IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 175

Originating Summons No 398 of 2017

Between

PACC Offshore Services Holdings Ltd

… Plaintiff

And

Kensteel Engineering Pte Ltd

… Defendant

ORAL JUDGMENT

[Credit and security] — [Lien] — [Equitable lien]

[Land] — [Caveats]

[Land] — [Sale of land] — [Remedies under uncompleted contract]

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v
Kensteel Engineering Pte Ltd

[2017] SGHC 175

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Tan Siong Thye J
27 April, 8 May 2017

15 May 2017 Judgment reserved.

Tan Siong Thye J:

Introduction

1 This application concerns the maintenance or removal of Caveat IE/364752C ("the Caveat"). The plaintiff wishes to maintain the Caveat pending the resolution of the parties' main dispute in Suit No 898 of 2015 ("Suit 898"), which is fixed for trial next month before a different judge. The Caveat is over a piece of land ("the Land") of which the defendant is the lessee. The defendant has lodged an application ("the Cancellation Application") before the Singapore Land Authority ("SLA") to cancel the Caveat. The plaintiff now asks this court to order – pending the outcome of Suit 898 and any appeal therefrom – that the Cancellation Application be stayed, that the Caveat continue, and/or that the Registrar of Titles be directed not to cancel or remove the Caveat.

The facts

2 The plaintiff is PACC Offshore Services Holdings Ltd, a publicly listed company incorporated in Singapore. Its business includes the chartering of ships, barges, and boats with crew. The defendant is Kensteel Engineering Pte Ltd, a company incorporated in Singapore that provides engineering products and services for petrochemical industries. The defendant leases the Land, which is a waterfront property, from the Jurong Town Corporation ("JTC"), a government-owned real estate corporation and statutory board.

3 On 27 January 2015, the parties entered into a sale and purchase agreement ("the SPA") under which the plaintiff was to purchase the defendant's leasehold interest ("the Property) in the Land for a sum of $38m. The SPA obligated the plaintiff to immediately pay a deposit of 10% of the purchase price (*ie*, $3.8m) and the amount of goods and services tax payable on that deposit (*ie*, $266,000). The total of the two sums, which for convenience I shall refer to collectively as "the Deposit", was $4.066m. The SPA also provided that the sale of the Property was conditional on, among other things, JTC granting in-principle approval of the sale (which I shall refer to as "JTC approval"). Various clauses within the SPA set out the consequences if JTC approval was not forthcoming, depending on the cause of the failure to obtain JTC approval. The plaintiff duly paid the Deposit to the defendant and subsequently lodged a caveat ("the Purchaser's Caveat") over the Land under s 115 of the Land Titles Act (Cap 157, 2004 Rev Ed) ("the LTA"). The Purchaser's Caveat, which is not the subject of this dispute, was stated to be in respect of the plaintiff's interest as purchaser under the SPA.

4 Ultimately, for reasons which are in dispute, JTC declined to grant its approval. I shall refer to this event as "the Non-Approval". On 17 August 2015,

the plaintiff, on the basis of the Non-Approval, purported to terminate the SPA and demanded the return of the Deposit. The defendant refused to acknowledge the purported termination as effective or to return the Deposit, taking the view that the plaintiff was at fault for the Non-Approval. Instead, the defendant treated the plaintiff's purported termination as a wrongful repudiation, which the defendant allegedly accepted on 2 September 2015.

5 Also on 2 September 2015, the defendant commenced Suit 898 to seek, among other things, a declaration that the defendant was entitled to forfeit and retain the Deposit. In response, the plaintiff filed a counter-claim for the return of the Deposit. Subsequently, on 18 December 2015 (*ie*, about three and a half, or four months after the SPA had been terminated, depending on whether the plaintiff's or defendant's purported termination date is used), the plaintiff voluntarily removed the Purchaser's Caveat and lodged the Caveat in its place.

6 The Caveat stated the interest claimed as being that of a "lienholder over the [Property] … for the refund of purchase monies (and goods and services tax thereon) aggregating the sum of S$4,066,000.00 paid by the [plaintiff] to the [defendant]". The grounds of the claim were stated as being the entry into and termination of the SPA and "the liability of the [defendant] to refund to the [plaintiff] the said sum of S$4,066,000.00 or any part thereof as a result of the termination of the [SPA]".

