NOTES OF CASES

OPTION AGREEMENTS IN RELATION TO THE SALE OF LAND *

Tai Tong Realty Co. (Pte.) Ltd. v. *Galstaun & Anor.*

The recent case of *Tai Tong Realty Co. (Pte.) Ltd.* v. *Galstaun & Anor.*[1] provides an opportunity for an examination of the nature and effect of option agreements in relation to the sale of land.[2]

In this case the defendants had given an option to the plaintiffs to purchase a piece of land in the following terms:—

> "In consideration of the sum of Singapore $2,000 received by us from you this day we hereby give you an option to purchase our property known as 27 Tomlinson Road, Singapore 10 containing an area of 45,843 sq. ft. at the price of Singapore $16.75 (Singapore dollars sixteen and seventy five cents) per sq. ft. on the following terms and conditions :-
>
> 1. The sale is subject to contract.
> 2. The property is to be sold with vacant possession to be given within three months from the date of contract for Sale and Purchase.
> 3. The sum equivalent to 10% of the purchase price must be paid to our solicitors, Messrs. Advani & Hoo of 7E-1, Asia Building, Singapore 1, on the exercise of this portion.
> 4. The contract for the Sale and Purchase shall be executed within six weeks of the date of exercise of this option.
> 5. On the signing of the agreement for Sale and Purchase a further 10% of the purchase price of the property will be paid by a bank cheque made out in favour of Mr. & Mrs. A.C. Galstaun. Further, the buyers will authorise Messrs. Advani & Hoo to pay us the original 10% paid to them on taking up of the option. The remaining 80% of the purchase price of the property shall be paid by a bank cheque to Mr. & Mrs. A.C. Galstaun on their giving vacant possession to the buyers.
> 6. The sale of the property does not include our furniture and fittings and goods on the premises. That is, the sale is only of the land and buildings on it.
> 7. It is distinctly understood that any portion of the property intended to be requisitioned by the Government before this date, now or in the future

* This case note is based upon the writer's contribution to a paper prepared in collaboration with Associate Professor Tommy Koh and Mr. Poh Chu Chai and delivered in November 1973 at the Seminar on Construction Practice and Economy in Singapore organised by the Building and Estate Management Society of the University of Singapore.

1. [1973] 2 M.L.J. 7. Appeal unreported. Civil Appeal No. 20 of 1973.
2. This is not the first case of its kind in Singapore and Malaysia. In *Low Kar Yit & Ors.* v. *Mohamed Isa & Anor.* [1963] M.L.J. 165 the status of an option subject to "a formal contract to be drawn up" was considered by Gill J., albeit on facts differing materially from those in *Galstaun's* case. This decision was followed by Winslow J. in *Koh Peng Moh* v. *Yahiya* [1965] 1 M.L.J. 230. See also *Koh Peng Moh* v. *Tan Chwee Boon* [1962] M.L.J. 353.

will be for your account and responsibility, that is, irrespective of the past, present or future intentions or plans of the Government in respect of this property, you will pay us the sum of S$767,870.25 (Singapore dollars seven hundred and sixty seven thousand, eight hundred and seventy five and twenty five cents) on the signing of the contract for Sale and Purchase.

8. The S$2,000 deposit is non-refundable in case the sale of the property does not go through.

This offer shall expire at noon of the 31st January 1973."

Within the period of the option the plaintiffs sent a letter to the defendants exercising the option and requesting for the title deeds and draft contract. The defendants however refused to proceed any further in the matter. The plaintiffs then brought an action to enforce the agreement and subsequently applied for an injunction to restrain the defendants from selling the property until judgment in the action.

The High Court, in the hearing of the motion for an injunction held that as the sale was subject to contract and as no formal contract had been signed by the parties, there was no binding contract between them. Accordingly the plaintiffs were not entitled to the injunction and the defendants were at liberty to sell to anyone they pleased.

On appeal to the Court of Appeal, the Chief Justice, delivering oral judgment, upheld the decision of Choor Singh J.

Before proceeding any further in examining this case let us first look into the nature of an option contract.

An option contract can be made in one of two ways. Firstly, A can promise, under seal or in return for a sufficient consideration, to sell property to B for a stated price at B's option, on condition of either B giving notice to purchase or actually paying the stated price within a stipulated number of days. This is a *conditional contract* to sell; it does not have the form of a continuing offer.

