

Choong Wai Phwee And Others (Trustees of Cheng Liam Um Vegetarian Temple) v Chileon
Pte Ltd
[2000] SGHC 151

Case Number : OS 763/2000, 764/2000
Decision Date : 26 July 2000
Tribunal/Court : High Court
Coram : G P Selvam J
Counsel Name(s) : Lok Vi Ming and Raistlina Kwek (Rodyk & Davidson) for the plaintiff; Quek Mong Hua and Adeline Foo (Lee & Lee) for both defendants
Parties : Choong Wai Phwee And Others (Trustees of Cheng Liam Um Vegetarian Temple)
— Chileon Pte Ltd

*Charities – Charitable trusts – Charity trustees selling trust land without express power of sale
– Whether trustees have power of sale without authorisation of court or Commissioner of Charities*

*Charities – Charitable trusts – Commissioner of Charities making order authorising sale of trust land
under s 30 – Whether s 30 or s 24 the proper provision for such order – ss 24 & 30 Charities Act
(Cap 37, 1995 Rev Ed)*

: Part I: The prelude

Introduction

Shanghai Road is situated off River Valley Road and is proximate to the prestigious Orchard Road and Tanglin area. The road is in the process of gentification. Chileon Pte Ltd, the defendants in this case, made collective sale agreements with the owners of nine properties at Shanghai Road yielding an aggregate land area of some 25,000 sq ft. They intend to construct a condominium of 48 flats. One of the properties, 24 Shanghai Road, houses a charity known as the Cheng Liam Um Vegetarian Temple ('the temple'). The temple charity was constituted by a trust deed made in 1927. The trustees of the temple charity entered into an agreement for the sale of the temple property to the defendants as part of the collective sale. The defendants have resiled from the agreements because their financiers at the eleventh hour pulled the carpet from under their feet. By domino effect all the other proposed sales also suffered the same paralysis. By OS 764/2000, the plaintiffs who are the present trustees of the temple charity seek an order against the defendant developers for the completion of the agreement for the sale of the temple property. By another originating summons, 763/2000, the owners of the other properties have also sought an order for specific performance of the agreements to sell their properties to the defendants. By way of a countermeasure, Chileon Pte Ltd by High Court Suit 335/2000/M commenced an action against all the nine vendors for the return of the deposit of \$2,380,000 in the hands of their solicitors. Pleadings have closed in that action. It cannot proceed any further because of my decision in this case; the central issue in that case is res judicata.

The lawyers

Before I proceed further I should introduce the lawyers of the parties. The vendors of all the properties have retained Rodyk & Davidson ('Rodyks'). The purchasers were represented by David Ong & Partners ('David Ong') in the matter of the sale and purchase. The purchasers had arranged for finance for the purchase and project from Hong Leong Finance Ltd and Singapore Finance Ltd ('the lenders'). Lee & Lee were their solicitors for the securitisation of the proposed loan. It was the intention of the purchasers to retain Lee and Lee to handle the sale of the condominium units. After the purchasers resiled from the sale and purchase they retained Lee and Lee to act for them in the three actions. By that engagement, Lee and Lee took on the task of defending and demonstrating

their view of the law was the correct view.

The SAPAs

The properties that were to be sold were comprised of Nos 22, 26, 28, 30, 32, 34, 36, Lot 257N and Lot 958L Shanghai Road, Singapore. The legal owners of each property granted on 2 November 1999 an option to purchase to `Chileon Pte Ltd and/or nominees`. The aggregate price of all properties was \$23,800,000. On 30 November 1999 Chileon exercised the option and paid the aggregate deposit of \$2,380,000. Thereupon there arose a binding contract of sale and purchase in respect of each property. I shall use the acronym `SAPA` to refer to the sale and purchase agreements.

Glitch No 1

Then, there arose a glitch in relation to No 26 Shanghai Road. It was in the shape of an objection raised by the purchasers. It arose like this. The trust instrument, an indenture of conveyance dated 19 July 1927, contained this provision:

Now this Indenture Witnesseth that in consideration of the premises the said Tay Choon Tow hereby conveys unto the Trustees all the land and premises described in the Schedule hereto To Hold the same unto the Trustees in fee simple Upon Trust to manage the said land and premises and permit the same to be occupied for the purposes of the Cheng Liam Um Vegetarian temple and if not so occupied to let the same and to receive the rents profits and income thereof and pay and apply the same to the use and benefit of the said Cheng Liam Um Vegetarian temple and the members thereof.

It is to be noted that the trust instrument included an express power of letting but not sale. This gave concern to the lawyers of the purchasers and the two finance companies which agreed to lend moneys to the defendants.

The agreement provided for two completion dates. The first was 21 March 2000. The lack of power was discovered before that date; in fact it was spotted soon after David Ong received the title documents.

Application to the court

To surmount the glitch on 21 March 2000 the lawyers for the charity trustees made an ex parte application to the High Court seeking an order to empower the trustees to effect the sale. The application was made by OS 442/2000. The application was made ex parte under s 56(1) of the Trustees Act. It was filed on 22 March 2000 to be heard on the same day. The applicants informed the court of the urgency. In addition to the completion date, there was urgency for another reason - the sellers were in the market to purchase substitute properties. None wanted anything to go awry.

