Lim Beng Cheng *v* Lim Ngee Sing
[2015] SGHC 282

Case Number : Suit No 416 of 2013

Decision Date : 29 October 2015

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Peh Chong Yeow (Advent Law Corporation) for the plaintiff; A Rajandran (M/s A Rajandran) for the defendant.

Parties : LIM BENG CHENG — LIM NGEE SING

Contract – Formation – Acceptance

Contract – Illegality and public policy – Statutory illegality – Moneylenders Act

Contract – Remedies – Specific performance

[LawNet Editorial Note: The defendant's appeal to this decision in Civil Appeal No 213 of 2015 was dismissed by the Court of Appeal on 9 May 2016 with no written grounds of decision rendered. The Court of Appeal largely endorsed the findings of the High Court, save in one respect. The Court of Appeal accepted the plaintiff's submission that the original agreement though it had been structured as an investment in the property was in fact a loan. However, this had no bearing on the appeal. In the Court of Appeal's judgment, on the facts of this case, it was dealing with a one-off moneylending transaction rather than a party who was carrying on the business of moneylending without a licence. Accordingly, s 14 of the Moneylenders Act (Cap 188, 2010 Rev Ed) did not apply and therefore the Court of Appeal dismissed the appeal.]

29 October 2015 Judgment reserved.

Judith Prakash J:

Introduction

1 The plaintiff says that on 11 October 2010, he entered into an agreement with the defendant ("the October 2010 Agreement") under which the defendant promised to transfer to the plaintiff a 46.5% stake in a strata title property ("the KG Avenue Unit") in consideration for the release from debt owed to the plaintiff. The October 2010 Agreement is the last in a series of agreements signed by the parties that date back to April 2008. The defendant's position is that no contract was made on 11 October 2010 because he did not agree to the plaintiff's offer and the plaintiff did not provide good consideration for the October 2010 Agreement. In any event, even if a contract existed, it would be unenforceable because the underlying transaction entered into in April 2008 offended the laws against moneylending.

Background

The parties

2 Both parties are businessmen. They share the same surname but have no familial relationship to

each other at all. They met in 2007 shortly after the defendant acquired an office property adjacent to the plaintiff's business premises.

3 The plaintiff owns and runs a software development company called "Hiwire Data & Security Pte Ltd". His office is located at 200 Jalan Sultan, #08-06, Textile Centre, Singapore. The defendant purchased the neighbouring office unit, #08-07, Textile Centre ("Unit 08 TC"), on 20 July 2007 and sub-divided it into two office units which, from time to time thereafter, were rented out to third parties. The defendant is a part-time property agent and an active investor in the property market.

4 Whilst the parties participated in a number of agreements, their perspectives on the facts before the court are diametrically opposed to each other. The dichotomy arises from the defendant's portrayal of the plaintiff as a moneylender seeking to recover an extortionate loan and the plaintiff's portrayal of himself as a businessman who was persuaded by the defendant to enter into an investment in property which subsequently entangled him in a whole series of transactions with the defendant.

5 According to the plaintiff, the parties shared a friendly relationship. The defendant brought fruit to the plaintiff's office and gave him mooncakes during the mid-autumn festival. Both parties also went out for lunch or coffee breaks together, sometimes with a few of the plaintiff's employees. The plaintiff and defendant had a number of casual discussions which often revolved around property investments. The defendant says otherwise. According to him, the parties were merely casual acquaintances and not very familiar with each other. They went out together for meals only occasionally and, when they did, they paid for their own meals. They never discussed property investments; instead, the plaintiff would remind the defendant to repay the sums allegedly borrowed from him. Any food given to the plaintiff was given out of courtesy and because the plaintiff had seen the defendant carrying it around.

The agreements between the parties

6 Between 24 April 2008 and 11 October 2010, the parties entered into seven alleged agreements on six occasions. The first and last of these agreements are the most crucial in this trial.

The first agreement: the 24 April 2008 Option to Purchase Unit 08 TC

7 The defendant says that he approached the plaintiff for a loan on 23 April 2008 because he urgently needed money and the plaintiff's office was right next to Unit 08 TC. According to the plaintiff, the defendant claimed to have exercised an option to purchase 200 Jalan Sultan, #18-08, Textile Centre ("Unit 18 TC"), a residential unit in the same building as the parties' offices. The defendant explained that his co-investor had backed out from the purchase and he urgently needed $240,000 to complete the purchase the following day.

8 The defendant then offered to sell Unit 08 TC to the plaintiff for $240,000 on the condition that he could "buy back" the option from the plaintiff by 28 July 2008 for $340,000. According to the plaintiff, the defendant was willing to buy the option back at a price which would give the plaintiff a profit of $100,000 because he was anticipating a capital gain of $400,000 if he completed the purchase of Unit 18 TC; its market value was $680,000 at that time whereas the price at which the defendant was buying it was only $280,000. The defendant proposed that if he was unable to buy back the option, the plaintiff would be entitled to act on it and complete the purchase of Unit 08 TC for $240,000. The plaintiff was initially hesitant; but ultimately accepted the defendant's offer after being assured that it was in order and that the defendant would definitely "buy back" the option since Unit 08 TC was worth more than $240,000.

9 On 24 April 2008, the defendant granted the plaintiff an option to purchase Unit 08 TC for $240,000 ("the April 2008 Option"). The plaintiff says that the defendant prepared the option, whereas the defendant says the opposite. The April 2008 Option was signed at the office of, and witnessed by, Mr Mak Kok Weng ("Mr Mak"), an advocate and solicitor. The purchase price of the unit stated on the April 2008 Option was $300,000 instead of $240,000, but this made little difference to the plaintiff for two reasons: first, the price was essentially academic as the defendant had assured the plaintiff that he would buy back the option and, secondly, even if the defendant did not do so, the plaintiff would be unlikely to suffer a capital loss despite having to pay an extra $60,000 to complete the purchase.

10 The plaintiff duly exercised the April 2008 Option and tendered three cashier's orders for a total sum of $240,000 on the same day. On 28 April 2008, Mr Mak lodged a caveat over Unit 08 TC on the plaintiff's behalf ("the April 2008 Caveat").

The second agreement: the July 2008 Joint Venture Agreement

11 On or about 24 July 2008, a few days before the expiry of the period to buy back the April 2008 Option, the defendant told the plaintiff that he could not raise the $340,000 needed to exercise his repurchase right. The plaintiff says that the defendant asked him to waive his rights under the April 2008 Option and instead enter into a joint venture agreement under which the plaintiff would be deemed to have contributed $340,000 to the purchase of Unit 18 TC (for clarity I repeat that this was the residential unit that the defendant had purchased in April 2008 with the funds derived from the April 2008 Option).

12 The parties signed a joint venture agreement the same day ("the July 2008 JVA"). Under this agreement, the defendant was to sell Unit 18 TC and the plaintiff would be entitled to the first $340,000 of the sale proceeds and half of any net sale proceeds beyond the first $680,000. The plaintiff says that this document was prepared by the defendant whereas the defendant says that the plaintiff prepared and asked him to sign it.

13 Additionally, the plaintiff says that the defendant agreed that if he defaulted on the July 2008 JVA, the plaintiff would be entitled to buy Unit 18 TC for $476,000 (*ie*, by paying another $136,000 above his deemed contribution of $340,000). This, however, was a verbal agreement.

The third agreement: the August 2008 Agreement

14 According to the plaintiff, on 15 August 2008, the defendant asked him to vary his rights under the July 2008 JVA by accepting a 10-year repayment plan on a principal sum of $340,000, under which the defendant would pay:

(a) $3,418.15 per month for the first two years (representing the monthly instalment of principal and interest at 3.85% per annum);

(b) $3,437.79 per month for the third to the tenth year (representing the monthly instalment of principal and interest at 4% per annum); and

(c) $1,000 per month (representing the plaintiff's share of rental income).

15 This variation agreement ("the August 2008 Agreement") was handwritten by the defendant. It has two interesting features. First, the property referenced in this agreement was not Unit 18 TC but Unit 08 TC. Secondly, it provided that there would be "no sharing of selling profits". The plaintiff says

that the defendant did not give him any reason for this but he suspected that the defendant was acting on rumours of an *en bloc* sale of Textile Centre; the plaintiff thought that the value of Unit 18 TC would be assessed at about $1.5m and that the defendant did not want to share this windfall with the plaintiff. The plaintiff says that the defendant proposed the terms of the August 2008 Agreement and that he accepted those terms. The defendant's explanation, however, is that the plaintiff insisted on the change for his own benefit because the value of the residential property (*ie*, Unit 18 TC) had fallen below that of the commercial property (*ie*, Unit 08 TC) in the light of the financial crisis. At the trial, however, he said he was forced to enter into this agreement because the plaintiff did not pay $136,000 under the July 2008 Agreement. According to him, the plaintiff dictated the terms of the August 2008 Agreement to him and that was why the document was in his handwriting.

