## CONTRACTS FOR THE SALE OF LAND

*Quek Choon Huat* v. *R.M. Seow*[1]
*Ong Chong Soo v. Tan Eng Tai etal*[2]
*Daiman Development Sdn. Bhd.* v. *Mathew Lui Chin Teck*[3]
*Cheng Chuan Development Sdn. Bhd. v. Ng Ah Hock*[4]

Several times over the last few years the courts of Singapore and Malaysia have had to consider the circumstances in which a contract for the sale of land becomes actionable. Two special problems have arisen: firstly the requirement of section 4 of the Statute of Frauds,[5] that for a contract to be enforceable there must be sufficient writing signed by the defendant or his agent, and in particular the impact of the words "subject to contract"; and secondly, the status of the "option" favoured by the housing developers and now governed, in Singapore, by the Housing Developers Rules.[6] Both these problems have recently been addressed by the courts.

In two Singapore cases the question of the existence of a contract was considered. In *Quek Choon Huat* v. *R.M. Seow*[7] the issue was whether certain letters written by the parties' solicitors could constitute a contract, enforceable under section 4 of the Statute of Frauds. Chua J. held that they did, various letters constituting offer, acceptance and reaffirmation of a contract. This was notwithstanding references by both sides to a "Sale and Purchase Agreement" to be signed subsequently: "the mere reference in [the letters] to a future formal contract will not prevent their constituting a binding bargain."[8] Chua J. also said that the letters complied with the requirements of section 4 in that they contained "a recognition and/or admission that a contract existed between the parties."[9] The decision as to the letters forming a contract was reversed in the Court of Appeal, on the short and simple ground that, far from affirming the existence of a contract, the letters represented an indication to conclude the contract in the normal manner, namely by signing and exchanging an agreed Agreement for Sale.[10] This is, perhaps, fair enough, but does serve to indicate that, in Singapore, unless the parties expressly agree otherwise the *only* way to conclude a binding contract for sale is by this method, and section 4 is limited to that extent.[11] The Court of Appeal was perhaps relying on *Koh Peng Moh* v. *Tan Chwee Boon* (see below)

[1] [1982] 2 M.L.J. 3.
[2] [1982] 1 M.L.J. 307.
[3] [1981] 1 M.L.J. 56.
[4] [1982] 2 M.L.J. 222.
[5] Statute of Frauds 1677, 29 Car. 2 c. 3. See, *e.g. Koh Peng Moh* v. *Yahiya* (1965) 31 M.L.R. 23.
[6] Made under the Housing Developers (Control and Licensing) Act Cap. 250, Singapore Statutes, Rev. Ed. 1970. See, *e.g. Yeo Long Seng* v. *Lucky Park Pte. Ltd.* [1971] 1 M.L.J. 20; *Yap Eng Thong* v. *Faber Union Ltd.* [1973] 1 M.L.J. 191; *Ang* [1973] M.L.J. 248.
[7] *Supra,* note 1.
[8] *Ibid,* at p. 4.
[9] *Ibid.*
[10] *Ibid,* at p. 6.
[11] The decision can be contrasted with the Malaysian case of *Diamond Peak Sdn. Bhd. & Anor.* v. *D.R. Tweedie* [1982] 1 M.L.J. 97.

distinguished by Chua J. on the ground that it was a "subject to contract" case, but no authority at all was cited for its decision.

In *Ong Chong Soo v. Tan Eng Tai et al*,[12] the issue was whether on the proper construction of various letters exchanged between the parties' solicitors there was a contract for sale. The first of these letters, from the plaintiff (purchaser), stated that the agreement was "subject to contract"; and Sinnathuray J. held that there was nothing in the subsequent correspondence to indicate that the parties had altered their intention to become bound only when the formal Agreement for sale and Purchase was signed by both parties. The judge felt that to decide otherwise would be to "throw into confusion the conveyancing practice in this country":[13] this notwithstanding that the parties were clearly *ad idem* and that the defendant's solicitor had signed memoranda arguably complying with section 4.