Rubin J, who took on the application, posed this question to counsel for the trustees of the temple before him:

Do you have to serve the papers on the A-G as guardian of charities. Does the property or the temple come within the purview of the Charities Act?

Obviously, what troubled Rubin J was s 9 of the Government Proceedings Act. The relevant part of that provision states that:

In the case of any alleged breach of any express or constructive trust for religious or charitable purposes, or where the direction of the court is deemed necessary for the administration of any such trust, the Attorney-General or two or more persons having an interest in the trust and having obtained the consent in writing of the Attorney-General, may institute a suit or be joined as a party in any existing suit on behalf of the Government or the public for the purpose of authorising the whole or any part of the trust property to be let, sold, mortgaged, charged or exchanged and obtaining such further or other relief as the nature of the case may require.

Counsel was unable to offer the information sought by Rubin J. Thereupon Rubin J adjourned the application `for the solicitor to make inquiries`. By reason of subsequent developments that application slumbered into silence.

Application to the Commissioner of Charities

Rodyks for the trustees took a look at the Charities Act (Cap 37) and made an application to the Commissioner of Charities under s 30(1) of the Charities Act. The section reads as follows:

Subject to this section, where it appears to the Commissioner that any action proposed or contemplated in the administration of a charity is expedient in the interests of the charity, he may by order sanction that action, whether or not it would otherwise be within the powers exercisable by the charity trustees in the administration of the charity; and anything done under the authority of that order shall be deemed to be properly done in the exercise of those powers.

On 23 March 2000 they asked the Commissioner to make an order in the following terms:

(1) that the sale of the property known as Cheng Liam Um Vegetarian temple at 26 Shanghai Road, Singapore 248195 by the abovenamed trustees of the said temple to Chileon Pte Ltd be authorised, notwithstanding the absence of a power of sale conferred on the trustees;

*(2) that all expenses in relation to the sale be paid out of the sale proceeds;
and*

(3) that the trustees be authorised to apply the balance sale proceeds towards the purchase of an alternative property for the use and benefit of the Cheng Liam Um Vegetarian temple and its members.

In case the Commissioner was not prepared to make the order, they asked for an alternative order under s 31 of the Charities Act to authorise the trustees to make `an application to court for a power of sale to be conferred on the trustees for the aforesaid purpose`. The Commissioner was appraised of the direction made by Rubin J.

In the event the Commissioner made an order in terms sought by the trustees. The order was dated 31 March 2000.

Glitch No 2

Then arose another glitch. This time it arose in the shape of an objection from the financiers of the purchasers. On 5 April 2000 David Ong wrote to Rodyks as follows:

Our clients` mortgagees are of the view that the said order is inadequate in that it does not authorise the execution of the conveyance by the trustees. Further as the contract for sale was entered into at a time when the trustees had no capacity to sell, it should be approved and ratified by the Commissioner.

They wanted the Commissioner`s order to be amended to include a reference to the agreement to sell and a reference to the conveyance to be executed.

In an affidavit in these proceedings the defendants explained the objection in these words:

Both the defendants` intended mortgagees and the defendant were advised by their respective solicitors, which advice they accepted and relied upon, that the said order obtained by the temple trustees under s 30 of the said Act was inappropriate as the proper order should have been made under s 24(1) of the said Act where the Commissioner of Charities could exercise the concurrent jurisdiction of the High Court only with the consent of the Attorney General.

It would be appropriate to state the contents of s 24(1) now:

Subject to the provisions of this Act, the Commissioner may, with the consent of the Attorney-General, by order exercise the same jurisdiction and powers as are exercisable by the High Court in charity proceedings for the following purposes:

(a) establishing a scheme for the administration of a charity;

(b) appointing, discharging or removing a charity trustee or trustee for a charity, or removing an officer or employee; and

*(c) vesting or transferring property, or requiring or entitling any person **to** call for or **make any transfer** of property or any payment. [Italics here and hereafter supplied by me.]*

The temple trustees` lawyers at once disagreed. On the same day, 5 April 2000, they asserted that the amendments were unnecessary. They further said that they had spoken to the Commissioner of Charities who was also view and that the Commissioner was willing to give a letter of confirmation on the points raised by the mortgagees` solicitors.

Extension of completion date

Be it noted that by then the parties were well past the first completion date of 21 March 2000. There was, however, a provision for a spontaneous extension of time to a second completion date. Clause 9(d) of the agreement provided as follows:

*The sale of the property is subject to and conditional upon simultaneous completion of the sale and purchase of Properties 22, 26, 28, 30, 32, 34 and 36 and Lot 257N of Town Subdivision 24 and Lot 958L of Town Subdivision 24 Shanghai Road (‘the other properties’) by the purchaser from the respective owners. It is hereby agreed that the purchase of the property is on a collective basis together with the other properties and **in the event that the sale and purchase of any or one of the other properties cannot be completed simultaneously for whatever reason, other than the default of the purchaser, completion shall be extended by a further eight (8) weeks without interest** (in this respect ‘completion date’ shall mean such extended date); thereafter, the purchaser shall have the sole discretion to either complete the sale of any of the other properties ready for completion (including the property if so elect) or to rescind this option and all moneys paid under this option shall be refunded to the purchaser in full without interest and thereafter, neither party shall have any claim whatsoever against the other.*

Invoking cl 9(d), David Ong, on behalf of the purchasers, on 9 April 2000 stipulated the second completion date as 16 May 2000. They said incorrectly that it was the purchasers’ right. In fact it was a spontaneous right accruing to the benefit of the sellers.