Secondly, A can make a formal offer to sell his property to B at the stipulated price and separately, for sufficient consideration or under seal, promise to keep that offer open for a stipulated number of days. In this second case, instead of one we have two separate transactions — first, an offer to sell and second, a promise, supported by consideration or under seal, to keep that offer open. The latter contract is separate from and preliminary to the contract of sale yet to be entered into.

In the second type of option contract, if A revokes his offer before B exercises his option, A would be in breach of the option contract[3] though not of the contract of sale since no contract of sale has yet been consummated by B's acceptance.[4]

3. See *Stromdale & Ball, Ltd.* v. *Burden* [1952] Ch. 223 at p. 235.

4. Salmond and Williams on *Contracts* (2nd edition) at p. 133 go so far as to state that:

"The consideration given by the option-holder deprives the grantor not merely of the right to revoke the option lawfully, but of his power to revoke it effectively. Notwithstanding any such wrongful revocation, the option may be exercised, and the conditional contract already constituted by the grant of the option will become ipso jure an absolute contract by the fulfilment of the condition."

But what if the sale is "subject to contract"? At first blush it is difficult to see how in such a case a revocation of the offer to sell can be actionable as being a breach of the collateral contract when the grantee's acceptance of the offer to sell may not consummate a contract. But really this begs the question as to the effect of the three words "subject to contract". The Court of Appeal in *Galstaun's* case held that the words [5]

> are so well-known and have acquired so definite a meaning in relation to the sale of land that, unless the facts and circumstances are so very strong and exceptional, its effect in law is that there is no binding contract of sale but a mere conditional contract of sale, the condition under that expression being that the parties agree to enter into another contract."

We may perhaps query whether these words are so well-known. Do laymen such as developers and others untrained in the law know the effect of these words? In particular, did the contracting parties in *Galstaun's* case appreciate the legal significance of these words? Doubtless there is a long line of English judicial precedents [6] to support the decision; but, as in all matters of construction, a comparison of decided cases is "apt to confuse rather than illuminate".[7] What seems to me the option contract, the two parties may be said to have intended to be bound at the time that the option was granted. The words "subject to contract" are not so intractable as to be capable of only one meaning. In an Australian case, *Masters v. Cameron*[8] three were suggested.[9]

Firstly the parties may have "reached finality in arranging all the terms of the bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have those terms restated in a form which will be fuller or more precise but not different in effect".

Secondly, the parties may have "completely agreed upon all the terms and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document".

Thirdly, it may be that "the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract".

In each of the first two there is a binding contract. In the third there is no contract until execution of the formal document.

In the context of an option contract, there is yet a fourth possible costruction of the words "subject to contract". Unlike in most transactions where there is only one contract to speak of, in the grant of an option to purchase of the second type, as previously pointed out, two

5. Unreported. Civil Appeal No. 20 of 1973.
6. *Winn* v. *Bull* [1877] 7 Vh.D. 29; *Chillingworth* v. *Esche* [1924] 1 Ch. 97; *Spottiswoode Ballantyne & Co. Ltd.* v. *Doreen Appliances & G. Barclay (London) Ltd.* [1942] 2 All E.R. 65.
7. Cheshire & Fifoot, *The Law of Contract* (7th edition) p. 34.
8. [1954] 91 C.L.R. 353.
9. *Ibid*., at p. 360.

contracts are envisaged. First is the contract whereby the grantor is bound to keep his offer to sell open. Second is the contract of sale yet to be entered into. This second contract does not come into being until the option is exercised. Thus to stipulate that the "sale shall come into effect only when the grantee decides to contract i.e. when he exercises the option. While the writer is not canvassing this view with full vigour it must be pointed out that an examination of the terms of the option discloses nothing that rules out such a construction. Certainly there is nothing therein which could have compelled the Court's particular construction. The Chief Justice however referred to clauses 4 and 5 as making it "clear beyond a shadow of doubt" that there was no binding contract until a further contract was entered into. With respect it is difficult to see why.

Clause 4 stated:

> "The contract for the Sale and Purchase shall be executed within six weeks of the exercise of this option."

Clause 5 continued:

> "On the signing of the agreement for Sale and Purchase a further 10% of the purchase price of the property will be paid...."

