their companies (Derby and Earling) ran out of funds, victims of the 1997 regional economic crisis. They did not hide their obligation to the plaintiff from the third defendants, as can be seen from the letter written by the third to the second, defendants dated 7 May 1997, before the third defendants mortgage was registered. Neither the plaintiff nor Leslie denied the first defendants/Wees allegation that they rejected the offer of $3.6m from Tancho Properties for one (1) of the other units of bungalows and which sale proceeds would have enabled Earling to finish construction of the plaintiffs unit, if not the entire development.

76. Had another law firm taken over acting for the plaintiff in place of Wong & Lim, it may well be that they would have formulated the plaintiffs claim properly and, which could only have been for breach of contract against the first but not against the other, two (2) defendants. The plaintiff was never given the opportunity or advised, to make this claim by either WAP or Mr Ponniah.

Proceedings under Order 58 r 8 of the Rules of Court

.

77. After I had dismissed the plaintiffs claim on 15 November 2000, on an application made by counsel for the second defendants (who submitted that these proceedings against his clients were an abuse of the process of court), I ordered WAP and Mr Ponniah to show cause under O 58 r 8 of the Rules of Court, why they should not be made personally liable for the costs of the plaintiffs unsuccessful

action against all three (3) defendants. Consequently, a week after the dismissal of the plaintiffs action, there was another hearing before me where WAP and Mr Ponniah were represented by Mr C Rajah SC.

78. Before I give the reasons for the orders I made, I need to set out the text of O 58 r 8, it states:

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

After hearing the submissions from counsel for the three (3) defendants and from Mr Rajah, I made an order against WAP and Mr Ponniah under the above order as regards the costs of the second and third defendants, and which is the subject of their appeal in Civil Appeal No. 167 of 2000.

79. Mr Rajah as well as counsel for the defendants relied on the same authorities for their opposing arguments. They cited the leading English authority *Ridehalgh v Horsefield & Anor* [1994] 3 All ER 848 where the appellate court in turn applied the principles from the House of Lords decision in *Myers v Elman* [1940] AC 282. *Ridehalgh v Horsefield* was followed by our Court of Appeal in *Tang Liang Hong v Lee Kuan Yew & Anor* [1998] 1 SLR 97.

80. In *Ridehalgh v Horsefield*, the Court of Appeal considered Order 62 r 11 of the 1986 Rules of the Supreme Court which wording is very similar to our O 58 r 8. Sir Thomas Bingham MR (at pp 856-857) set out the five fundamental principles for which *Myers v Elman* was authority:-

> (1) the courts jurisdiction to make a wasted costs order against a solicitor is quite distinct from the disciplinary jurisdiction exercised over solicitors;
>
> (2) whereas a disciplinary order against a solicitor requires a finding that he has been personally guilty of serious professional misconduct, the making of wasted costs order does not;
>
> (3) the courts jurisdiction to make a wasted cost order against a solicitor is founded on breach of the duty owed by the solicitor to the court to perform his duty as an officer of the court in promoting within his own sphere the cause of justice;
>
> (4) to show a breach of that duty it is not necessary to establish dishonesty,

> criminal conduct, personal obliquity or behaviour such as to warrant striking a solicitor off the roll. While mere mistake or error of judgment would not justify an order, *misconduct, default* or even negligence is enough if the negligence is serious or gross;
>
> (5) the jurisdiction is compensatory and not merely punitive.

81. What then do the words *misconduct or default* connote? According to Lord Wright in *Myers v Elman* (at pp 290 and 292) it did not have to amount to disgraceful or dishonourable conduct by the solicitor, but on mere negligence of a serious character, the result of which was to occasion useless costs to the other parties a serious dereliction of duty as a solicitor either by the person himself or by his clerks.

82. Several passages from *Ridehalgh v Horsefield* are helpful on what is meant by *improper* and *unreasonable* in O 58 r 8. Sir Thomas Bingham had this to say (at p 861):-

> Improper means what it has been understood to mean in this context for at least half a century. The adjective covers but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty. It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct. But it is not in our judgment limited to that. Conduct which would be regarded as improper according to the consensus of professional (including judicial) opinion can be fairly stigmatised as such whether or not it violates the letter of a professional code.
>
> Unreasonable also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonably simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioners judgment, but it is not unreasonable.

The learned judge added (at p 863):-

> It is, however, one thing for a legal representative to present, on instructions, a case which he regards as bound to fail; <u>it is quite another to lend his assistance to proceedings which are an abuse of the process of the court</u>. Whether instructed or not, a legal representative is not entitled to use litigious procedures for purposes for which they were not intended, as by issuing or pursuing proceedings for reasons unconnected with success in the litigation or pursuing a case known to be dishonest, nor is he entitled to evade rules intended to safeguard the interests of justice, as by knowingly failing to make full disclosure o n ex-parte applications or knowingly conniving at incomplete disclosure documents. It is not entirely easy to distinguish by definition between the hopeless case and the case which amounts to an abuse of the process, but in practice it is not hard to say which is which and if there is doubt the legal

representative is entitled to the benefit of it.(emphasis underlined)

83. Jeffrey Pinsler in commenting on O 58 r 8 in his book *Civil Practice in Singapore and Malaysia* (1998) said (at para 452):-

> .the rule requires a certain degree of impropriety as opposed to merely unreasonable conduct or lack of diligence on the part of the solicitor before it can operate.

84. Applying the tests set out in *Ridehalgh v Horsefield* and following upon my earlier comments (in para 62), I was of the view that the action of WAP and Mr Ponniah in instituting this suit against the second/third defendants was indeed an abuse of the process of the court; it was more than unreasonable conduct, it was inexcusable. What I found disquieting was the fact that this was not the first time that the two partners had sued another law firm over their own inaction/omission, a fact which their counsel may not be aware of.