Lee and Lee write to the Attorney General

Then the solicitors for the trustees, the purchasers and the finance companies embarked on a polemic over the efficacy of the order of the Commissioner. Lee and Lee stood firm on their position that an order under s 24(1) as proposed by them was necessary. To break the deadlock it was agreed that Lee and Lee would write to the Attorney General. They did on 11 April 2000 write as follows:

We act for Singapore Finance Limited and Hong Leong Finance Limited, the intending mortgagees in an en bloc sale of nine pieces of property which include the above property. Messrs Rodyk & Davidson act for the vendors collectively and Messrs David Ong & Partners act for the purchasers, Chileon Pte Ltd (‘Chileon’). It is intended that we will eventually also act for Chileon in developing the project following the en bloc sale.

We have the concurrence of all parties concerned to write to seek your Honour’s kind assistance as guardian of Charities and have informed the Commissioner of Charities (the ‘Commissioner’) of this initiative as well.

The present trustees of the temple, Choong Wai Phwee, Sek Miew Teck also known as Auyong Sin Kee @ Auyong Lai Kum, Siew Yoke Peng and Goh Meng Fei, have entered into an agreement to sell the property under the en bloc sale arrangement. A copy of the option dated 2 November 1999 duly accepted by Chileon on 30 November 1999 is enclosed for your reference.

Upon checking the conveyance of the property in favour of the then trustees of the temple, it was noted that the trustees do not have power to sell the property. Messrs Rodyk & Davidson then sought and obtained an order dated 31 March 2000 from the Commissioner (a copy of which is enclosed herewith) pursuant to s 30(1) of the Charities Act, authorising the sale of the property by

the trustees to Chileon.

After discussions on the adequacy of the said order, the parties have agreed to meet the concerns of Chileon and their mortgagees that there should be no possible subsequent challenges to the title. In particular, Chileon, as the future developer of the en-bloc site, has to be certain that it will not encounter any objections to title on the ground that the order of the Commissioner authorising the trustees to sell and convey the property to Chileon ought to have been made under s 24(1) of the Charities Act instead of s 30(1).

Hence it was agreed that we should request your Honour to consent to an order by the Commissioner to be made pursuant to s 24(1) of the Charities Act in terms of the draft enclosed herewith. As the Commissioner has already made an order pursuant to s 30(1), he has in his learned view already deemed the transaction expedient in the interests of the temple.

As completion of the en-bloc sale has already been delayed by nearly three weeks because of the problems raised by the trustees' lack of power to sell, the other en-bloc vendors are thereby facing difficulties in their purchase of alternative properties. On behalf of all parties concerned, we would be grateful if your Honour could kindly indulge us with an urgent reply to this request.

It is to be observed that Lee and Lee did not even attempt to say the order made by the Commissioner was inefficacious let alone advance any reason for saying so. They made it appear that they merely wanted to assuage the fears of subsequent purchasers. What would be the basis of a future challenge or objection was not explained.

The Attorney General consents

The Attorney General gave his consent on 18 April 2000. The Attorney General did not say that the order already made was insufficient, improper or inefficacious. He merely consented. With that consent Lee and Lee wrote to the Commissioner. On 5 May 2000 the Commissioner reasserted his position that the order given under s 30 was sufficient as it had been stated previously.

The Commissioner stands firm

The Commissioner did not wish to compromise his authority under s 30 of the Charities Act. The Commissioner, nonetheless, was prepared to discuss the matter with the parties and the lawyers the following day. The purchasers did not sense any urgency or were not free on 6 May 2000 to meet the Commissioner. Their enthusiasm by then had somewhat evanesced. The earliest day they could meet was 13 May 2000. That was a Saturday. Remember, the new completion date was 16 May 2000, which was a Tuesday. There was only one working day in between.

Queen`s Counsel`s opinion

In the meantime Lee and Lee sought the opinion of Mr Hubert Picarda QC of the Chambers of Lord Goodhart QC. Mr Picarda QC is the author of ***The Law and Practice Relating to Charities***. He gave support to the views of Lee and Lee. In his written opinion Mr Picarda QC suggested that a copy of his opinion be submitted to the Commissioner on a renewed application under s 24. The opinion was dated 9 May 2000. The Commissioner was given sight of the opinion. It was one of the papers placed

before me. I should, however, add that a copy of the instructions to counsel was not offered to me.

Vendor`s petition to the Commissioner

On 10 May 2000 all the nine owners, placed in a predicament, wanted to accelerate the process. They signed a supplicatory letter addressed to the Commissioner of Charities. The letter read:

We refer order granted by you under s 30(1) of the Charities Act (`Act`) authorising the trustee of No 26 to sell the said property.

As you are aware, the solicitors (Messrs Lee & Lee) acting for the bank financing the purchaser, Chileon Pte Ltd, refused to accept the order as they are of the view that a more specific order under s 24 should be obtained from you.

Notwithstanding that, with due respect, our solicitors, Messrs Rodyk & Davidson do not agree with their view. However, in order to resolve this matter expeditiously, we agree to the application being made to the Attorney General for his consent and that the order be made under s 24 of the Act.