These cases confirm the "hard line" approach that Singapore courts had already taken to these problems. No clearer example of this could be provided than *Tai Tong Realty* v. *Galstaun*[14] in which the plaintiff was given an option to purchase the defendant's property for a stipulated price by a certain date. The option was exercised but the defendant purported to revoke his offer. The plaintiff's claim for specific performance of the contract for sale allegedly brought into existence on his exercise of the option was refused on the ground that, by virtue of the terms of the option itself, the sale was "subject to contract". In the words of Wee C.J. in the Court of Appeal, "[t]he expression 'subject to contract' is so well known and has acquired so definite a meaning in relation to the sale of land that unless the facts and circumstance are so very strong and exceptional it's *[sic]* 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."[15] This case is really only supportable on the assumption, arguable on the facts, that the parties had agreed not to be bound until a *formal* contract for sale had been entered into.[16] The Chief Justice's statement as to the effect of the phrase is misleading, at least according to English authorities.[17] Its effect is not that there is a conditional contract but that there is no contract at all. Hence the inappropriateness of his reference to the need for "another" contract.[18] The point here, though, was that no effect should have been given to the words at all. In the circumstances, they were meaningless, and there was a binding contract.

Be that as it may, all three cases indicate that the Singapore courts are firmly behind the approach of the English Court of Appeal in *Tiverton Estates* v. *Wearwell*[19] in the great debate between that case and the earlier Court of Appeal decision of *Law* v. *Jones*.[20] This,

12 *Supra,* note 2.
13 *Ibid,* at p. 308.
14 [1973] 2 M.L.J. 7.
15 *Ibid.* at p. 9.
16 See, *e.g. Koh Peng Moh* v. *Tan Chwee Boon* (1962) 28 M.L.J. 353.
17 See Megarry & Wade, *The Law of Real Property* (1975) p. 544.
18 For a less rigid analysis see, *Yeo Long Seng's* case, *supra* note 6, at p. 23, *per* Winslow J.
19 [1975] Ch. 146.
20 [1975] Ch. 112.

it is submitted, is regrettable. The conflict between these two cases has, to a considerable extent, been stirred up by English jurists (Lord Denning M.R. in the van) anxiously searching for ammunition in the battle over precedent in the English Court of Appeal. On basic principles, *Law* v. *Jones* was surely rightly decided: it was held that writing containing the term "subject to contract" could constitute a section 4 memorandum if subsequent events showed that the parties regarded the suspensive effect of the term as waived. It goes against common sense to decide, as a different Court of Appeal decided in *Tiverton,* that a letter containing the phrase can *never* constitute a section 4 memorandum on the grounds that the section requires the memorandum to indicate the existence of the contract, which the phrase apparently denies, even when the parties are clearly *ad idem*.[21] This is not to say that the words "subject to contract" should always be disregarded and that letters containing the necessary terms should always be held to satisfy section 4. That would clearly cause problems in conveyancing. What is suggested is that where the parties clearly are in agreement, one side should not be allowed to withdraw from the contract subsequently simply in reliance on the phrase. In other words a more careful analysis of what happened is required than that provided in *Tai Tong* and *Ong.* The matter warrants closer judicial attention.

The third case, *Daiman Development Sdn. Bhd.* v. *Mathew Lui Chin Teck*[22] is a Privy Council decision from Malaysia. The appellants were housing developers who advertised lots for sale on which they proposed to build, subject to the granting of planning permission, various types of residential accommodation. The respondent was anxious to buy a house, and so he paid a "booking fee' and signed a "booking proforma". Under the terms of the proforma the respondent agreed "to purchase the above lot together with the house as specified at the above stated price," with the proviso that within two weeks of his receipt of notice from the appellants, he would pay a sum by way of deposit and sign a formal agreement for sale, and that in the event of his failure to do this the booking would be treated as cancelled and the booking fee forfeited. Seven months later the appellants informed the respondent that because of rising costs the price of his lot had risen by some M$8000: and they sent him a notice requiring the payment of a proportionately increased deposit and the signing of a formal contract of sale, both within fourteen days, failing which the booking would be regarded as cancelled.

Mathew Lui did not stand for this. He brought an action for specific performance of the original agreement at the stated price: the appellants' only contention, albeit expressed in various ways, was that there was no enforceable contract. The respondent succeeded in all three courts: one must surely applaud the equity of the decision but it does raise interesting questions about the nature of the "proforma" commonly used by housing developers.

The developers' first submission in the Privy Council was that the agreement comprised in the proforma was "subject to contract".

[21] See the remarks of Buckley L.J. in *Daulia Ltd.* v. *Four Millbank Nominees Ltd.* [1978] Ch. 231 at 249 *et seq.*

[22] *Supra* note 3.