7 More than a year later, on 20 March 2017, the defendant brought the Cancellation Application before the SLA in respect of the Caveat. On 31 March 2017, the SLA notified the plaintiff that the Caveat would be cancelled after 30 days (*ie*, on 2 May 2017) unless, within that period, the plaintiff served an order of court to the contrary on the Registrar of Titles. The plaintiff therefore

made the present application on an urgent basis. On 27 April 2017, I granted, as an interim measure while I considered this application, an order that the Registrar not remove the Caveat pending further order.

8 Lastly, it is relevant to note that after the termination of the SPA, the defendant granted an option to purchase ("the OTP") in respect of the Property to a third party, Eng Lee Logistics Pte Ltd ("Eng Lee"). That sale is also subject to JTC approval. The OTP was exercised by Eng Lee on 4 April 2017.

Issues

9 The issues before me are fairly restricted. As both parties have agreed, it is not this court's task to delve into the underlying merits of the larger and substantive dispute between the parties. That dispute engages issues including which party, if either, breached the SPA and/or caused the Non-Approval. Those issues, and the overall dispute, are for the trial judge in Suit 898 to decide. It follows that this court is not being asked to determine whether the plaintiff has an interest in the Property capable of sustaining the Caveat indefinitely. Rather, the question I must answer is whether the Caveat should be maintained *for the time being* in order to preserve the *status quo* pending the resolution of Suit 898.

10 In such a case, it is undisputed that the relevant principles are those set out in *Eng Mee Yong and Others v V Letchumanan s/o Velayutham* [1980] AC 331 ("*Eng Mee Yong*"), a decision of the Privy Council which was endorsed and applied by the High Court in *Tan Yow Kon v Tan Swat Ping and others* [2006] 3 SLR(R) 881 ("*Tan Yow Kon*"). As Lord Diplock (delivering the judgment of the court) held in *Eng Mee Yong* (at 337, cited with approval in *Tan Yow Kon* at [77]), the court embarks upon the following two-stage inquiry:

> … [The caveator] must first satisfy the court that on the evidence presented to it his claim to an interest in the property does raise a serious question to be tried; and, having done so, he must go on to show that on the balance of convenience it would be better to maintain the *status quo* until the trial of the action, by preventing the caveatee from disposing of the land to some third party.

11 Applying the *Eng Mee Yong*/*Tan Yow Kon* framework to the present case, the following issues arise for my decision:

(a) Does the plaintiff's claim to a purchaser's lien raise a serious question to be tried?

(b) Is the balance of convenience tilted in favour of cancelling or maintaining the Caveat?

If both questions are answered in the affirmative, the Caveat should be allowed to remain.

Decision

12 Having considered all the circumstances, and the arguments raised and authorities relied on by both parties, I am of the view that the Caveat should remain unless the defendant is able to provide an alternative form of security. In the interest of providing certainty to both parties in what is undoubtedly a time-sensitive dispute, I set out my detailed reasons below.

Does the plaintiff's claim to a purchaser's lien raise a serious question to be tried?

13 In the present context, it is helpful to sub-divide the first question into two parts:

(a) In the first place, *assuming* the plaintiff is entitled to the return of the Deposit, would that entitlement or right give rise to a caveatable interest?

(b) If that entitlement or right would give rise to a caveatable interest, is there a serious question to be tried as to whether the plaintiff is entitled to the return of the Deposit?

If the plaintiff's entitlement or right to a return of the Deposit would not, even if proven, constitute a caveatable interest, it would be unnecessary to ask the further question of whether there is a serious question to be tried as to the existence of that entitlement or right.

Would an entitlement or right to the return of the Deposit give rise to a caveatable interest?

14 The parties explored this point in considerable detail in their written submissions. As this is a fulcrum issue that will decide the fate of the parties in these proceedings, I requested parties to make supplementary written submissions to address each other's arguments. I will therefore analyse this issue at some length.