We would like to explain to you the reasons for agreeing and why we want to avoid any protracted delay:

1 Messrs Lee and Lee would want us otherwise to apply to the court for a vendor-purchaser summons which would incur cost and protracted delay.

2 The partner in Messrs Lee and Lee having the conduct of this matter for the application to the Attorney General was a few months earlier with the Attorney General`s Chamber and was confident that his consent will be given expeditiously.

3 Many of us owners have committed to purchase our respective new properties for accommodation and are paying interest or have been served a 21-day notice to complete. Upon the expiry of the said period, all deposit paid by us will be forfeited and our vendors will also take an action against us for damages.

We request you to look favourably and consider issuing the order under s 24(1) of the Act.

We would also like to bring to your attention that we understand that the purchaser, Chileon Pte Ltd, is trying to abort the purchase as they are of the view that the contractual price they have paid (though reasonable at that time) is high. It is for this reason why no one of representatives was willing to attend to the meeting with you on 6 May 2000 and finally we understand that a meeting is scheduled on 13 May 2000. There is always a possibility for them to further postpone the meeting with you as by such `delaying tactics`, they will be able to abort the purchase; since the contract with us is for an extension of eight (8) weeks from completion date which will expire on 19 May 2000. Such opportunity for their delay, even if it is unjustifiable, will result in many of us, including Cheng Lam Um Vegetarian temple being sued by our respective

vendors.

Please look into this matter urgently and assist us in all ways possible. We would certainly like to meet with you to explain our predicament and you may wish to contact our representative, Mr Saechang Pilek (Tel) 96830808 (Handphone)/2203444 (Office) or Madam Sek (Tel) 7372081 (Home) for the meeting.

Conference with the Commissioner

The parties had a conference with the Commissioner on 13 May 2000. At the meeting the Commissioner's office maintained the original stand. Obviously the Queen's Counsel's opinion cut no ice with the Commissioner. It would appear that the lawyers for the finance companies were unable to state their stand at that meeting. Note that the finance companies were the ones who rejected the order made under s 30. Lee and Lee said that they would attempt to respond by 16 May 2000 with the finance companies' instructions on whether they were prepared to accept the s 30(1) order together with a confirmation letter of its validity from the Commissioner. In the event of their not agreeing the Commissioner was prepared to review the matter and consider if a s 24 order would be issued. It was in the fit of things that such review could only take place within a reasonable time after 16 May 2000.

Hong Leong and Singapore Finance withdraw

All concerned agreed and waited till 16 May 2000. Lee and Lee for reasons not revealed did not press for the lenders' instructions on 15 May 2000. They obtained instructions only on 16 May 2000. On that day they sent a letter by fax to the Commissioner. It read as follows:

We refer to the meeting at your office on 13 May 2000.

We understand from our mortgagee clients over the telephone today that they will not agree to proceed with the matter unless an order under s 24(1) of the Charities Act is obtained.

We have communicated this to Messrs Rodyk & Davidson this morning, but we have just been informed by them that you require our written confirmation on this.

The Commissioner compromises

In the event, two important events occurred on 17 May 2000. First, the Commissioner of Charities on that day issued an order in the following terms:

Upon the application of the trustees of Cheng Liam Um Vegetarian temple and in exercise of the powers conferred on me by s 24(1) of the Charities Act (Cap 37), I, Koh Cher Siang, Commissioner of Charities, with the consent of the Attorney General, hereby order that the trustees of the temple shall be empowered to:

1 sell the property known as Cheng Liam Um Vegetarian Temple at 26 Shanghai Road, Singapore 248195 (the 'property') to Chileon Pte Ltd on the terms of the option dated 2 November 1999 which was exercised by Chileon Pte Ltd on 30 November 1999 (the 'contract for sale'), which contract for sale is hereby approved and ratified; and

2 pay all expenses in relation to the sale from the sale proceeds; and

3 apply the balance of the sale proceeds towards the purchase of an alternative property for the use and benefit of the temple and its members; and

4 execute a conveyance of the property in favour of Chileon Pte Ltd (which execution by the trustees on 3 April 2000 is hereby approved and ratified) and to deliver the same to Chileon Pte Ltd on completion of the sale of the property.

The purchasers attempt to rescind

On the same day, the purchasers sought to rescind the SAPA. David Ong's letter read as follows:

We refer to the above matter.

The above matter was scheduled for completion on 21 March 2000. Due to the inability of your clients to deliver good title of 26 Shanghai Road our clients exercised their option under cl 9(d) of the option/agreement to extend the date of completion by eight weeks to 16 May 2000 in order for the defects to be rectified.

The deadline for the eight weeks has expired on 16 May 2000. Pursuant to cl 9(d) of the option/agreement our clients are entitled to rescind the option/agreement.

We are instructed to and hereby on behalf of our clients give you notice that our clients hereby exercise their rights under cl 9(d) of the option/agreement to rescind the option/agreement for the purchase of the above properties.

Further, pursuant to cl 9(d), please refund all moneys (without interest) paid to you and your clients pursuant to the aforesaid immediately from the date of the receipt of this letter.

The purchasers contended that the SAPAs were discharged for breach of contract by the temple trustees.