Reference to a contract yet to be signed does not preclude the possibility that a binding contract of sale has already been entered into and that the signing of the formal document is merely for the purpose of reducing their agreement to writing. As Lord Blackburn observed in *Rossiter* v. *Millers*[10]

> "I think the decisions settle that it is a question of construction whether the parties finally agreed to be bound by the terms, though they were subsequently to have a formal document drawn up."

The learned Chief Justice however seems[11] to have been of the opinion that a contract for the sale of land only comes into existence when both parties have signed the agreement of Sale and Purchase. This is surprising in view of the fact that there have been cases where the Courts have upheld contracts made before the formality of signature by both parties. Suffice it just to cite *Law* v. *Jones*,[12] a recent decision

10. (1878) 3 App. Cas. 1124 at p. 1152.

11. Whatever the learned Chief Justice left unsaid, Mr. T.P.B. Menon has stated very clearly, albeit in a different context. In his article on "Contracts for Sale of Land" in (1973) 2 M.L.J. *v*, Mr. Menon stressed that there was no contract in both *Yeo Long Seng* v. *Lucky Park Pte. Ltd.* [1971] 1 M.L.J. 20 and *Yap Eng Thong & Anor.* v. *Faber Union Ltd.* [1973] 1 M.L.J. 191 on the ground, *inter alia*, that, "a formal contract in the prescribed form was. . .a statutory requirement.. .before a binding contract could be created." But a reference to the "statutory requirement" he referred to, viz. section 21 (2) (d) of the Housing Developers Act (Cap. 250) discloses that the section merely provides that the Minister for National Development may make rules to provide for the form or forms of contract to be used by a licensed housing developer and a purchaser *as a condition of the grant of a licence under the Act.* Nowhere does the Act render invalid contract of sale entered into prior to the signing of the "prescribed" form(s) of contract.

12. [1973] 2 W.L.R. 994.
Although the English Court of Appeal in *Tiverton Estates* v. *Wearwell Ltd.* (in The Times, November 21, 1973) declined to follow this case the difference of judicial opinion related not to the above proposition, which remains valid, but to the secondary question as to what constituted a sufficient memorandum.

of the Court of Appeal in England upholding an *oral* contract of sale of land upon finding that there was a sufficient memorandum in writing evidencing the contract.

It is well settled that, where there has been a definite acceptance of an offer, the mere fact that the contracting parties desire that it should be put into a more formal shape does not relieve either party from his liability under the contract.[13]

One important clause in the option contract which seems to have been ignored by the Court is that which provided that the two thousand dollars paid in consideration of the grant of the option was *non-refundable*. What possible construction could be placed upon this clause? It seems to me the fact that the sum was non-refundable strongly suggests that the option contract was intended to be binding on the grantors. It cannot be that the grantee paid two thousand dollars for a mere chance that the grantors may agree to sell. In such a case there would be a total failure of consideration and consequently, no contract.[14] But where there are two possible ways of viewing a transaction the Court should, wherever possible, uphold the transaction as a valid contract lest it should incur the reproach of being the destroyer of bargains.[15] Thus the better view would seem to be that the option contract was intended to be binding on the grantors.

Surely there is much to be said in favour of a policy of not allowing a party to resile from a bargain solemnly entered into, especially where all the essential terms have been agreed upon. The circumstance that all the essential terms had been agreed upon and that the money paid by the grantee was non-refundable, read in the light of the peculiar nature of an option contract could, to my mind, easily have costituted "strong and exceptional" circumstances envisaged by the learned Chief Justice. This decision is the more to be regretted because in a time when gazumping is rampant, a court should assiduously avoid any suggestion of condonation of such.

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13. Halsbury's *Laws of England* (3rd Edition) Vol. 8 p. 76. See also cases there cited.

14. There is another construction which though technically possible is highly unlikely. This view is that the grantors may impliedly have agreed to forbear selling the property to anyone else during the period given for the exercise of the option. If this view is accepted, then there cannot be said to be a total failure of consideration since the grantors suffer a detriment by such forbearance. Note however that this view was not canvassed by counsel for the defendants i.e. the grantors. Furthermore both the High Court and the Court of Appeal held that the defendants were at liberty to sell to whomsoever they pleased.

15. Per Lord Tomlin in *Hillas & Co.* v. *Arcos Ltd.* [1932] 147 L.T. 503 at p. 512.