16 After the agreement was signed, the defendant commenced the payment of the monthly instalments via bank transfers.

The fourth and fifth agreements: the November 2008 Deed and the November 2008 Option to Purchase Unit 08 TC

17 According to the plaintiff, shortly before 28 November 2008 the defendant visited him and proposed replacing the August 2008 Agreement with a set of twin agreements. The plaintiff accepted the offer. Unsurprisingly, the defendant says that it was the plaintiff who drafted these agreements and asked the defendant to sign them.

18 One of these agreements was a deed ("the November 2008 Deed") under which the defendant promised to pay:

(a) $3,418.15 per month for the first two years;

(b) $3,437.79 per month for the third to the *ninth* year (the plaintiff, however, says that this was a mistake and the monthly payments should be made in the tenth year as well); and

(c) $1,000 per month from the rental received from the tenant of Unit 08 TC until the defendant pays up the principal sum.

Under cl 3 of the November 2008 Deed, the defendant was entitled to discharge the deed at any time by paying the balance of the principal sum due to the plaintiff.

19 The other agreement was an option to purchase Unit 08 TC for $350,000 ("the November 2008 Option") issued by the defendant in the plaintiff's favour. Clause 2b of this option provided that if the defendant defaulted on the payments under the November 2008 Deed for six months, the plaintiff would be entitled to either complete the purchase of Unit 08 TC or sell Unit 08 TC in the open market and apply the sale proceeds in satisfaction of the outstanding sum owed to him by the defendant. The defendant was also entitled, under cl 3 of this option, to pay "all dues instalment" to "reinstate" cl 2b; the plaintiff says he understood this to mean that the defendant could prevent the plaintiff from exercising his rights under cl 2b by paying all overdue instalments.

20 The plaintiff duly exercised the November 2008 Option. The signing of the acceptance copy of this option was apparently witnessed by Mr Mak again (even though he did not remember it). However, a fresh caveat was never lodged over Unit 08 TC because the April 2008 Caveat (which had been lodged against Unit 08 TC on the basis of the April 2008 Option) had not been discharged.

The penultimate agreement: the April 2009 Variation

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21 By the end of February 2009, the defendant had made five monthly payments of $3,418.15 and five monthly payments of $1,000. In March 2009, the defendant paid the plaintiff $200 instead of $1,000. The reason for this is disputed. The plaintiff says that the defendant simply wanted to pay less, but the defendant says that Unit 08 TC was vacant by then and accordingly no rental was due under the November 2008 Deed.

22 On 1 April 2009, the defendant proposed varying the November 2008 Deed into a 9-year repayment plan at an interest rate of 5% per annum for the first year from 1 April 2009 and 6% per annum for the remaining period, in lieu of giving the plaintiff a share in the rental. This meant that the defendant was to pay the plaintiff:

(a) $3,753.54 per month for one year; and

(b) $3,896.51 per month subsequently, until the principal sum is repaid.

23 The plaintiff says that he reluctantly accepted these terms. This agreement ("the April 2009 Variation") was never put in writing. The defendant's position is that the plaintiff foisted these terms on him.

24 Thereafter, the defendant paid the plaintiff $3,753.54 per month for 12 months until March 2010. From 1 April 2010 onwards, he paid $3,896.51 per month.

The last agreement: the October 2010 Agreement

25 On 11 October 2010, the undisputed outstanding principal sum was $279,352. The defendant went to the plaintiff's office and told the plaintiff that he had, on 9 September 2010, exercised an option to purchase the unit known as Block 803, King George's Avenue, #02-168, Singapore 200803 ("the KG Avenue Unit") at $430,000. The defendant was to hold this property with an investment partner, Tan Nguan Cher ("NC Tan"), as tenants-in-common in the proportions of 97% and 3% respectively. It transpired that the KG Avenue Unit had been previously held by the defendant and NC Tan as tenants-in-common in equal shares; they had sold it in January 2009 to the then tenant of the unit for $380,000 subject to a right to repurchase it for $430,000 within an 18-month window. They subsequently exercised this right as the value of the KG Avenue Unit had risen above $430,000.

26 According to the plaintiff, the defendant offered to settle the outstanding principal sum of $279,352 in the following way: in return for the plaintiff's promise to waive his rights under the November 2008 Option, the defendant would pay the plaintiff $79,352 and deem the remaining $200,000 to have been contributed towards 46.5% of the repurchase price of the KG Avenue Unit so that the plaintiff would receive a 46.5% share in the KG Avenue Unit upon completion of the repurchase. Were this settlement to be executed, the plaintiff, the defendant and NC Tan would hold the property as tenants-in-common in the proportions of 46.5%, 50.5% and 3% respectively. The plaintiff claims to have been assured by the defendant that his name could be included as a tenant-in-common because the option to repurchase the KG Avenue Unit had stated "[NC Tan] … and [the defendant] … and/or *nominee(s)* [emphasis added]" and that the defendant alone could make all the decisions regarding the KG Avenue Unit. The defendant, however, denies having made such representations. According to him, the plaintiff wanted to exploit the defendant's situation when he learnt of the defendant's intention to repurchase the KG Avenue Unit at $430,000. At the time, the defendant needed a bank loan to finance the repurchase of the KG Avenue Unit. Pending the approval of the bank loan (which was eventually extended to him), the defendant says that he approached the plaintiff for a further loan. While the plaintiff did not extend this loan, he proposed to set off moneys

then owing by the defendant for a share in the KG Avenue Unit. Eventually, this proposal was embodied in the October 2010 Agreement which was in truth a proposal and not a contract.

27 On 11 October 2010, the parties signed the October 2010 Agreement. On the same day, the plaintiff authorised a firm of advocates and solicitors to withdraw his caveat over Unit 08 TC. The defendant, however, continued to make monthly payments of $3,896.51. His position is that the terms of the October 2010 Agreement were never accepted by him even though he signed it. The proposal could not become a contract without NC Tan's approval, which was never obtained.

28 According to the plaintiff, the defendant later claimed to have had problems in completing the repurchase of the KG Avenue Unit because the owner was reluctant to complete the sale due to the low purchase price. The defendant told the plaintiff that he would not include the plaintiff's name as a nominee because his lawyer had advised him that the seller might otherwise have an excuse to dispute, void or delay the sale. The defendant promised to transfer a 46.5% interest in the KG Avenue Unit once the title passed to him.

29 Although the purchase of the KG Avenue Unit was eventually completed on 8 November 2011, the plaintiff only found out about this on 1 January 2012, when the defendant told him that he would not be transferring the 46.5% share in the KG Avenue Unit to the plaintiff. Instead, the defendant tendered a cheque for $240,515.17 (an amount which the plaintiff understood to represent the outstanding principal sum at that time) and asked the plaintiff to discharge him from his obligations under the October 2010 Agreement. The plaintiff rejected the cheque and asked for the share in the KG Avenue Unit which he had been promised.

Subsequent events

30 The plaintiff says that while he delayed legal action on account of his friendship with the defendant, the defendant's dilatory behaviour eventually led the plaintiff to seek legal advice. The parties had corresponded in various ways and the documentary trail shows that the plaintiff kept making demands which the defendant practically ignored.

31 On 23 October 2012, Advent Law Corporation, the solicitors for the plaintiff, sent a letter to the defendant, demanding the transfer of a 46.5% interest in the KG Avenue Unit to the plaintiff. On 6 March 2013, the plaintiff sent another letter to the defendant, accusing the latter of failing to transfer the 46.5% share in the KG Avenue Unit to him and demanding an unconditional return of $200,000 within seven days on the threat of legal action. On 29 March 2013, the defendant sent the plaintiff an e-mail showing that he transferred $3,896.51 to the plaintiff's bank account on 28 March 2013. The plaintiff replied, later that day, saying that the defendant only owed $1,549.42 (which, to the plaintiff, represented the balance of $79,352 that the defendant had agreed to pay under the October 2010 Agreement). The plaintiff purported to treat the remaining $2,347.09 as part payment for the sum of $200,000 which he said the defendant owed. However, he demanded the balance in weekly instalments of $50,000.

32 The weekly instalments of $50,000 demanded never came. On 1 April 2013, the defendant paid $3,896.51 to the plaintiff. The defendant wrote to the plaintiff again on 8 April 2013, asking the plaintiff to verify that the outstanding principal sum was $195,757.65. The plaintiff replied on 11 April 2013, stating that the principal sum was $195,757.44 (the difference was caused by the plaintiff's rounding off of certain figures to the nearest dollar). The last straw came when the defendant paid another $3,896.51 on 1 May 2013. On 7 May 2013, the plaintiff wrote to the defendant, stating that the monthly instalments were unacceptable and that he was entitled to a 46.5% share in the KG Avenue Unit under the October 2010 Agreement. He purported to return the 1 May 2013 payment

by issuing a cheque to the defendant for $8,139.07 and on the same day commenced this action.