Part II: The action

Originating summons

The vendors did not accept the repudiation of the purchasers. In their view they were ready, able and willing to complete from 4 April 2000. They filed two originating summons. By OS 764/2000 the trustees of Cheng Liam Um Vegetarian Temple in effect sought a declaration that the purchasers were in breach and sought an order of specific performance against them. By OS 763/2000 the other sellers sought similar reliefs. They were filed on 22 May 2000.

The decision

I heard both originating summons on 12 July 2000. The decisive point for resolution was whether the temple trustees having secured the authorisation of the Commissioner were able to complete the sale. I took time to deliberate. On 14 July 2000 I made orders in both originating summonses in favour of the vendors. I had no difficulty in arriving at the conclusion that the Commissioner's order of 31 March 2000 was effective and efficacious for the purpose it was required. I read the law. Then the facts fell into place.

I declared that the defendants wrongfully attempted to rescind the contract and ordered specific performance of the agreement to sell. I extended the time for completion by four weeks from the date of the order. I further ordered interest from 17 August 2000 on the amount payable at the time of completion at 10% pa. I gave costs to the plaintiff sellers. Finally I gave liberty to apply. I shall now state the grounds of my decision

The law - power to sell

First, it is necessary to relate the law relating to the right of charity trustees to sell. In this regard, the expression 'right to sell', 'capacity to sell', 'power to sell' and 'authority to sell' all connote the concept.

The first principle of law is that the absence of power of a charity trustee to sell trust property does not make the sale void. It is merely voidable at the instance of the beneficiary for breach of trust with the result that the purchaser will end up defending his interest. Whether the court would set aside the transaction where the transaction benefits the trust is, of course, a different question. What is crucial is that there is a valid sale but subject to the equity of the beneficiary. The transferee with notice of the absence of power, however, does not get the title he is entitled to. He may accordingly refuse to complete unless the trustee obtained approval by an appropriate statutory authority to effect the sale by executing the conveyance. The purchaser should be free from the risk of litigation; see **Re W & R Holmes and Cosmopolitan Press, Limited's Contract** [1944] 1 Ch 53.

Tudor on Charities (8th Ed, 1995) states the position with amazing clarity as regards charity trustees at pp 239-240:

*Charity trustees have always had a general power **at law** to sell, lease or mortgage charity land, **whether expressly authorised by the instrument of foundation or not**. However, the transaction was liable to be set aside if the purchaser could not show that the transaction was beneficial to the charity, unless lapse of time raised a presumption of power to sell.*

Trustees' power of sale is now regulated by statute and there is some doubt as to whether the statutory powers have superseded the common law powers it is better to rely on the trustee's statutory powers to deal in charity land in the absence of any express powers in the governing instrument.

Astbury J explained the legal position in **Re Howard Street Congregational Chapel, Sheffield** [1913] 2 Ch 690 at pp 695-696:

Prior to the Charitable Trusts Act there was no common law prohibition against a sale by trustees of charity lands vested in them although no express power of sale was given to them under their document of trust, but all such sales were liable to be upset if not for the benefit of the charity. In **In re Mason's Orphanage and London and North Western Ry Co** (1) Kay LJ, after referring to the Acts of 1853 and 1855, says: 'Before this time, charities, even where they had not an express power of sale, had been in the habit in many cases of selling the property which belonged to them. The sale might not be good unless it was shewn - and the onus was on the purchaser to shew - that it was for the benefit of the charity that the sale should be made. Then in other cases they had express power to sell by the original instrument of trust, and that was a second case in which trustees of a charity might sell. Again, under the Act of 1853 they might sell, where they had no express power to sell, with the sanction of the Charity Commissioners.' And in the case of **In re Clergy Orphan Corporation** Davey LJ, giving the decision of the Court of Appeal, said this: 'Mr Vaughan Hawkins contended that a charity cannot sell its land by law independently of the Charitable Trusts Acts. We think that statement is too broad. A charitable corporation can sell and pass the legal estate to a purchaser, but he takes it subject to the obligation of shewing that the sale was beneficial to the charity and justified by the circumstances,' and cited **Attorney-General v Warren** for that proposition.

The position would be different should there be a statutory prohibition of the transfer say for instance without the leave of the court or the Commissioner. In that case no sale or transfer would be effective unless prior leave was obtained. Section 35(2) of the Conveyancing and Law of Property Act (Cap 61) is good example of such provision.

The English s 36 of the Charities Act 1993 (UK) provides that 'no land held by or in trust for charity shall be sold, leased or otherwise disposed without an order of the Court or of the Charity Commissioner'. Prohibitions of this nature date back to the time of Queen Elizabeth I and were found in several statutes. It has been decided that such statutes make all aberrant transfers unlawful and void and not merely voidable. **Bishop of Bangor v Parry** [1891] 2 QB 277 explained the law. The Charitable Trusts Amendment Act 1855 (England) provided that it shall not be lawful for charity trusts to make or grant, otherwise than with the express authority of the Charity Commissioners, any lease of the charity estate for more than three years. Trustees of the Bishop Rowland's charity granted a lease for more than 21 years. Charles J held that the lease was absolutely void. At p 275 Charles J explains his decision as follows:

*An analogy to it is, I think, to be found in the case of leases which are void under the provisions of s 3 of stat 13 Eliz c 10. An example is to be met with in the case of **President and Governors of Magdalen Hospital v Knotts** (1) in the House of Lords. There a question arose as to the effect of a lease granted by a charitable corporation in contravention of that statute, which enacts that all such leases shall be 'utterly void and of none effect to all intents, constructions, and purposes.' It was argued that, notwithstanding the strong language of the statute, the lease was in fact only voidable; but the Lord Chancellor and the other learned lords held that the statute meant what it said, and that the lease was, therefore, utterly void and incapable of being supported for any purpose. The slight difference in the language of the two statutes does*

not, in my opinion, assist the defendant. The statute of Elizabeth enacts that the lease is to be 'utterly void.' This statute declares that it is contrary to law to grant the lease. In granting it, therefore, the trustees committed, as I have said, an unlawful act, and I cannot hold the lease good for any purpose.