15 The plaintiff argued that it was settled law that a purchaser of land has an equitable lien (known in this context as a purchaser's lien) over the land for the purchase price which he has paid. The purchaser's lien is distinct from the equitable interest which the purchaser has under the contract of sale and is not dependent on the availability of specific performance. As authority for this proposition, the plaintiff primarily relied on two Court of Appeal cases, *Chip Thye Enterprises Pte Ltd v Development Bank of Singapore Ltd* [1994] 2 SLR(R) 68 ("*Chip Thye*") and *Bestland Development Pte Ltd v Manit*

Udomkunnatum and another [1997] 1 SLR(R) 177 ("*Bestland*"). It also cited the English case of *Whitbread & Co, Limited v Watt* [1901] 1 Ch 911 ("*Whitbread*"); [1902] 1 Ch 835 ("*Whitbread (CA)*"), which *Chip Thye* and *Bestland* followed, and the leading local text on land law, Tan Sook Yee, Tang Hang Wu and Kelvin F K Low, *Tan Sook Yee's Principles of Singapore Land Law* (LexisNexis, 3rd Ed, 2009) ("*Principles of Singapore Land Law*").

16 The defendant's response was that since the plaintiff, by purporting to terminate the SPA, had renounced any intention of completing the sale of the Property, its only interest was monetary and it no longer had any interest to ground the Caveat. In support of this proposition, the defendant cited one local High Court decision, *Virginia Developments Pte Ltd v Behem Investment Pte Ltd* [1988] 1 SLR(R) 302 ("*Virginia Developments*"), and three Malaysian decisions: *Chia See Yin & Ors v Yeoh Kooi Imm* [1996] 2 MLJ 494 ("*Chia See Yin*"), *EM Buxton & Anor v Packaging Specialists Sdn Bhd* [1987] 1 MLJ 342 ("*EM Buxton*") and *Yuny-Li Home Care Sdn Bhd v Fairview Development Sdn Bhd* [2009] 9 MLJ 189 ("*Yuny-Li*").

17 Having considered both parties' arguments, I agree with the plaintiff on this point. It appears to me that the defendant has conflated two types of interest which a purchaser can have: first, the interest acquired under a contract of sale, and second, the purchaser's lien for purchase moneys paid. For convenience, I shall refer to the former type of interest as "the purchaser's proprietary interest". As a starting point, the learned authors of *Principles of Singapore Land Law* (at [15.36]) have succinctly explained the distinction between these two types of interest in the following terms:

> … [A] purchaser has a lien over the land for the purchase price, in part or in full, which he has paid. This equitable interest is not the equitable interest which a purchaser has under the

> contract for sale. That interest is dependent on the availability of specific performance while the purchaser's lien is a security interest. …

I turn now to the authorities from which the learned authors drew this proposition.

18 In *Chip Thye* at [28]–[35], the Court of Appeal surveyed and approved of a number of English cases (including *Whitbread* and *Whitbread (CA)*) in which the English courts had recognised a purchaser's lien despite specific performance being unavailable. In particular, the court endorsed (at [35]) the statement by Cozens-Hardy LJ in *Whitbread (CA)* (at 840–841) that:

> … [T]he lien for the deposit exists so long as, and in every case in which, the right to recover the deposit has not been lost by reason of the misconduct of the purchaser. In other words, when the contract goes off either by reason of the default of the vendor, or without any default on the part of the purchaser, the lien becomes operative. …

As to the underlying justification for this position, that was forcefully stated by Vaughan Williams LJ (in *Whitbread (CA)* at 838, cited with approval in *Chip Thye* at [34]) as follows:

> The lien which a purchaser has for his deposit is not the result of any express contract; it is a right which may be said to have been invented for the purpose of doing justice. It is a fiction of a kind which is sometimes resorted to at law as well as in equity. … When Lord Westbury in *Rose v. Watson* speaks of 'a transfer to the purchaser of the ownership of a part of the estate corresponding to the purchase-money paid,' and Lord Cranworth speaks of the purchaser being exactly in the position of a mortgagee of the estate to the extent of the purchase-money which he has paid, those expressions are merely verbal vehicles to carry the right which justice demands that the purchaser should have. …

19 To sum up the position in *Whitbread (CA)*, the purchaser's lien is a security interest that equity has invented because it would be unfair to the

purchaser under a rescinded or terminated sale agreement if such a lien did not exist, given that the purchaser has a right to claim the sum paid towards the sale of the property. In fact, the situation in which a purchaser's lien becomes relevant is when the contract for sale has been rescinded or terminated, and specific performance of the contract is no longer available. Given that practical reality, it would be illogical for a purchaser's lien to be dependent on the availability of specific performance because that would deprive the device of the purchaser's lien of all utility.