Summary of the parties' cases

33 The plaintiff's case is that:

(a) the October 2010 Agreement is valid and enforceable; and

(b) the defendant breached the agreement by either completing the purchase of the KG Avenue Unit without including the plaintiff as a tenant-in-common holding a 46.5% interest or, failing thereafter, to transfer a 46.5% interest in the KG Avenue Unit to the plaintiff.

34 The defendant's case, in substance, is that:

(a) the October 2010 Agreement was a proposal to which the defendant never agreed;

(b) no consideration moved from the plaintiff under the October 2010 Agreement; and

(c) in any event, the October 2010 Agreement and the November 2008 Deed are unenforceable under s 14(2) of the Moneylenders Act (Cap 188, 2010 Rev Ed) ("the Act") and at common law.

35 The issues as regards the liability, if any, of the defendant to the plaintiff, appear clearly from the above summary. Briefly, they are as to the existence of the October 2010 Agreement, whether there was consideration for the same and, whether the underlying transaction was an illegal moneylending one covered by the Act, thus rendering the October 2010 Agreement unenforceable. If the defendant is found liable, further issues will arise regarding what remedy would be appropriate for the plaintiff in the circumstances of the case. I will delineate those later.

The credibility of the defendant

36 Before I discuss the substantive issues that arise, I must deal with the credibility of the defendant. Generally, he did not strike me as a credible witness. There are three broad reasons for this.

37 The first set of reasons concerns the fact that the defendant suppressed his understanding of the English language and his financial sophistication. For example, he asserted that he was unable to draft options to purchase property when the same contained special features (as the April 2008 Option did) and had to ask the plaintiff to explain certain clauses to him. I find this extremely hard to believe.

38 Although the defendant testified in Mandarin, the evidence and his conduct showed that he is proficient in the English language. All the instances of written communication from the defendant are in English. The standard of grammar and vocabulary displayed is more than rudimentary. The defendant accepts that the handwritten annotations and terms on the agreements, which are all in English, were almost exclusively written by him. He says that almost all the annotations made by him were dictated to him by the plaintiff. I find it very hard to believe that the plaintiff would have dictated to the defendant every handwritten annotation and term in the agreements. The more important point, however, is that the defendant's command of the English language was adequate. Even though the defendant said that his written English was better than his spoken English, he understood many questions posed to him in English during cross-examination and re-examination even

before they were translated into Mandarin. He was also able to read out portions of documents written in English.

39 The defendant also seemed to be a shrewd and financially savvy investor. The defendant was awarded a diploma in life insurance in 1992. He admitted after some probing that the life insurance course had been conducted in English (though he maintained that there was some Mandarin interpretation) and that the text books were written in English. Someone with only a basic command of the language would have found it very difficult to successfully complete such a course. The defendant also attended some property or investment seminars to help him make investments. By 2008, he had had at least five years' experience as a part-time estate agent and, by his own admission, he had completed at least three or four transactions. When Wintz Lim, one of the plaintiff's employees, needed to rent a room, he found the defendant to be a satisfactory property agent.

40 The defendant stated confidently that as an investor he bought properties for long-term investment. He maintained a "spare fund" with his business partner in order to be able to seize investment opportunities as they arose, and he was willing to finance the acquisition of properties by using overdraft facilities in order to overcome a lack of ready cash. The defendant had at least three business partners who each invested with him in different properties. By 2010, the defendant was already the owner of five properties: Unit 08 TC, Unit 18 TC, the KG Avenue Unit, the unit known as 462 Crawford Lane, #02-37, Singapore 190462, and the unit known as 2 Rochor Road, #06-590, Singapore 180002. In cross-examination, he conceded that he did "know a bit" about investing.

41 In the light of all this evidence, the defendant's claim that he could not understand certain clauses in the April 2008 Option, as well as his other claims that he was neither competent in English nor financially sophisticated, must be viewed with great suspicion.

42 Next, the defendant downplayed his friendship with the plaintiff and repeatedly accused him of being devious and manipulative. It appears to me that the defendant was not truthful in this regard. First, although the plaintiff and his staff consistently took the position that the defendant brought fruit to their office, the defendant's denial was heard for the first time only during cross-examination and was never put to the plaintiff or his staff members. Secondly, the defendant also had lunch and tea with the plaintiff on a number of occasions. The plaintiff's employee, Wintz Lim, was also invited to lunch while another employee, Tan Jong Chuan, joined them on at least one occasion. According to both the plaintiff and Tan Jong Chuan, the parties' conversations often revolved around property investments, prices, trends and events. Again, the defendant's denial was heard for the first time in cross-examination and his position was not put to the plaintiff or Tan Jong Chuan. The defendant in fact went on to claim that the parties seldom talked during lunch and that, if they did, the plaintiff would mention the alleged loan he gave to the defendant. However, I cannot understand why the defendant would want to have meals with the plaintiff if the plaintiff was constantly harping on the alleged loan. Further, the defendant has not accounted for conversations in the many months *before* the transaction on 24 April 2008 was entered into, during which the plaintiff obviously could not have been talking about any alleged loan.

43 The third point concerns the fact that the defendant left a set of keys to Unit 08 TC in the plaintiff's office. The plaintiff explained that this was done because Unit 08 TC had been partitioned into two sub-units, one of which was still vacant; if the defendant was unavailable to show potential tenants the vacant sub-unit, the plaintiff could assist. The defendant, however, claimed that the plaintiff wanted the keys to Unit 08 TC because the defendant had borrowed money from the plaintiff. However, it would be very strange for an experienced businessman like the plaintiff to keep, as security for an alleged loan, a set of keys to the debtor's property.

44 In my view, all these claims were made to set the stage for the defence of illegality. To me, the evidence showed a fairly close friendship between the parties, albeit a business friendship, at the material time. In fact, in February 2009, the defendant bought a 2-year subscription for the software produced by the plaintiff's company and received a substantial discount for it. By this time, the April 2008 Option had been thrice varied. This, to me, is not the behaviour of a devious, manipulative moneylender on one hand and an oppressed debtor on the other.

45 Finally, the defendant was generally evasive on the stand and many parts of his testimony were incredible. I list five examples below:

(a) The defendant claims that he had approached the plaintiff to "borrow" $240,000 merely because he was in need and because the plaintiff was his neighbour. However, he says that he had never discussed property investment with the plaintiff and did not know if the plaintiff had any substantial savings.

(b) The defendant surmises that the plaintiff did not complete the purchase of Unit 08 TC under the April 2008 Option because he felt guilty and afraid that the supposed illegality of the transaction might be exposed. At the same time, the defendant insists that each variation to the prevailing agreement between the parties was more advantageous to the plaintiff than the defendant and was foisted by the plaintiff on him.

(c) The defendant has failed to explain satisfactorily his position that he approached the plaintiff for a second loan to repurchase the KG Avenue Unit in 2010 despite thinking that the terms of the April 2008 Option were oppressive to him and expecting the plaintiff to impose terms that were less favourable to him than those offered by a bank.

(d) The defendant has also failed to give a satisfactory answer as to why he signed the October 2010 Agreement if it was (as he said) meant to be a mere proposal.

(e) The defendant says that, on each occasion he asked the plaintiff for a loan, he did not state the terms which he proposed to the plaintiff.

The October 2010 Agreement

Contents of the agreement

46 For easy reference, the entire agreement is reproduced below:

Reference statement dated 01 April 2009 between Lim Ngee Sing (LNS) NRIC [XXX] and Lim Beng Cheng (LBC) NRIC [XXX].

As on 1 Oct 2010, there is an outstanding balance of $279,352.

The agreed settlement is for LNS to pay cash $79,352 to LBC and the balance of $200,000 to be converted into 46.5% share of the property at Blk 803 King George's Ave #02-160 Singapore 200803 calculated as being $200,000 share of the $430,000 selling price of the mentioned property.

The property shall be purchased as Tenancy in Common with share apportioned as follows:

Lim Ngee Sing with 50.5%

Lim Beng Cheng with 46.5%

Tan Nguan Cher with 3%

For purpose of rental return, the nett return (after deducting all relevant costs) shall be apportioned based on above share values.

In view of this agreement, LBC shall release the caveat for 200 Jalan Sultan #08-07 Textile Centre Singapore 199018.

For bank loan, it is agreed to loan up to $301,000 with LNS bearing all the loan repayment and loan liabilities. In case of any default, the rental return shall be used to service the loan and other expenses.