Having regard to the peremptory expression of the prohibition it has been held that such a prohibition applies to conveyances as well as contracts to sell: see **Milner v Staffordshire Congregational Union (Inc)** [1956] Ch 275. More about this case later.

Singapore has never had such a statutory prohibition forbidding sale without the authorisation of the court or the Commissioner for Charities. The position that obtains here is what I have outlined above. Accordingly English cases should be read with great caution.

The law - sale and contract to sell

Next, it is important to note the distinction between a sale and an agreement to sell. An agreement to sell does not transfer property at the time the agreement is made but at a future time or subject to the same condition later to be fulfilled. It is also called an executory sale. An agreement to sell is a mere contract spawning only personal rights. It confers no right in rem. As **Chitty on Contracts** (28th Ed, 1999), para 1-126 puts it 'A contract, which creates rights in personam, must be distinguished from a conveyance of property, which creates rights in rem.' On the other hand a sale is both a contract and a conveyance transferring property to the buyer. There is no sale unless and until the transaction is completed by transfer or conveyance of the property from the seller to the buyer. In this regard it is vital to note the doctrine of merger. It was stated by Lord Russell in **Knight Sugar Co Ltd v Alberta Rly & Irrigation Co** [1938] 1 All ER 266 (PC) at p 269:

where parties enter into an executory agreement which is to be carried out by a deed afterwards to be executed, the real completed contract is to be found in the deed. The contract is merged in the deed. The most common instance, perhaps, of this merger is a contract for sale of land followed by conveyance on completion.

By this doctrine the purchaser derives his rights and title from the conveyance and not the agreement to sell. For this reason, the subsequent purchaser looks not at the agreement for sale but the deed of conveyance.

Time to make good title

The significance of the distinction, for this case is that it has an important bearing on the time at which the right and ability to make good title must be established. Put plainly it is at the time of the transfer or conveyance.

The Sale of Goods Act (Cap 393) by s 12(1) provides that 'there is an implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and in the case of an agreement to sell he will have such a right at the time when the property is to pass'. This implied condition applies equally to sale of land. A vendor of land warrants that at the time of conveyance he will have the power to make a marketable title.

The law is well expressed in 42 **Halsbury's Law of England** (4th Ed), Sale of Land, at para 137:

Obligation as to title. In the absence of any express stipulation as to title, a contract for the sale of land implies an agreement on the part of the vendor to make a good, that is, a marketable title to the property sold. He discharges this obligation when he shows that he, or some person or persons whose concurrence he can require, can transfer to the purchaser the whole legal and equitable interest in the land sold.

*In general, **it is sufficient if the vendor shows that he has a good title by the time fixed for completion**, but, if it appears before that time that he has not a title, and is not in a position to obtain one, the purchaser may repudiate the contract.*

I must now explain **Milner v Staffordshire Congregational Union**. That case was concerned with s 29 of the Charitable Trusts Amendment Act 1855 (UK). The Act provided that 'It shall not be lawful for charity trustees to make or grant any sale of the trust estate otherwise than with the express authority of certain authorities'. Danckwerts J noted that the Act did not say 'make a conveyance' or 'complete a sale' and held that for the purposes of that section 'a sale is made when a contract is entered into by the owners of the property. That must clearly be so.' The court there was concerned with the purpose of a prohibitive provision in a statute. The expression 'sale' can of course mean different things in different statutory contexts. One must ascertain the true meaning of the expression having regard to the words of the provision. In that case on or about 11 September 1954 the plaintiff paid a deposit of £250 towards the purchase price of £2,200. On 16 October 1954 he repudiated the agreement on the ground that it was an unlawful agreement because the defendant had not obtained the express authority as provided. The agreement was to do a prohibited act. It therefore clearly offended the statute. Notwithstanding that, it is now settled that a contract to sell charity land expressly subject to consent of the stipulated authority is a valid agreement to sell. Authorisation or consent may be obtained by the time of transfer. See **Michael Richards Properties Ltd v Corporation of Wardens of St Saviour's Parish, Southwark** [1975] 3 All ER 416, **Haslemere Estates Ltd v Baker** [1982] 3 All ER 525 [1982] 1 WLR 1109 and 42 **Halsbury's Laws of England** (4th Ed), Sale of Land, paras 25 and 240. The principle enunciated in **Milner** has no application to this case because the statutory prohibition which governed in that case does not obtain in Singapore.