20 Having endorsed the principles encapsulated in *Whitbread* and *Whitbread (CA)*, the court in *Chip Thye* applied them to the facts in that case and concluded (at [36]) that since the failure of the sale had not been due to the default of the purchasers, the purchasers had an equitable lien "irrespective of whether the sale agreement was specifically enforceable or not".

21 *Bestland* confirmed the position in *Chip Thye* while also elaborating on what was meant by the phrase "so long as … the right to recover the deposit has not been lost by reason of the misconduct of the purchaser", which was used in *Whitbread (CA)*. In *Bestland*, the Court of Appeal clarified (at [19]) that the phrase did not mean that a purchaser's lien would be lost so long as the purchaser's default caused the failure of the sale. Rather, the phrase merely reflected the fact that there could be no lien if there was no entitlement to a return of any part of the purchase money. The court succinctly stated (in that same paragraph) the true position:

> … The lien arises upon payment of part of the purchase money and while the contract is in force the purchaser has a lien for that part of the purchase money. *When the contract goes off,* ***whether or not by reason of his default, and the purchaser is entitled to recover that part of the purchase money, his***

> ***lien for such money continues to subsist.*** [emphasis added in italics and bold italics]

Further, the court reiterated the underlying justification identified in *Whitbread (CA)*, stating (at [23]):

> … The purchaser's lien is *essentially an equitable one, which has been developed to achieve substantial justice between the parties*. … In our opinion, justice would not be served where a purchaser who is entitled to recover from the vendor part of the purchase money paid is deprived of his lien for that part of the money. [emphasis added]

22 Since *Chip Thye* and *Bestland* are decisions of the Court of Appeal, I am not at liberty to depart from them. For completeness, I wish to add that I am not persuaded that a departure would be justified even if it were permissible. I say this primarily because, with respect, the cases cited by the defendant all appear to concern a purchaser's proprietary interest as opposed to a purchaser's lien. They are therefore not germane to the present dispute.

23 *Virginia Developments* was a case in which the interest asserted by the purchaser in the caveat was not a purchaser's lien, but an interest in the whole property arising under the sale agreement, *ie*, the kind of interest which depended on the availability of specific performance. As a result, Chao Hick Tin JC (as he then was) was of the view that he only had to consider the narrow question of whether the caveator was entitled to lodge the caveat by virtue of his status as purchaser under the contract of sale (at [10]). Indeed, Chao JC made it expressly clear that the availability of a purchaser's lien was a question which did not properly arise in the dispute before him, stating (at [17]):

> … Perhaps a purchaser's lien might have arisen in favour of the defendants and in respect of which a different caveat might be lodged against the said property. *That is a question yet to be argued and decided upon. … In any event, that question does not concern us here and [is one] on which I would not offer any views*

> *at this time.* … [emphasis added; addition in square brackets present in original as reported]

Virginia Developments, which was decided before *Chip Thye* and *Bestland*, therefore says nothing about the availability of a purchaser's lien and does not assist the defendant at all.

24 The remaining three cases did not expressly draw a distinction between a purchaser's proprietary interest and a purchaser's lien. Nonetheless, they can be distinguished on much the same grounds.

25 Like *Virginia Developments*, *Chia See Yin* was a case in which the disputed caveat was lodged on the basis of the caveator's proprietary interest as purchaser, as opposed to a purchaser's lien. The purchaser, having paid the deposit on a property, had failed to pay the balance of the purchase price by the deadline for completion. Her argument at trial was that the vendors had agreed to waive compliance with the deadline. The court rejected this argument and found that the vendors had validly terminated the sale agreement due to late payment or non-payment. From this it followed that she had no entitlement to specific performance and no basis for her caveat. Two things may be observed. First, the purchaser did not argue that she had a purchaser's lien and her caveat was not lodged on that basis. Second, it is clear on the facts found in *Chia See Yin* that the purchaser would not have been entitled to the return of her deposit because the sale agreement was terminated due to her failure to pay the balance of the purchase price on time. There was hence no basis for a purchaser's lien.