In case of any failure to complete the above property, the outstanding amount of $200,000 owned [sic] by LNS to LBC can be used to caveat any of the below properties:

200 Jalan Sultan #08-07 Textile Centre Singapore 199018.

200 Jalan Sultan #18-08 Textile Centre Singapore 199018.

[Defendant's Signature]

Lim Ngee Sing, 11 Oct 2010

[Plaintiff's Signature]

Lim Beng Cheng, 11 Oct 2010

Issue 1: Whether the parties agreed to the terms of the October 2010 Agreement

47 The first issue is that of agreement. The plaintiff's point is simply that the October 2010 Agreement was freely signed by the defendant and was meant to be a binding contract. The defendant's position is that the October 2010 Agreement was merely a proposal prepared by the plaintiff which was never accepted by the defendant.

48 To me, it is clear that a binding agreement was formed on 11 October 2010. First, the language of the document suggests that the October 2010 Agreement was intended to be a binding contract and not a mere proposal. The concept of an agreement appeared three times in the language of the document ("The *agreed* settlement …", "In view of this *agreement* …" and "… it is *agreed* …") whereas the concept of a proposal was nowhere to be seen. Secondly, the parties signed the document after spending an hour preparing it. If it was a mere proposal (as the defendant says), signing it would make little sense. When the defendant was asked why he signed it, he replied that there was an understanding that the document was merely a proposal and that he signed it because the plaintiff asked him to do so. The document was, in his words, a "non-binding proposal". In my view, his answer is unsatisfactory. At the time, the defendant had much experience in executing transactions generally and obviously understood the significance of signing a document. Further, it would be strange for the defendant to wait an hour to sign a document that he says the plaintiff had been preparing, if that document was merely a proposal. The defendant's argument that there was nothing wrong in parties recording the terms of a proposal in writing misses the point.

49 The defendant makes four other arguments to support his claim that a contract was never concluded on 11 October 2010.

50 First, the defendant argues that the proposed terms of the October 2010 Agreement were so onerous and commercially insensible that the defendant could not be taken to have agreed to them. Specifically, he says that the plaintiff would acquire a share in the KG Avenue Unit which he knew to be valued at $302,250 simply by forgiving the defendant's debt to the extent of $200,000, and that the defendant would be saddled with an immediate financial burden because the balance debt of $79,352 was to be paid in a lump sum and not in instalments. However, I struggle to find any commercial insensibility of the kind that would make the plaintiff doubt whether the defendant's consent was genuine. Paying the $79,352 in a lump sum would have freed the defendant from paying interest on instalment payments. If the returns earned by the defendant on his investments were less than the interest of 6% he was paying on the sum owed to the plaintiff, it would make sense to pay the $79,352 in a lump sum rather than in instalments. In fact, the October 2010 Agreement would have improved the defendant's medium-term liquidity generally. It is perfectly conceivable that the share of the KG Avenue Unit to be given to the plaintiff was calculated based on its repurchase price rather than its then market price. By receiving an interest in property instead of cash, the plaintiff would suffer a loss of liquidity and the risks of ownership (*eg*, fluctuating property prices) and it was only natural that he was compensated for it by receiving a share of the KG Avenue Unit the market value of which exceeded his notional investment. It should also be noted that as a part owner of the KG Avenue Unit the plaintiff's liquidity would have been subject to more restrictions than those faced by sole owners of property.

51 Next, the defendant argues that this agreement was subject to NC Tan's approval, which was never obtained. The evidence does not support that argument. First, NC Tan was evidently not intended to be party to the October 2010 Agreement; it neither required NC Tan's signature nor suggested that his approval was needed in any way. Secondly, the plaintiff was told by the defendant that the defendant and NC Tan had agreed to hold the KG Avenue Unit as tenants-in-common in the respective shares of 97% and 3% and that the defendant alone could make all the decisions regarding the KG Avenue Unit. Although the defendant denies having made these representations, I think that the plaintiff's version of events should be believed. To my mind, the plaintiff would only have entered the October 2010 Agreement if the defendant had assured him in some way that the promises could be carried out. In the light of this, the reference to NC Tan's shareholding was merely additional information and, in my view, both parties treated it as such when they signed the document on 11 October 2010. The defendant explained that he ought to consult NC Tan because they were long-time business partners and because the terms were onerous to NC Tan. That, as the plaintiff points out, is inconclusive. NC Tan did not even state in his affidavit of evidence-in-chief that there was an agreement that restrained the defendant from dealing with the latter's own share in the KG Avenue Unit or that the defendant required his consent to contract with the plaintiff on the unit. Even if the defendant promised NC Tan separately not to alienate his own share in the KG Avenue Unit, such a promise is *res inter alios* and, as such, irrelevant.

52 I draw an adverse inference against the defendant on this point because NC Tan did not attend to testify despite having filed an affidavit of evidence-in-chief. The defendant's claim that NC Tan was present during the earlier tranches of the hearings is evidence from the bar. Not much weight can be given to the defendant's argument that he himself was not cross-examined on NC Tan's absence. I had already questioned the defendant on NC Tan's absence and there was little point in allowing further cross-examination had it been requested by the plaintiff's counsel. No proper explanation was given as to why NC Tan did not turn up. Nor did the defendant give evidence of any effort to procure NC Tan's attendance by the issue of a subpoena notwithstanding that in a telephone conversation a few days prior to the hearing NC Tan had informed him that he would not be

turning up.

53 Thirdly, the defendant points to three aspects of the parties' subsequent conduct and correspondence which he says show that the October 2010 Agreement actually remained a proposal. None is convincing. The defendant says he never paid the lump sum of $79,352 but continued paying monthly instalments as if the April 2009 Variation was still in force; this, he says, the plaintiff was aware of and acquiesced to. The fact of continued instalment payments is neither here nor there. The plaintiff's explanation that he did not protest because the defendant promised to pay $79,352 in a lump sum after he obtained a loan is plausible and was not tested in cross-examination. Next, the defendant refers to the plaintiff's letter of demand dated 6 March 2013, which refers to the April 2009 Variation and goes on to state: "It is also very absurd that you are still keeping the $200,000, while still not willing to make the *transaction* …" The defendant also refers to the plaintiff's subsequent letter dated 29 March 2013 which he says shows that the plaintiff was demanding the repayment of a *loan*. However, these references must be seen in context. The 6 March 2013 letter itself referred to an agreement to buy a 46.5% share of the KG Avenue Unit from the defendant for a sum of $200,000 which was handed to him on that day. These terms were only introduced in the October 2010 Agreement and the date stated (*ie*, 1 April 2009) was, in my view, correctly and candidly admitted to be a mistake on the plaintiff's part. The agreement was also impliedly said to be binding and enforceable. The word "transaction" in that letter must mean the defendant's promise to transfer a 46.5% share in the KG Avenue Unit. The plaintiff's 29 March 2013 letter made no reference to a loan; instead, it again referred to the payment of $200,000 for "the property". Moreover, the letter of demand dated 23 October 2012 sent by the plaintiff's solicitors referred to the October 2010 Agreement.

54 In fact, the parties' subsequent conduct actually suggests that the defendant's position at trial is an afterthought. From the time the letter of demand dated 23 October 2012 was sent by the plaintiff's solicitors to 7 May 2013, when the writ of summons was issued, the defendant never once denied that he was under an obligation to transfer a 46.5% share in the KG Avenue Unit to the plaintiff. More importantly, the plaintiff had instructed his solicitors to remove the caveat over Unit 08 TC on the very day that the October 2010 Agreement was signed. The defendant must have led him to think that they were *ad idem* as regards the October 2010 Agreement. The defendant's rationalisation that the plaintiff withdrew his caveat in anticipation of the defendant's agreement is strange if the plaintiff was the devious and exploitative person the defendant makes him out to have been.

55 Finally, the defendant argues that he rejected the plaintiff's offer within a week. However, this argument cannot help the defendant. The fact that he signed the October 2010 Agreement and the plaintiff then authorised the withdrawal of his caveat over Unit 08 TC on 11 October 2010 shows that, objectively, an agreement had been concluded. Any purported rejection which came later was therefore irrelevant to the question of acceptance. In any event, I think that the defendant was untruthful in this regard. This claim is devoid of detail. He said only that he rejected the offer via a phone call placed either within "the first week" or "before November 2010". If he did reject the plaintiff's offer, it is strange that he left no paper trail despite having signed a document which, on its face, showed his unequivocal and unconditional agreement. The fact that the plaintiff never re-lodged (or tried to re-lodge) a caveat over Unit 08 TC on the grounds of the November 2008 Option to protect his interest is supportive of the plaintiff's position that the defendant had accepted, rather than rejected, the October 2010 Agreement.

56 I conclude that the defendant accepted the terms of the October 2010 Agreement and knew when he was signing it that it was intended to be a contract, not merely a proposal requiring further consideration.