The law - the charity legislation

It is apt now to consider the relevant statutory provisions in Singapore governing charity trustees. The High Court's jurisdiction over charity trustees springs from its power to invoke and apply principles of the common law and equity. The court's authority over charity trustee also stems from its authority over trustees in general. The court's general jurisdiction over charities and charity trustees, however, is more extensive than in the case of private trusts. See **Andrews v M'Guffog** [1886] 11 App Cas 313, (HL) at pp 316-317 where Lord Watson said:

In the case of a public charitable trust the courts have a power and discretion which does not belong to them in the case of a private trust.

Then there are the provisions of the Trustees Act and the Charities Act. In Singapore there was no special statute governing charities and charity trustees until 1982 when the Charities Act 1982 was enacted. Before then the only governing legislation was the Trustees Act and the Government Proceedings Act.

The Charities Act 1982 `was based on the United Kingdom Charities Act 1960 with such modifications as were appropriate`. One important modification was that the Singapore Act did not prohibit or make void sales of charity land without the approval of an appropriate authority. The Charities Act 1982 was repealed in 1994 and a new legislation was passed - the Charities Act 1994. The new Act re-enacted the Charities Act 1982 with improving amendments.

Statutory - Power to empower charity trustees

Besides the High Court, jurisdiction in respect of charities and charity-trustees is conferred on the Commissioner of Charities (`the Commissioner`). Commissioner is vested with administrative and judicial powers.

Both the High Court and the Commissioner wield statutory power to empower charity trustees to do certain acts. There is no such power at law or in equity. Section 30(1) of the Charities Act, which carries the section-title `Power to authorise dealings with charity property`, reads as follows:

Subject to this section, where it appears to the Commissioner that any action proposed or contemplated in the administration of a charity is expedient in the interests of the charity, he may by order sanction that action whether or not it would otherwise be within the powers exercisable by the charity trustees in the administration of the charity; and anything done under the authority of that order shall be deemed to be properly done in the exercise of those powers.

There is no similar provision in the Charities Act empowering the High Court to authorise charity trustees in a similar manner. That power, however, is contained in s 56(1) of the Trustees Act. This section also carries a similar section-title: `Power of court to authorise dealings with trust property`. This provision is wide enough to encompass charity trusts. The expression `to authorise dealings` means `to empower trustees to make sales`.

The power of the Commissioner and the High Court to empower charity trustees is judicial in nature. They are alternative authorities, albeit the Commissioner is subordinate to the High Court in that an appeal lies against any order or decision of the Commissioner of Charities to the High Court, see ss 24 and 46 of the Charities Act 1994. Otherwise an order whether made by the Commissioner and the High Court have the equal force and effect because they derive from the same legislative authority.

The power of the Commissioner under s 30 of the Charities Act is to authorise or sanction dealings that are proposed or contemplated. This permits charity trustees, if they are convinced that a sale of charity property is expedient, to enter into a contract to sell and then seek the authorisation of the Commissioner or the High Court. There is nothing in that section or any other legislation requiring the charity trustees to seek the sanction of the Commissioner or the court before entering into a contract to sell. In most cases the Commissioner and the court would be better placed to make a decision when all the terms of the proposed sale are known. Charity trustees who act with good faith and good conscience should have no fear of the Commissioner or the court refusing to authorise a good deal.

Charity proceedings

The Charities Act, by s 31, provides for the institution of legal proceedings called `charity proceedings` in the High Court. This section does not spell out the powers of the High Court. It is

clear that inherent powers of the High Court in relation to its jurisdiction over trustees under the common law, equity and the Trustees Act and more importantly the Government Proceedings Act are left unimpaired. Section 31(8) of the Charities Act clarifies that 'charity proceedings' means 'proceedings in the High Court brought under the jurisdiction of the Court with respect to charities, or brought under the jurisdiction of the Court with respect to trusts in relation to the administration of a trust for charitable purposes'.

Section 24(1) delegates the jurisdiction and certain ancillary powers of the High Court in relation to charity proceedings to the Commissioner of Charities. One of the powers so delegated is the power 'to make any transfer', see s 24(1)(c). In one sense this is narrower than the power under s 30.

When ss 31 and 24 of the Charities Act are read together it is clear that applications and legal proceedings contemplated by s 24 are adversarial in nature and the applications contemplated by s 30 are amicable applications.

Charity proceedings by their very nature are complicated. In order to exercise his jurisdiction under s 24, therefore, the Commissioner needs the consent of the Attorney General. This requirement does not apply to an application under s 30(1).

The analysis set out above means that, where charity trustees seek empowerment, an application under s 30 should be their first resort. It is true that under s 30 the Commissioner may only make a prospective order. The position is not any different under s 24 - for the power under s 24 is also prospective: to make an order to make a transfer. It does confer the power to sanction or rectify what has been done. By authorising the trustees to sell the Commissioner is in effect authorising the trustees to execute the conveyance. Furthermore, the Commissioner's authorisation has the spontaneous effect of authorising the agreement to sell by operation of law and the doctrine of merger. That is also the position under s 24. What is vital is that the end result is the same under both sections. As the Commissioner asserted 'it is not necessary to ratify the sale and purchase contract. As long as the transaction is authorised under the order, it will be legal and binding. It is also not relevant whether the contract was signed before or after the order was made.'

Part III: Explication of decision

Conclusions

I shall now marry the law to the facts. I start with the finding that there was a valid and enforceable SAPA. It was not void for lack of power or other defect. The trustee could have executed the conveyance on the first completion date. Technically it was voidable at the suit of the beneficiary. On the special facts of this case such possibility was too remote and unreal. This is because the proposed sale was so eminently beneficial to the charity.