26 *Yuny-Li* was also a case involving a caveat lodged to protect a proprietary interest. The caveator there was a party to a joint venture agreement which argued that its investment in the joint venture (including work done on

the land) entitled it to an interest in the land. Thus, not only was *Yuny-Li* a case which did not concern a caveat lodged on the basis of a purchaser's lien, it was not even a case involving a vendor and purchaser, making it two steps removed from being relevant to the present case.

27 Finally, *EM Buxton* is a case which is slightly less clear, but is still distinguishable. The facts stated in that decision do not specify the interest which was claimed in the caveat. The purchaser purported to terminate a contract of sale, demanded the refund of the deposit that it had paid, and subsequently lodged a caveat to (in the court's words) "protect its interest over the land". Before the court, the purchaser sought to justify the maintenance of the caveat on the basis of its entitlement to a refund of its deposit. From these facts, one may suspect that the purchaser had in mind a purchaser's lien. Nonetheless, given that caveators do not always correctly specify their interest on the face of the caveat, the facts as stated in *EM Buxton* do not allow any firm conclusion to be drawn as to what the actual stated basis of the caveat was. It may be that the purchaser in *EM Buxton*, like that in *Virginia Developments*, had specified a more general interest in the whole of the land. That is one possible reading of the words "interest over the land" used by the court. In any event, what is clear is that the learned judge in *EM Buxton* did not address her mind to the availability of a purchaser's lien, as she analysed the dispute before her purely in terms of the availability of specific performance and the proprietary interest arising therefrom. Naturally, given how the court had framed the inquiry, the purchaser's arguments failed. *EM Buxton* hence does not provide much guidance in the present case, in which both the Caveat itself and the plaintiff's arguments are founded explicitly on a purchaser's lien.

28 Finally, it is significant that the three Malaysian cases were decided without any discussion of the reasoning adopted in *Whitbread* or *Whitbread (CA)*. One may presume that counsel for whatever reason did not cite that case, with the consequence that the Malaysian courts were denied the benefit of considering the astute observations of Cozens-Hardy and Vaughan Williams LJJ (discussed in [18] above). Indeed, it appears that *none* of the four English cases relied on by the Court of Appeal in *Chip Thye* (at [28]–[35]) were brought to the courts' attention in the three Malaysian cases. This further limits any persuasive value that the latter cases might have.

29 In short, not only are *Chip Thye* and *Bestland* binding on this court, the principles set out therein are, in my view, consistent with doctrine and policy as well. Applying those principles to the present case, I find that the plaintiff is right that *if* it is entitled to the return of the Deposit, it also necessarily has a purchaser's lien over the Property for that part of the purchase money. Such a purchaser's lien would obviously constitute a caveatable interest in relation to the Caveat, which is explicitly stated to be lodged in the purchaser's capacity as lienholder arising out of its entitlement to a refund of purchase money (see [6] above). The position would be different if the Caveat had, like the Purchaser's Caveat, been stated to be in respect of the whole Property by virtue of the plaintiff's status as purchaser under the SPA. Had that been the basis, it would clearly have fallen away following the termination of the SPA, as in the case of *Virginia Developments*.

Does the plaintiff's claim to be entitled to the return of the Deposit raise a serious question to be tried?

30 Having determined that an entitlement or right to the return of the Deposit would give rise to a caveatable interest in the form of a purchaser's lien,

the question that remains at the first stage is whether there is a serious issue to be tried as to the existence of that entitlement or right.