Issue 2: Whether sufficient consideration moved from the plaintiff under the October 2010 Agreement

57 The defendant argues that the October 2010 Agreement is void for want of consideration. Although the defendant's closing submissions are unclear, he appears to suggest that the only consideration moving from the plaintiff was the withdrawal of the April 2008 Caveat over Unit 08 TC, an act which he says the plaintiff was bound to do in any event.

58 I do not accept this argument. As the plaintiff contended, there was valid consideration because the plaintiff promised to release the defendant from the latter's obligation to pay $279,352 under the November 2008 Deed as varied by the April 2009 Variation and because he promised to withdraw the April 2008 Caveat over Unit 08 TC (even if the caveat had improperly remained on the register). The former is quite clearly good consideration. As for the latter, the forbearance to sue on a doubtful or even "clearly invalid" claim is good consideration if there are reasonable grounds for the promisor's claim and if the promisor honestly believes he has a fair chance of success (*Abdul Jalil bin Ahmad bin Talib v A Formation Construction Pte Ltd* [2006] 4 SLR(R) 778 at [42]). This principle applies to the plaintiff's promise to withdraw the April 2008 Caveat. The plaintiff, strictly speaking, did not have a right to leave the April 2008 Caveat on the register of titles, as that caveat claimed an interest as purchaser in respect of a contract for sale dated 24 April 2008. However, the plaintiff did not lodge a caveat following the November 2008 Option, even though he was entitled to do so, because the April 2008 Caveat had not been discharged. The evidence suggests that the plaintiff believed in good faith in October 2010 that he was entitled to maintain a caveat against Unit 08 TC. It should also be noted that had the plaintiff not agreed to withdraw the caveat, the defendant would have been put to expense and delay in obtaining an order to effect its compulsory withdrawal. In the circumstances, the plaintiff's agreement to withdraw the April 2008 Caveat also conferred a benefit on the defendant and should be considered good consideration.

Issue 3: Whether the October 2010 Agreement is unenforceable by reason of illegality

59 The defendant takes the position that the October 2010 Agreement is unenforceable because it is an illegal moneylending contract under the Act and because it is illegal at common law. The issue of illegality at common law can be easily disposed of. The plaintiff rightly points out that the unenforceability of moneylending contracts is entirely the province of statute and not common law; it is therefore unnecessary to discuss illegality at common law. The discussion must focus on illegality under the Act. The plaintiff takes the position that the transactions into which he entered were not moneylending transactions and that he is not a moneylender in that he is an excluded moneylender within s 2 of the Act and, in any event, he does not carry on a business of moneylending.

60 To begin, it is correct that a contract for a loan granted by an unlicensed moneylender is unenforceable. However, under s 2 of the Act certain categories of persons who carry on the business of lending money are defined as "excluded moneylenders" and are exempted from the requirement to obtain a moneylending licence under the Act. Therefore, a loan contract entered into by a unlicensed but excluded moneylender will be valid. The plaintiff's position is that he is an "excluded moneylender" because he falls within sub-para (*f*) of the definition of "excluded moneylender" in the Act which reads:

> (*f*) any person carrying on any business not having for its primary object the lending of money in the course of which and for the purposes whereof he lends money;

61 In *Sheagar s/o T M Veloo v Belfield International (Hong Kong) Ltd* [2014] 3 SLR 524 ("*Sheagar*"), it was stated by the Court of Appeal, albeit *obiter*, that the alleged borrower bears the

burden of proving that the alleged lender is *not* an excluded moneylender (*Sheagar* at [40] and [67]–[73]). If the alleged lender is an excluded moneylender, the rest of the statutory scheme is inapplicable to him (*Sheagar* at [57] and [87]). However, if the alleged lender is not an excluded moneylender, the borrower may raise the presumption in s 3 of the Act that any person who makes a loan which is to be repaid with interest is a moneylender until the contrary is proved. This would shift the burden onto the lender to prove that he was *not* carrying on the business of moneylending (*Sheagar* at [38]–[39]).

62 The questions that need to be dealt with in this part of the judgment are, first, whether the plaintiff did lend money to the defendant and, if so, second, whether the plaintiff was an excluded moneylender and, if not, third, whether the plaintiff carried on the business of moneylending.

Whether the plaintiff lent money to the defendant

63 It is self-evident that a transaction must be a loan to attract the operation of the Act in the first place. The defendant argues that the underlying agreement (*ie*, the April 2008 Option) was an ill-disguised loan of $240,000 carrying a liability to pay interest of $100,000 and, accordingly, all the arrangements subsequent to and flowing from it were also moneylending transactions. The plaintiff, by addressing the issue of whether the April 2008 Option was a loan, seems to accept that the nature of the April 2008 Option could "taint" the nature of the October 2010 Agreement. However, he submits that the form of a transaction *prima facie* reflects its substance; it is only where both parties intended *not* to comply with the transaction that the transaction will be said to be a sham. The April 2008 Option was not a sham; when exercised it was a sale contract with a deferred right of completion subject to a repurchase option and the parties treated it as such.

64 The law is clear on how the nature of transactions should be analysed. The proper approach in determining the true nature of a transaction is to look at the substance, as opposed to the form, thereof (*E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd* [2012] 1 SLR 32 (CA) ("*E C Investment*") at [61]). This may involve looking beyond the documents and divining the true agreement. The Court of Appeal in *E C Investment* stated at [30]:

> 30 We recognise that the court is not prohibited from evaluating evidence *other than* the transaction documents … to determine the true nature of a transaction. In other words, the crux of the [issue of whether the instruments were rightly regarded as a secured loan] lies not in construing the wording or terms used in the [instruments] *per se*, but in determining whether the real agreement between the parties was that expressed in those instruments. If the parties had adopted the arrangement set out in the [instruments] as a disguise for what was truly a loan, then their true intent, and not the form of the [instruments], will prevail … [emphasis in original]

65 However, the courts have emphasised that the form of the transaction generally reflects the substance of that transaction. There is a "very strong presumption that parties intend to be bound by the provisions of agreements which they enter into" (*Chng Bee Kheng and another (executrixes and trustees of the estate of Fock Poh Kum, deceased) v Chng Eng Chye* [2013] 2 SLR 715 at [51] *per* Chan Seng Onn J). Thus, in *Sheagar*, it was said that the court would look past the form only when there is cogent evidence to suggest that it was a sham:

> 81 In our judgment, to come within the definition of an "excluded moneylender", both the letter and spirit of the law must be complied with. We would emphasise, however, that in most, if not all cases, the form of the transaction would *prima facie* reflect its substance. The [Moneylenders Act] must not be seen by desperate defendants as a "legal panacea" to stave off their financial woes. **Accordingly, it was incumbent on the Appellant to place cogent evidence before us**

to make good its assertion that the First and Second Loans were sham corporate loans. [emphasis added]

66 V K Rajah J outlined the approach which should be taken in analysing whether a transaction was a disguised moneylending transaction or a genuine commercial transaction of a different nature in *City Hardware Pte Ltd v Kenrich Electronics Pte Ltd* [2005] 1 SLR(R) 733 ("*City Hardware*"). He stated:

> 24 … What constitutes lending must of course remain a question of fact in every case. **Careful consideration has to be given to the form and substance of the transaction as well as the parties' position and relationship in the context of the entire factual matrix.** …
>
> 25 It ought to be stressed, however, that the **court ought not to be overzealous in analysing or deconstructing a transaction in order to infer and/or conclude that the object of the transaction was to lend money**. Salutary advice against adopting such an investigative factual witch-hunt is to be found in the seminal decision of *Chow Yoong Hong v Choong Fah Rubber Manufactory* [1962] AC 209 … at 216 where Lord Devlin stated with his customary clarity and authoritativeness:
>
> > The fundamental error that underlies the defendants' case on both groups of cheques is that because they were, so they say, in need of ready cash, and because the Plaintiff supplied them with it and made, if he did, a profit out of doing so, therefore there was a loan and a contract for its repayment. There are many ways of raising cash besides borrowing. One is by selling book-debts and another by selling unmatured bills, in each case for less than their face value. Another might be to buy goods on credit or against a post-dated cheque and immediately sell them in the market for cash. Their Lordships are, of course, aware, as was Branson J., that transactions of this sort can easily be used as a cloak for moneylending. **The task of the court in such cases is clear. It must first look at the nature of the transaction which the parties have agreed. If in form it is not a loan, it is not to the point to say that its object was to raise money for one of them or that the parties could have produced the same result more conveniently by borrowing and lending money. But if the court comes to the conclusion that the form of the transaction is only a sham and that what the parties really agreed upon was a loan *which they disguised* , for example, as a discounting operation, then the court will call it by its real name and act accordingly.** [emphasis added]
>
> 26 This brief overview of moneylending legislation would be incomplete if no reference is made to the oft-cited decision of Branson J in *Olds Discount Co Ltd v John Playfair Ltd* [1938] 3 All ER 275 at 280:
>
> > Unless there was evidence upon which it would be proper for the court to act that the parties had deliberately entered into those documents knowing that they did not represent what had been agreed between them, but that what had been agreed between them was something quite different, it seems to me that the proper course for the court to take is to accept the formal agreements between the parties, and to decide their rights according to those agreements.
>
> [emphasis in original in italics; emphasis added in bold]

67 In this case, the plaintiff was issued the April 2008 Option in consideration of the payment of $240,000. This gave him an option to purchase Unit 08 TC which could be exercised by delivering a

signed copy of the acceptance and paying a further $1 as deposit by 4pm on 24 April 2008. The purchase price of Unit 08 TC was $300,000. The two most crucial (and unusual) clauses read:

> 1a. The Purchaser shall grant the Vendor Lim Ngee Sing to buy back this Option from the Purchaser Lim Beng Cheng by returning the option money paid plus an amount: $100,000/= (One Hundred Thousand Only) by the date: 28 July 08, hereinafter called 'Buy Back Expiry Date'.
>
> 1b. If the vendor [*ie*, the defendant] fails to buy back the option by the Buy Back Expiry Date [*ie*, 28 July 2008], the Purchaser [*ie*, the plaintiff] shall proceed to complete the purchase and reserve the right to recover an addition of the option money paid [*ie*, $240,000] and an amount as stated on clause 1a [*ie*, $100,000].