85. In *PT BII Finance Centre v Eunike Juwita & Anor* [2000] 3 SLR 233, the plaintiffs, who are an Indonesian finance company, represented by Mr Ponniah, sued the second defendant law firm (who coincidentally was represented by Mr Tan) for breaching a letter of undertaking they had furnished to the plaintiffs, to pay to the plaintiffs the sale proceeds of a Singapore property owned by the first defendant and which was mortgaged to a local bank. WAP had acted for the plaintiffs in relation to a guarantee and indemnity which the first defendant had furnished to the plaintiffs, to secure the obligations of a company which was controlled by her husband, to which the plaintiffs had provided factoring facilities. The second defendants had paid to the plaintiffs $63,711.62 which balance sum was all the sale proceeds they held of the property, after paying the claim of the mortgagee bank and making other deductions. I dismissed the plaintiffs action as I took the view that the second defendants had discharged their obligations by paying over the balance sum of $63,711.62, which sum they held at the time of the plaintiffs demand for payment, after making all the deductions stipulated in their letter of undertaking.

86. In para 31 of my judgment, I had said (at p 242):-

> In my view, having regard to the fact that a prudent solicitor would only give an undertaking over clients money which he holds and that it is entirely a matter of contract whether the second defendants held the [10%]deposit as stakeholders, a reasonable person in the position of the plaintiffs should not so readily assume that the use of the word sale proceeds must necessarily mean 100% of the sale proceeds in the circumstances under which the undertaking was given. Unfortunately, it was this pre-conceived notion which resulted in this litigation. The plaintiffs could have protected their position by either taking a second mortgage on the property or, if the former course of action was not agreed to by [the mortgagee bank], by lodging a caveat against the property once the guarantee was executed or even later, after being notified about the sale of the property(emphasis added).

Similar to our case, the Indonesian finance companys position would have been protected, had WAP lodged a caveat against her property, once the first defendant had executed the guarantee and indemnity in the plaintiffs favour; he did not. Yet his firm and Mr Ponniah in particular, chose to sue another law firm for his own omission.

87. Mr Tan drew my attention to yet another case where Mr Ponniah had sued a law firm without

basis, namely *Active Timber Agencies Pte Ltd v Allen & Gledhill* [1996] 1 SLR 478. The plaintiffs, a Singapore registered company which was controlled by one Tiang Ming Sing (Tiang) had entered into a sale and purchase agreement with two (2) gentlemen Cam and Adam to buy over the entire shareholdings in a Vanuatu company. The defendant firm of solicitors were retained by Cam and Adam to receive payment on their behalf. The plaintiffs remitted to the defendants clients account in August 1993 the sum of US$250,000 (the sum) for account of Cam and Adam; in turn the defendants paid the sum to their clients in September 1993. Apart from that payment, there was no communication between the plaintiffs and the defendants. According to the plaintiffs, the agreement with Cam and Adam was subsequently aborted.

88. In May 1994, through their (then) solicitors, the plaintiffs demanded the return of the sum; the defendants naturally could not and so informed the plaintiffs pointing out that neither the plaintiffs nor Tiang gave any instructions nor imposed any conditions as to how the sum should be dealt with, at the time the remittance was received. The plaintiffs through Wong & Lim (Mr Ponniah) nevertheless persisted in their claim. In their pleadings, the plaintiffs alleged that the defendants received the sum into their clients account as agents for the plaintiffs and claimed the defendants were their trustees. Not surprisingly, the plaintiffs action (on the defendants application) was struck out under O 18 r 19 of the Rules of Court, as disclosing no reasonable cause of action. The plaintiffs appeal to the Court of Appeal (against the common decision of the assistant registrar and judge [on a registrars appeal] in striking out their claim) was dismissed.

89. I was of the view that both WAP and Mr Ponniah were guilty of a serious dereliction of duty in instituting these proceedings against the second/third defendants when clearly they had no basis at law to do so. To quote Sir Thomas Bingham in *Ridehalgh v Horsefield*, it makes no difference that their conduct is the product of excessive zeal and not improper motive. A willingness to sue their fellow solicitors without second thoughts and without considering the merits of their clients case and their own involvement, was not conduct which could be overlooked by any court of law. Why then should the plaintiff bear the financial consequences of their wrongful act? Accordingly, it would be highly inequitable to order her to pay the costs of the second and third defendants.

90. Consequently, I ordered that WAP and Mr Ponniah bear the plaintiffs costs payable to the second and third defendants. In so doing, I had not taken into consideration the second complaint put forward by counsel for the second defendants, that there had been deliberate non-disclosure of crucial documents from the plaintiffs conveyancing file, even though solicitor and client privilege had been waived by the plaintiff. I was prompted to order further discovery by the plaintiff as a result of counsels complaint and which led to the revelation of the three (3) documents referred to in paras 46 to 48 above. I gave the benefit of the doubt to WAP and Mr Ponniah that their omission to give full discovery was an inadvertence and not deliberate. However, the same indulgence could not be extended to them in the manner they pursued the plaintiffs claim against the second and third defendants.

91. I did not make a similar order against the two (2) partners for the costs payable by the plaintiff to the first defendant; whatever her cause of action, whether it be for breach of trust or contract, the plaintiff would have had to bear the costs of the first defendant in any event should she fail in her action. Consequently neither WAP nor Mr Ponniah should be penalised in this regard.

Lai Siu Chiu

Judge