31 Under cl 5(8) of the SPA, if the defendant is unable to obtain JTC approval, either party may terminate the SPA by giving written notice to the other. If cl 5(8) is triggered, cl 15 further requires the defendant to refund the Deposit, provided certain conditions are met. The validity and general effect of these provisions are not disputed, although there are disputes over certain aspects of their interpretation, whether there are any implied terms, and whether the conditions for a refund are met. What is clear is that the SPA is conditional upon JTC approval. The parties at the time of entering into it had envisaged a possible situation of Non-Approval, and had stipulated the rights of the parties should such a scenario occur. The only issue is whether the circumstances of the Non-Approval and/or termination were such as to deprive the plaintiff of the right to a refund of the Deposit. If the plaintiff's right has been lost, then – following *Chip Thye* and *Bestland* – there would be no purchaser's lien and no caveatable interest.

32 As to that issue, it is obvious to me that there is a serious question to be tried. That much is apparent from the positions taken by the parties. The plaintiff, naturally, submitted that there are serious questions to be tried concerning, among other things, the interpretation of the SPA, the factual and legal causes of the Non-Approval, and the parties' conduct leading up to and following the Non-Approval. The defendant through its counsel also agreed, when asked at the first hearing before me, that there were serious issues which were hotly contested between the parties, and which were neither necessary nor appropriate for me to adjudicate in advance of the trial. The defendant went on to submit in its supplementary written submissions that "we had [*sic*] not

reached a stage where the Honourable Court can form a view whether the SPA was breached by the [plaintiff] or the [defendant]".

33 Curiously, the defendant then invited the court, on that basis, to essentially assume that the plaintiff would fail at trial, suggesting that "[w]hat is left is therefore whether the [plaintiff] was under the SPA, entitled to the return of whole or part of the deposit even if the [plaintiff] was in breach". It was submitted that unless that question could be answered in the affirmative, I would have to rule against the plaintiff. With respect, the defendant has grasped the wrong end of the stick. Assuming for the sake of argument that the defendant is right that the plaintiff will only be entitled to a return of the Deposit if it did not breach the SPA, the inability of this court to resolve the question of whether the plaintiff breached the SPA would *not* imply that I must rule against the plaintiff. On the contrary, it would demonstrate that there is indeed a serious issue to be tried.

34 To fortify that conclusion, the plaintiff referred me to the following statement by Kan Ting Chiu J (as he then was) in *Sim Kwang Mui Ivy v Goh Peng Khim* [1994] 2 SLR(R) 814 (at [24]):

> The correct position is for the court to consider the evidence adduced by the contending parties, and to see if it can come to any conclusion on the caveator's claim. If it finds that the caveator's claim is without merit, the court will remove the caveat. *Conversely, if it is unable to decide on the merits of the claim, then the caveat will be allowed to stand while the parties go to trial over the claim. …* [emphasis added]

The italicised sentence is, as Sundaresh Menon JC (as he then was) pointed out in *Tan Yow Kon* (at [87]), something of an overstatement, given that it will still be necessary in such a case to consider the balance of convenience. Nonetheless, the general point is sound: if a trial is necessary to resolve the dispute as to a

caveator's *actual* entitlement or right to an interest in the property in question, that is a reason in favour of maintaining the caveat, not lifting it.

35 For these reasons, I find that there is a serious question to be tried as to the plaintiff's entitlement to a return of the Deposit and (arising out of that) to a purchaser's lien over the Property.

Is the balance of convenience tilted in favour of cancelling or maintaining the caveat?

36 Having found that there is a serious question to be tried as to the plaintiff's entitlement to a purchaser's lien over the Property, I need only consider in whose favour the balance of convenience tilts.

37 As a preliminary point, I note that ordinarily, damages are only available for the lodgment of a caveat in the limited circumstances where the caveat was not merely *wrongly* lodged, but was lodged "wrongfully, vexatiously or without reasonable cause", as stated in s 128 of the LTA. I need not set out the definitions of those terms here. For present purposes, the salient point is that unless one of those three limbs is satisfied, the court's finding that a caveat was wrongly lodged will not entitle the caveatee to compensation (see *Ho Soo Fong and another v Standard Chartered Bank* [2007] 2 SLR(R) 181 at [34]–[36]; see also the discussion in *Principles of Singapore Land Law* at paras 15.130–15.142).