68 An examination of the form and substance of the transaction, the parties' conduct and the surrounding circumstances shows that the April 2008 Option was not a loan. First, the form of the transaction was plainly that of an option/contract to purchase real property; in form it was definitely not a loan.

69 Next, I turn to the economic substance of the April 2008 Option, an issue on which parties disagree. The defendant argues that the transaction was a loan of $240,000 with an interest liability of $100,000. He says that five features are unusual. First, the market price of Unit 08 TC at the material time, which was $380,000, was far greater than the purchase price of $300,000 stated in the April 2008 Option and the option was therefore in substance security for the loan. Secondly, the option price was $240,000 whereas options to purchase are normally priced at 1% of the purchase price. Thirdly, there was a guaranteed gain of $100,000. Fourthly, if the defendant did not exercise his buy-back right, then he was liable to pay the plaintiff $340,000 *and* to sell Unit 08 TC to the plaintiff for $300,000. Finally, the expiry date of the option was the same as the date it was granted. The plaintiff criticises the defendant's characterisation as being a *post facto* rationalisation. To him, the April 2008 Option was an investment of $240,000 through which the plaintiff stood to enjoy a $100,000 profit or capital gain (out of a total of $400,000) that would arise when the purchase of Unit 18 TC was completed. The buy-back right was unusual but a similar instrument in *E C Investment* was held not to be a loan. The $100,000 was simply the capital gain on an investment. Further, the plaintiff was exposed to other investment risks. Finally, there was no provision for interest past the three-month period during which the defendant could exercise his buy-back option.

70 In my view, the economic substance of the April 2008 Option does not show that it was a loan rather than an option/contract to purchase. As the plaintiff points out, the defendant's first three points can be answered by a study of *E C Investment*. There, the defendant, RR, granted an option dated 5 June 2009 to the plaintiff, ECI, to purchase a piece of property (which was valued at $23.2m) for $20m in consideration of an option fee of $1.5m. A deed of settlement between the parties, executed on the same day but post-dated to 8 June 2009, afforded the RR the right, "within 60 days from today", to cancel the option by refunding the option fee of $1.5m and paying an additional sum of $180,000. If this right was not exercised, ECI would be entitled to exercise the option during the 30-day period thereafter. ECI lodged a caveat claiming an interest as the holder of an option and, following RR's failure to exercise its cancellation right, a second caveat claiming an interest as purchaser. The High Court held that this transaction was in substance a secured loan of $1.5m at an interest of $180,000 (*E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd (Orion Oil Ltd and another, interveners)* [2011] 2 SLR 232 (HC) ("*E C Investment (HC)*") at [71]–[90]). The Court of Appeal, disagreeing, stated that the nature of the transaction was a genuine agreement for the sale of the property (*E C Investment* at [74]). Three of the court's findings are pertinent here. First, the fact that ECI hoped to achieve a gain regardless of whether or not RR cancelled the option was merely regarded as a "hard bargain" (*E C Investment* at [71]; *E C Investment (HC)* at [30]).

Secondly, the cancellation right, far from suggesting that the option was not a "true" option, was in fact evidence of the existence of the option; the deferment period of ECI's right to exercise the option presumed the existence of the option (*E C Investment* at [73]). Thirdly, the court found that the option was a true option *despite* the fact that there was no real negotiation on the purchase price; it was thought by the parties to be an academic issue as the defendant's sole shareholder-director was very confident that he could exercise his cancellation right (*E C Investment* at [66]).

71 Applying *E C Investment* to the present case, it can be said that the difference between the market price and purchase price, the unusually high pricing of the option and the fact that the plaintiff was guaranteed a $100,000 gain do not *ipso facto* make the April 2008 Option a loan. Conversely, the cancellation right as expressed in cll 1a and 1b of the April 2008 Option suggests that it was a genuine option/contract to purchase with a deferred right of completion that was subject to a repurchase of the option by the grantor. This is consistent with cl 3, which reads:

> 3. The sale and purchase shall be completed within **2 month** [*sic*] from the **Buy Back Expiry Date** ("the Completion Date") at the Vendors' solicitors' office or at such other place as the Vendors' solicitors may on or before the Completion Date specify. [emphasis in original]

72 The issue of the cancellation right shades into the defendant's fourth point. The defendant argues that, on a true interpretation of cl 1b, the plaintiff was entitled to complete the purchase of Unit 08 TC *and* in addition to that recover $340,000 from the defendant. I reject that argument. First, while the grammar of cl 1b can accommodate the defendant's interpretation, I think that the plaintiff's understanding (that he could *either* complete the purchase of Unit 08 TC *or* recover $340,000) reflected the parties' agreement at the time of contract. The discussions preceding the contract showed that the defendant intended to pay the plaintiff $340,000 by 28 July 2008, failing which the defendant would complete the sale of Unit 08 TC at $300,000. It is hard to see how the defendant would have agreed to a clause which required him to repay $340,000 over and above selling Unit 08 TC for $300,000 if he did not exercise his right to buy back Unit 08 TC. If this is correct, then the mechanism of this transaction is almost identical to that in *E C Investment* discussed above. The only difference (which is of no help to the defendant) is that the option in *E C Investment* had a deferred right of exercise whereas the option/sale here had a deferred right of completion. Secondly, the defendant's interpretation of cl 1b is unfavourable to him as regards the issue of whether the April 2008 Option was a loan, even though it seems to portray the plaintiff in a negative light. If the defendant is correct, the plaintiff would be *required* to complete the purchase of Unit 18 TC. Such a transaction is more akin to an investment than a loan because the plaintiff would be forced to bear the risks and rewards flowing from the ownership of Unit 08 TC.

73 The defendant's fifth point, which is that the expiry date of the April 2008 Option was the same as the date it was granted, does not add anything at all to his argument. In sum, the substance of the April 2008 Option does not show that it was a loan. For the purpose of clarity, I should point out that although the parties referred to the April 2008 Option as an "option", that was rather loose terminology. Legally, the April 2008 Option was an option to purchase which developed into a sale and purchase contract when the plaintiff exercised it on the day it was granted. The unusual feature of the sale contract was the right given to the defendant to buy back the property if he did so before the "Buy Back Expiry Date". Essentially, it was the defendant, not the plaintiff, who had an option to buy Unit 08 TC after 24 April 2008.

74 I now turn to the parties' conduct and the surrounding circumstances. First, at the material time, the plaintiff was a businessman of 17 years' standing. The defendant was a property agent and property investor (perhaps "speculator" would be a more accurate description) with a fair degree of financial sophistication. The parties should be taken to know the effects of the transaction.

75 Secondly, on 24 April 2008, the parties attended at the office of Mr Mak. The evidence, on balance, suggests that either or both of the parties asked Mr Mak whether the transaction was in order. The defendant claims that this was meant to give a semblance of legitimacy to what was otherwise an illegal transaction. I cannot agree. As the plaintiff points out, attending at Mr Mak's office for legal advice does not mean that the plaintiff was trying to circumvent the law. In fact, it would be strange for a party wishing to circumvent the law to attend before a lawyer. The fact that parties had legal advice was one of the reasons that the transaction in *E C Investment* was held not to be a loan (*E C Investment* at [67]). The Court of Appeal also clarified that the mere fact that a party was thorough in considering all the potential implications of a transaction was neutral and did not indicate whether it was a disguised moneylending transaction or not (*E C Investment* at [68]).