The purchaser's obligation under the SAPA was absolute in that it was not subject to their financier's approval or their granting the necessary facilities. There was no privity of contract between the sellers and the finance companies.

All the same, for reasons stated, the purchasers were entitled to demand that the trustees produce an authorisation of the sale from the High Court or the Commissioner. This was to ward off the

possibility of a challenge by the beneficiaries. But it was not legitimate for the purchasers or the lenders to demand that the Commissioner ratified the SAPA.

The order made by the Commissioner on 31 March 2000 under s 30 was valid and vivid. It was prospective in that it authorised completion of the sale which had not occurred. By authorising the sale, the order by necessary implication authorised the execution of the conveyance. To require that the authorisation must expressly empower the execution of the conveyance was an unreasonable and unjustified demand. It was a case of over-egging the pudding. There was nothing to ratify because the SAPA was valid and binding. The authorisation to sell by implication sanctioned the agreement to sell. By operation of the doctrine of merger the SAPA in any event would merge with the deed of conveyance. The order under s 30 was adequate and efficacious for the purpose at hand. If anything, the order under s 30 was more appropriate because its purpose was to authorise dealings, that is the sale. Section 24(1) give the power to merely to make a **transfer** and not a dealing. The power under s 24(1)(c) `to call for or make any transfer of property` is aimed at and applied to the future and not ratifying and accomplished act. If for any reason the SAPA was void or unlawful, which it was not, the Commissioner had no power to ratify it under s 24(1)(c). Additionally the agreement to sell in this case was valid and binding even though no authorisation had been obtained before making the agreement. It was unnecessary to obtain the authorisation before completion because the SAPA was accepted and acted upon as a valid agreement by all the parties at all times.

I hold that the plaintiffs in both summonses were ready, able and willing to complete the sale from the time the purchasers were given sight of the order of the Commissioner dated 31 March 2000. The purchasers thereafter were in continuous breach of their obligation to complete. In the circumstances the sellers were entitled to an order for specific performance.

Estoppel point

The sellers had a second string to their bow, namely, that they and the Commissioner were led to believe that the purchasers would give a reasonable extension. I now turn to the effect of the events antecedent to 17 May 2000. I start with 4 April 2000. On that day, David Ong having sighted the Commissioner`s order by letter asked Rodyks to `Please lodge the order of the Commissioner of Charities and let us have the registration particulars as soon as possible`. They went on to ask the Rodyks to `Please confirm that the mode of payment will not be changed.` These statements constituted an equivocal acceptance of the Commissioner`s order of 31 March 2000 and the sellers` readiness to execute the conveyance.

The following day they made a capricious reversal of position because the **mortgagees** were of the view that the Commissioner`s order was inadequate. As I have observed earlier, the purchasers` obligation to complete was absolute and they could not impose on the sellers, the objections and requirements of the finance companies.

At this stage I should observe that the finance companies occupied a special position with the purchasers. The documents governing that relationship were not placed before me. In the usual case it is easy for the lenders to escape before completion. Ordinarily neither the lender nor the borrower is under a legal obligation to complete the financial transaction. More often than not the lenders` conditions are so subjective that they may easily use them to pull out of the deal if the market conditions make them uneasy.

However, neither the purchaser nor the finance companies had the right to dictate to the Court or the Commissioner on the form and substance of the order and under which section the order should be made. But that was what they attempted to do in this case. The sellers and the Commissioner

rightfully rejected the stand taken by the finance companies and the purchasers.

The vendors, were however, willing to treat with the purchasers and finance companies. It was nothing more than a favour indulged to them. It was not in the interest of the vendors to let the purchasers to antagonise their fund providers providing them with an opportunity to withdraw. So they chose to indulge the sellers to supplicate the Commissioner to issue a new order under s 24(1). The sellers at all times maintained that their willingness to indulge the purchasers was **without prejudice** to their position that the Commissioner's order of 31 March 2000 was sufficient.

I have related the subsequent event in the first part of this judgment. The effect and implication of the conduct of the purchasers and the finance companies was that they would not withdraw until the Commissioner was given the opportunity to reconsider the matter after hearing from Lee and Lee on 16 May 2000 the decision of the finance companies. That was why they left it to Lee and Lee to secure an order under s 24. In the circumstances, it was a reasonable and legitimate understanding that the Commissioner would be given a reasonable opportunity because the purchasers treated with the Commissioner without declaring that they would rescind the agreement. In fact they declared that they would complete as long as the lenders did not withdraw. By saying that they would inform the Commissioner of the decision on the completion day they must have by necessity implication agreed to a reasonable extension. The Commissioner well within the reasonable time reconsidered the matter and obliged the finance companies and the purchasers with the order they asked for.

On those facts, the principle of equitable estoppel deriving from **Hughes v Metropolitan Rly Co [1877] 2 App Cas 439** applied. In the result the SAPA was not validly rescinded and continued to subsist. As the Commissioner on 17 May 2000 issued the order in the form required by the finance companies and the purchasers, all perceived obstacles were removed. The purchasers were bound to honour their agreement.

Hence the order for specific performance.

Outcome:

Application allowed.