38 In my view, that default position may work an injustice in a case such as the present one, where the plaintiff has acknowledged that there are serious disputes over the issues which will determine whether the plaintiff's claim to a purchaser's lien is well-founded. It is for that reason that s 124(*a*) of the LTA

empowers the court to order, among other things, that the caveator give an undertaking in damages as a condition for the continuance of the caveat. Such an undertaking would parallel the undertakings routinely provided by plaintiffs seeking interlocutory injunctions. In the present circumstances, if I am to order that the Caveat be maintained, I am inclined to exercise the power under s 124(*a*) to require an undertaking in damages for losses that may be caused to the defendant by the continuance of the Caveat. Thus, my analysis of the balance of convenience will proceed on the basis that the defendant, if successful in Suit 898, will have recourse in damages for the lodgment of the caveat, at least for losses caused by the presence of the Caveat subsequent to the handing down of this court's orders. This is to preserve the *status quo* of the parties pending the determination of their substantive dispute in June 2017.

39 Turning now to the balance of convenience, it is well-established that a critical consideration is the relative financial status of the parties (see *Tan Yow Kon* at [90]). I must weigh the likelihood that the defendant would be able to satisfy the plaintiff's claim for a refund (if the plaintiff succeeds) against the likelihood that the plaintiff would be able to compensate the defendant for lodging the caveat (if the defendant succeeds).

40 The plaintiff, on the one hand, seems to be in a secure financial position. The plaintiff's counsel at the second hearing informed the court that the plaintiff is a publicly listed company with assets exceeding $1.2bn. Moreover, it is not disputed that the plaintiff had the means (when the parties entered into the SPA) to purchase the land in question for $38m, and the defendant has not pointed to anything that would suggest that the plaintiff's financial position has since deteriorated. I therefore see no reason to believe, and the defendant has not suggested, that the plaintiff would be financially unable to compensate the

defendant should the defendant prevail at trial. It is for this reason that, although I am minded (for reasons discussed at [38] above) to require an undertaking in damages from the plaintiff, I am not persuaded that security from the plaintiff for those damages is necessary.

41 The defendant, on the other hand, seems to face significant financial difficulties. Troublingly, the sale price under the OTP which the defendant entered into with Eng Lee is vastly lower at only $13.5m compared to the purchase price of $38m under the SPA. While I am aware that market values can fluctuate, it has not been suggested that this $24.5m or 64.5% reduction in the purchase price can be explained by a fall in the market value and/or any depreciation of the lease. Moreover, the Property is mortgaged to Malayan Banking Berhad for about $8.4m (before interest, which continues to accrue), and this would leave the defendant with only about $5.1m once the mortgage is paid off. In the absence of a compelling explanation, this set of circumstances seems to suggest that the defendant may be in dire straits, such that it felt compelled to accept Eng Lee's offer even though it was drastically lower. This argument was raised by the plaintiff in its written submissions, yet the defendant has offered no response.

42 There are other facts which suggest that the defendant's finances are shaky. In an unrelated application, a creditor of the defendant, Lego Industry Pte Ltd, appeared before me to seek to wind up the defendant on account of an unpaid debt. (The application was adjourned on the application of the parties and will be heard by another judge later this month.) When I mentioned those winding up proceedings at the hearing of the present case, the defendant's counsel assured me that the defendant intended to vigorously contest them. However, the plaintiff subsequently drew my attention to the existence of other

quite recent winding up applications as well as other actions against the defendant brought by diverse parties. Many of these applications and actions appear to be ongoing, and some of the actions appear to have resulted in default judgments against the defendant. All of these confirm that there may be a real risk of the plaintiff obtaining only a paper judgment against the defendant in Suit 898.