76 Thirdly, on 28 April 2008, four days after the April 2008 Option was exercised, a caveat was lodged by Mr Mak on the plaintiff's behalf, in which the plaintiff claimed an interest as *purchaser*. This shows that the plaintiff treated the April 2008 Option at face value. The defendant, however, takes issue with the fact that stamp duty was never paid. He says that the parties never intended for the plaintiff to actually complete the purchase of Unit 08 TC and that the plaintiff did not expect the defendant to actually allow the purchase to be completed. Crucially, he says that Mr Mak knew from the outset that the sale would not happen and advised the plaintiff *not* to pay stamp duty. The plaintiff, in fact, faxed a letter dated 5 May 2008 to Mak & Partners asking for the return of a cheque for $4,200 and stating that he would bear the penalty for late payment upon completion of the purchase. However, I accept the plaintiff's response that this conduct did not make the option any less genuine. The fact that the plaintiff did not believe that the defendant was willing to complete the sale of Unit 08 TC did not mean that the plaintiff did not intend to buy it. Mr Mak said that there was no point paying the stamp duty immediately as there was a buy-back clause in the option; if the defendant did not buy the option back the plaintiff could pay stamp duty at a later date with a small penalty.

77 Fourthly, the defendant exercised his buy-back right *in a modified way*, *ie*, by entering the July 2008 JVA. Under that agreement, the defendant would be deemed to have paid $340,000 to cancel the April 2008 Option. The relevant part of the agreement reads:

> Amount $240,000 plus $100,000 totaling $340,000 (Singapore Dollars Three Hundred Forty Thousand) be used by [the Defendant] to buy back Option dated 24 April 2008 (Property Address: 200 Jalan Sultan #08-07 Singapore 199018) from Mr Lim Beng Cheng …

The defendant, however, argues that the agreements entered into after the April 2008 Option actually reveal the features of the loan which were at first disguised. Specifically, he says that the July 2008 JVA, the August 2008 Agreement and the November 2008 Deed provided for a repayment plan specifying instalment amounts and interest rates. Even if these subsequent agreements display features characteristic of loans, that cannot change the fact that the parties abided by the terms of the April 2008 Option while it was in force. Further, I accept the plaintiff's evidence that each of these subsequent agreements were entered into at the defendant's behest. In so far as the defendant contends that it was the plaintiff who forced him to enter these agreements, I do not believe him. I have given my comments on the defendant's general credibility above.

78 Further, the defendant did not try to disavow any of the agreements until late 2012, when the letters of demand were sent to him, despite claiming to have known that the transaction was illegal, as early as the day *before* the April 2008 Option was signed. The defendant explains that he is a man who keeps promises even if they are unenforceable at law. This explanation, however, has been completely undermined by the defendant's vigorous root-and-branch attack on the plaintiff's case.

79 Finally, it is said by the defendant that the fact that the plaintiff entered into the April 2008 Option because the promised returns were more attractive than the fixed deposits in which the plaintiff had been investing and that he would not have entered the transaction but for the guaranteed gain of $100,000 showed that the April 2008 Option was a loan. This, as the plaintiff rightly points out, is neither here nor there.

80 In conclusion, the form and substance of the transaction, the conduct of the parties and the totality of the circumstances strongly suggest that the April 2008 Option was not a loan. Accordingly, the transactions flowing from it (including the October 2010 Agreement) are not illegal under the Act.

Whether the plaintiff was an excluded moneylender

81 I go on to discuss the other issues that would have arisen had I found that the April 2008 Option was a loan. I do this briefly and for completeness only.

82 The defendant relies on s 3 of the Act, which operates to raise a presumption that the plaintiff was carrying on a business of moneylending because he had disbursed $240,000 in consideration of $340,000 being repaid. The plaintiff, however, argues that the defendant has failed to discharge his burden of proving that the plaintiff is not an excluded moneylender. I do not find much merit in the plaintiff's argument. The only limb of the definition of an "excluded moneylender" which could possibly encompass the plaintiff is sub-para (*f*). This paragraph is meant to encompass persons who lend money incidentally over the course of their business.

83 There are no cases interpreting sub-para (*f*) of the *current* definition of an "excluded moneylender" but two older decisions are helpful. The first, *Premor Ltd v Shaw Brothers (A Firm)* [1964] 1 WLR 978, explains the test that must be satisfied. For a loan to be made "in the course of" a business, it must be associated with a transaction of that business. Additionally, for a loan to be made "for the purposes of" a business, it must be made with the object of promoting that business. It was insufficient that the loan kept a customer well-disposed towards the lender; the purpose of the loan must be directly to help the business as distinct from, for example, getting a high rate of interest. The plaintiff in this case ran a hire-purchase finance company and it entered, in addition to *bona fide* hire-purchase transactions, certain "stocking transactions" in which loans were made by the plaintiff to the defendants, some purporting to be on the security of specified motor vehicles, others mentioning no vehicle at all. However, it transpired that the documents (which were *ex facie* unregistered bills of sale) were entirely fictitious; they recorded purchase prices in respect of specified motor cars, initial payments and storage charges which never existed. An issue arose as to whether the plaintiff was not a moneylender because of s 6(*d*) of the Moneylenders Act 1900 (63 & 64 Vict, c 51) (UK) ("UK Act 1900"), which reads:

> **6**. The expression "moneylender" … shall include every person whose business is that of moneylending, … but shall not include —
>
> …
>
> (*d*) any person bona fide carrying on the business of banking or insurance or **bona fide carrying on any business not having for its primary object the lending of money, in the course of which and for the purposes whereof he lends money**;
>
> [emphasis added]

The English Court of Appeal held that the loans were not made "in the course of" the hire-purchase

business as they were not linked with any hire-purchase transaction at all. The loans were also not made "for the purposes of" the business because they were made to promote the success of the hire-purchase business but for the simple purpose of earning a high rate of interest from customers who were prepared to pay it.

84 The second is a decision of the Privy Council (on appeal from the Court of Appeal of the Colony of Singapore), *Official Assignee of the Property of Koh Hor Khoon and others, bankrupts v Ek Liong Hin Ltd* [1960] 1 AC 178. The respondent there, a Singapore-incorporated company, carried on as their primary business that of rubber merchants and shippers. They made loans to selected customers on the security of goods stored in godowns which they managed; these loans were found to have been made to retain their existing customers and to gain fresh ones. The court, applying these facts to s 2(*d*) of the Moneylending Ordinance (Cap 193, 1955 Rev Ed) (which is *in pari materia* with s 6(*d*) of the UK Act 1900), held that the moneylending transactions were undertaken in the course of and for the purpose of the business.

85 The evidence before me establishes that the plaintiff did not lend money in the course of and for the purpose of a business which did not have for its primary object the lending of money. If a loan was extended, it was extended in the plaintiff's personal capacity. The plaintiff did not issue a cheque in the name of his company, and the $240,000 which was advanced to the defendant on 24 April 2008 came from the plaintiff's personal fixed deposit investments which he terminated. In any case, the loan had nothing to do with the plaintiff's business at all. Accordingly, on the assumption that the April 2008 Option was a loan at interest, the s 3 presumption would have been raised.

Whether the plaintiff carried on a business of moneylending

86 On the assumption that the s 3 presumption has been raised, the next issue is whether the plaintiff carried on a business of moneylending.

87 Belinda Ang Saw Ean J's judgment in *Mak Chik Lun v Loh Kim Her* [2003] 4 SLR(R) 338 ("*Mak Chik Lun*") is instructive on what it means to carry on a business of moneylending:

> 11 … The local test of whether there is a business of moneylending is whether there was a system and continuity in the transactions. If no system or continuity is displayed, the alternative test … of whether the alleged moneylender is one who is ready and willing to lend to all and sundry provided that they are from his point of view eligible is used. …

88 I generally agree with the plaintiff's submissions that neither of the tests set out in *Mak Chik Lun* are satisfied in this case. First, there was no system and continuity in the transactions. The plaintiff did not hold himself out as carrying on the business of moneylending or, more generally, being willing to lend money. Second, the plaintiff has been in the software development business for over 20 years. The defendant did not seriously dispute the fact that the plaintiff had a full-time business not connected with moneylending. Third, the only known person with whom the plaintiff had any moneylending transactions in his personal capacity was the defendant. There is no evidence to suggest that he lent money on any other occasion.

89 The defendant takes issue with certain payment schedules the plaintiff produced. He says that the fact that these schedules referred to "Loan Amount" and "Loan Period" is evidence that the plaintiff was a moneylender with a systematic method of keeping track of payments due to him. The plaintiff offered a perfectly plausible explanation: these payment schedules were generated by software that he had developed to help property agents calculate housing loans; the heading of these payment schedules reads "Hiwire Data & Security Pte Ltd", the name of the plaintiff's company.