There was nothing in the terms of the proforma to support this contention and, construing the proforma in the context of the relevant housing developers' rules, the Committee felt that "the terms... point rather strongly towards obligations presently accepted rather than to a suspension of obligations until some further event or agreement has agreed or been made."[23] Their next argument was that the proforma agreement was "inchoate" for want of agreement as to the terms and conditions to which the formal contract for sale was to be subject: in other words, no binding contract would come into existence until the formal agreement referred to in the proforma was signed. To some extent their Lordships' rejection of the developers' first argument inevitably involved the rejection of the second also: for there was much to be said for the view that "the terms and conditions which the solicitors might properly insert in the contract, apart from repeating the substance of the proforma itself, were limited to the implementation of the obligations imposed upon the developer by the [Housing Developers] Rules. Once it is decided that the promise to purchase was not subject to contract the obligation [to pay the deposit and sign the agreement] is to sign a contract of sale which implements a sale for which agreement has already been made."[24]

The developers' final submission, described as "unarguable" by their Lordships, was that, granted that the proforma created a legal obligation, it constituted, in effect "an option to sell", giving the purchaser no more than a right of first refusal should the developers decide, in fact, to go through with the sale. This argument was summarily dismissed. "If the appellant did not wish to become bound to the respondent at the outset, a document radically different from the proforma would be necessary."[25] Accordingly specific performance was ordered.

The case is reminiscent of Winslow J.'s decision in the Singapore case of *Yeo Long Seng* v. *Lucky Park*[26] where a developer whose prospective purchaser signed a "proforma" in similar terms and paid a booking fee, was held to be in breach of contract in purporting to revoke that offer within the period during which the purchaser was entitled to sign the formal agreement, and the purchaser was awarded damages. In considering the legal nature of the proforma, Winslow J. said: "Both parties entered into a solemn binding arrangement whether one looks at it from the point of view of a legally enforceable contract at common law [presumably conditional] or as an irrevocable option to purchase. I find it difficult to comprehend how it can fail to be one or the other, if not both."[27]

*Daiman* seems to place the housing developer's option firmly in the former category. It seems to be assumed that the proforma constitutes a binding contract. Does this mean that the purchaser is bound as well as the vendor, so that if the purchaser refuses to sign the agreement within the stipulated period, the vendor can sue him for specific performance? Surely not: but then why do the Privy

[23] *Ibid.* at p. 60.
[24] *Ibid.*
[25] *Ibid.* at p. 61.
[26] *Supra,* note 6.
[27] *Ibid.* at p. 22.

Council use the language of binding contracts rather than that of options? In a sense there is little distinction in the sense that in either case the purchaser acquires an equitable interest. However, in an option, while the seller is obliged to offer the property for sale, the buyer is under no obligation to buy. Winslow J.'s approach to this problem of mutual obligation is equivocal; and it might have been hoped that the Privy Council would analyse the legal nature of the proforma a little more closely.

Finally brief mention might be made of another Malaysian case, *Cheng Chuan Development Sdn. Bhd. v. Ng Ah Hock*.[28] The facts were almost the same as in *Daiman,* but the issue was rather different. Again the developers wished to increase the price after the purchaser had signed a proforma and paid a booking fee. In this case, when the purchaser sent a cheque for deposit representing 10% of the originally agreed price, the developers returned it and also sent a cheque for $1000 as a refund of the booking fee. A reduced offer was rejected by the purchaser who cashed the cheque for $1000. He subsequently sent the developers another cheque for $1000 which the latter refused to accept. The purchaser sued the developer for specific performance or, alternatively, damages. The Federal Court decided in favour of the purchaser and awarded him damages, being the difference between the contract price and the price at which the property was subsequently sold to a third party.

On the basis of *Daiman,* there was clearly a concluded contract between the parties. The question was the effect of the purchaser's acceptance of the refund after the developer had repudiated the contract.[29] The correspondence between the pities made it clear that the purchaser did not accept this repudiation: on this basis the contract would still be operative, and the purchaser entitled to his remedy. On the other hand, the acceptance of the refund might well constitute acceptance of the repudiation. That would bring the contract to an end, but the party in breach could still be sued. The decision seems eminently just.

W.J.M. RICQUIER

[28] *Supra,* note 4.

[29] The developer had two alternative, and highly optimistic arguments: firstly, that acceptance of the refund by the purchaser constituted waiver of his rights under the contract; and secondly, that the delay between the acceptance of the refund and the sending of the replacement of $1000 estopped him from claiming damages. Neither argument had the slightest legal or factual weight.