43 In addition to the relevant financial circumstances of the parties, the fact that the trial of Suit 898 is imminent, being fixed for next month, further tilts the balance of convenience in the plaintiff's favour as it means that the added delay of the sale to Eng Lee should be relatively short. I note as well that there is no apparent risk that the sale will be jeopardised by the delay. By the terms of the OTP, the sale is to be completed:

> … on or before the expiry of twelve (12) weeks from the date of exercise of this Option or within two (2) weeks from the date of the [defendant's] receipt of the [JTC sale approval] *or within two (2) weeks from the date of removal of the Caveat … lodged by [the plaintiff]; **whichever is later*** … [emphasis added in italics and bold italics]

In other words, the deadline for completion cannot be any earlier than two weeks from the date the Caveat is lifted, whenever that may be. The OTP was exercised by Eng Lee on 4 April 2017, apparently in full knowledge of the possibility that the Caveat may not be lifted for some time. It does not appear, then, that my ordering the Caveat to remain pending the trial of Suit 898 would allow Eng Lee to back out of its commitment to purchase the Property from the defendant if and when the Caveat is finally lifted. If such a risk existed, I would expect the defendant to draw the court's attention to it, which it has not done.

44 Considering the above factors as a whole, I find that the balance of convenience is tilted in favour of the maintenance of the caveat. However, it

would be desirable, if possible, to seek an outcome that would better accommodate the interests of both parties. The defendant wishes to liquidate the Property, even at the low price of $13.5m. The plaintiff's interest, meanwhile, is the recovery of the Deposit. That interest will be protected so long as it receives any sufficient security, not necessarily one over the Property specifically. To balance those interests, if the defendant is able to put up security for the plaintiff's claim in the amount of $4.066m, I will allow the Caveat to be removed. Of course, if the defendant is really in financial difficulties, it may not be practically capable of furnishing such security. Nonetheless, I shall leave that option open in case the defendant is able to come up with the necessary funds.

45 Finally, I wish to make an observation concerning an unusual feature in the present case. The sale of a property, and the payment of part of the sale proceeds to the holder of the purchaser's lien, is the usual means of enforcing the security. Thus, it may seem strange that the plaintiff is seeking effectively to block the sale of the property in question – most purchasers would be all too happy for there to be a sale provided they receive their share of the proceeds. The facts of the present case, however, make such a solution difficult. Logically, the plaintiff would have no reason to remove the Caveat or to consent to the registration of Eng Lee's title unless the sum of $4.066m of the sale proceeds was first paid into court for the satisfaction of a possible judgment in Suit 898. But since the sale price agreed between the defendant and Eng Lee is a mere $13.5m, and the mortgage is $8.4m before interest, there would be perhaps $1m left for the defendant's own use once the mortgage had been repaid and the $4.066m had been paid into court. In the light of the scale of the defendant's commitments, it is doubtful whether such an arrangement would be of much practical utility to the defendant. Otherwise, the defendant would no doubt have suggested it.

Conclusion

46 On the basis of the foregoing analysis, I make the following orders:

(a) Pending the outcome of Suit 898, and subject to paragraphs (b) and (c) below, the Caveat is to remain and the Cancellation Application is to be stayed.

(b) The continuance of the Caveat shall be conditional on the plaintiff providing an undertaking within seven days in damages for losses flowing from the maintenance of the Caveat after the date of this order in the event that the court determines, in Suit 898, that the plaintiff was not entitled to a purchaser's lien over the Property.

(c) The defendant may furnish security for the plaintiff's claim for the return of the Deposit in Suit 898 in the amount of $4.066m. This may be in the form of payment into court, a banker's guarantee, or the parties may agree on another, mutually acceptable form of security. Upon the furnishing of the security, the Caveat shall be removed.

47 I shall hear the parties on costs.

Postscript

48 After I delivered the above judgment, the parties attended a further hearing before me on 17 July 2017. At this hearing, the parties agreed that the undertaking at [46(b)] above be changed to the following:

(b) The continuance of the Caveat shall be conditional on the plaintiff providing an undertaking within seven days. If the court later finds that this order has caused loss to the defendant and decides that the

defendant should be compensated for that loss, the plaintiff shall comply with any order the court may make.

Apart from that, the rest of the orders at [46] above remain unchanged.

Tan Siong Thye
Judge

William Ong, Vincent Leow, Ivan Lim and Robin Teo (Allen & Gledhill LLP) (for the 27 April and 8 May 2017 hearings) and Foo Chuan Min Jerald and Elsa Goh (Cavenagh Law LLP) (for the 17 July 2017 hearing) for the plaintiff;
Salem bin Mohamed Ibrahim and Kulvinder Kaur (Salem Ibrahim LLC) for the defendant.