90 I also agree with the plaintiff's submission that there was no evidence that he was willing to lend to all and sundry. First, the plaintiff did not hold himself out as being willing to lend money. It was the defendant who approached the plaintiff. Second, the plaintiff entered into the transaction on 24 April 2008 only because, among other things, he had known the defendant for about nine months and regarded the defendant as a neighbour and a good enough friend. Third, even the defendant says that the plaintiff allegedly turned down a request for a second loan. The defendant's position that the plaintiff had mentioned, after the transaction on 24 April 2008, that he could give other loans was never put to the plaintiff.

91 The defendant harps on the fact that a single transaction with a single person can amount to moneylending and the fact that the Act targets not just loansharking. He relies on the judgment of Lai Siu Chiu JC in *Bhagwandas Naraindas v Brooks Exim Pte Ltd* [1994] 1 SLR(R) 932 at [51], in which the Judge observed that the test of system or continuity does not rule out the possibility that one solitary transaction can, if the facts so justify, amount to a moneylending transaction. No doubt the defendant is correct as a matter of principle. However, that is merely the logical conclusion of the proposition that a business of moneylending may be proved either by system or continuity in the transactions or, failing that, by the fact that the alleged moneylender was willing to lend to all and sundry provided they were from his point of view eligible.

92 I am satisfied that in this case neither test was satisfied and therefore hold that the plaintiff did not carry on the business of moneylending. Accordingly, the Agreements between the plaintiff and the defendant would not, in any case, have been unenforceable by reason of illegality.

Issue 4: Whether the October 2010 Agreement was void for uncertainty

93 The defendant makes a very brief claim that "the various factual distortions on the face of the document itself" makes the October 2010 Agreement void for uncertainty. This argument is a non-starter. What must be certain in a contract are its terms and not recitals of facts (see, *eg*, *Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 at [50]). The terms of the October 2010 Agreement are clear. The only term that could be relevant to this issue is the stipulation that the plaintiff could lodge a caveat over either Unit 08 TC or Unit 18 TC if the defendant did not complete the purchase of the KG Avenue Unit. The plaintiff may not be able to do so as a matter of law as he has no proprietary interest in either Unit 08 TC or Unit 18 TC, but that is merely a secondary obligation, rather than the main object of the agreement. The legal impossibility of fulfilling this obligation cannot render the October 2010 Agreement void for uncertainty.

Conclusion on the issues relating to liability

94 For the reasons given above, I hold that the October 2010 Agreement is valid and enforceable and that the defendant is in breach of contract since he has not transferred a 46.5% interest in the KG Avenue Unit to the plaintiff.

Remedies

95 The plaintiff seeks the following main substantive reliefs:

(a) specific performance of the October 2010 Agreement;

(b) further or in the alternative, that:

(i) the KG Avenue Unit be sold and 46.5% of the gross sale proceeds, less the plaintiff's

proportionate share of the costs of the sale, be paid to the plaintiff upon completion;

(ii) that the defendant be responsible for discharging the mortgage over the KG Avenue Unit, including all costs relating to the discharge of the mortgage; and

(iii) that if the defendant's share of the net sale proceeds is insufficient to pay the plaintiff, the balance or shortfall shall become a debt payable by the defendant to the plaintiff forthwith;

(c) damages for breach of the October 2010 Agreement and/or an account of profit for use of the KG Avenue Unit by the defendant to the plaintiff in respect of a 46.5% share in the KG Avenue Unit for the period of 1 December 2011 "to date".

Issue 1A: Whether specific performance of the October 2010 Agreement should be ordered

96 The parties did not include arguments on remedies in their first set of closing submissions. Subsequently, after a request from me, they each filed further submissions addressing the point. The defendant contends vigorously that if he is to be found liable, specific performance should not be ordered on the basis that the plaintiff has come to court with unclean hands, that the plaintiff was guilty of delay, that he elected to receive damages in lieu of specific performance, and that the October 2010 Agreement provides an alternative to specific performance. In his submissions, the plaintiff admits quite candidly that there are circumstances which would weigh against specific performance even though he is pursuing and willing to accept it should he succeed on the question of liability. He also recognises that this remedy is at the discretion of the court and damages may be awarded instead if in all the circumstances that is the just and equitable course.

97 Specific performance is a discretionary remedy and the court will order it only if it is just and equitable to do so. The court considers various factors, the foremost of which is whether damages are adequate (*Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR(R) 537 at [52]–[53]).

Adequacy of damages

The law

98 Traditionally, damages have been regarded as an inadequate remedy for a breach of a contract for the sale of land. This is generally premised on the uniqueness of land. The traditional position, however, seems to have been diluted in recent years and it is now recognised that in some situations damages would not only be adequate but the correct remedy.

99 The first signs of dilution appeared in the case of *Good Property Land Development Pte Ltd v Société Générale* [1989] 1 SLR(R) 97 ("*Good Property*"). The plaintiff there had mortgaged its hotel to the defendant as security for a facility granted to it by the defendant. Unfortunately, the plaintiff fell into arrears; this triggered the defendant's power of sale. The plaintiff then applied for an interim injunction to restrain the defendant from completing a mortgagee sale of the hotel to a third party ("HPL") on the basis that the hotel was being sold at an undervalue in bad faith. Chan Sek Keong J expressed the view, albeit *obiter*, at [26] that:

> 26 … **In circumstances where the main object of owning land is not the personal enjoyment thereof but the profit derivable therefrom, it would be unrealistic to believe that damages would not be an adequate remedy to the owner for the loss of the mortgaged property.** I am aware that there is high authority to the contrary: see in *Pianta v*

National Finance of Trustees Ltd (1964) 38 ALJR 232 where Barwick CJ said, at 233:

> But in my opinion this proposition is without foundation in law, even if the respondent had had no other business than that of subdividing and selling land and had made a decision to subdivide and sell the subject land.

but see the Canadian authorities referred to in *Sharpe on Injunctions and Specific Performance* (1983) para 617.

[emphasis added]

100 These pronouncements found favour with Lee Seiu Kin JC in *Cathay Theatres Pte Ltd v LKM Investment Holdings Pte Ltd* [1999] SGHC 171 who approved them but did not find them applicable to the facts of the case before him.

101 The most recent development is found in *E C Investment*. There, Quentin Loh J at first instance refused specific performance. In Loh J's view, the hallmark of specific performance, as an equitable remedy, was *discretion*. The court would have to look at all the facts and circumstances, including, importantly, the nature and function of the property in relation to the purchaser. After a survey of authorities from Australia, New Zealand and Canada, he stated that specific performance was not available as a matter of course for a purchaser of land where the land was bought for investment or financial gain. The judgment of Sopinka J in *Semelhago v Paramadevan* [1996] 2 SCR 415, a decision of the Supreme Court of Canada (part of which was cited by Loh J), is worth reproducing here:

> 20 … While at one time the common law regarded every piece of real estate to be unique, with the progress of modern real estate development this is no longer the case. Both residential, business and industrial properties are mass produced much in the same way as other consumer products. If a deal falls through for one property, another is frequently, though not always, readily available.
>
> …
>
> 22 Courts have tended, however, to simply treat all real estate as being unique and to decree specific performance unless there is some other reason for refusing equitable relief. … Some courts, however, have begun to question the assumption that damage will afford an inadequate remedy for breach of contract for the purchase of land. … In *Chaulk v Fairview Construction Ltd* (1977) 14 Nfld. & P.E.I.R 13, the Newfoundland Court of Appeal (*per* Gushue J.A.) … stated, at p 21:
>
> > The question here is, whether damages would have afforded Chaulk an adequate remedy, and I have no doubt that they could, and would, have. There was nothing whatever unique or irreplaceable about the houses and lots bargained for. They were merely subdivision lots with houses, all of the same general design, built on them, which the respondent was purchasing for investment or re-sale purposes only. He had sold the first two almost immediately at a profit, and intended to do the same with the remainder. It would be quite different if we were dealing with a house or houses which were of a particular architectural design, or were situated in a particularly desirable location, but this was certainly not the case.

Specific performance should, therefore, not be granted as a matter of course absent evidence

that the property is unique to the extent that its substitute would not be readily available. …

102 Thus, Loh J eventually held:

> 106 I am of the view that the law in Singapore should follow the New Zealand and Canadian cases and has found expression, albeit *obiter*, in the *Good Property Land Development* … and *Cathay Theatres Pte Ltd v LKM Investment Holdings Pte Ltd* … cases referred to above. Just because the contract involves the purchase of land, specific performance does not follow as a matter of right. The court needs to look at all the facts and circumstances. As [Robert J Sharpe, *Injunctions and Specific Performance* (Canada Law Book, Looseleaf Ed, December 2009 release)] correctly puts it, land in the hands of a speculator, is a fungible good. If all that matters is the profit that the purchaser can make upon a resale, then damages must be an adequate remedy. This is so even if the object is unique, be it a piece of land, a piece of art or shares in a private limited company. The traditional bases of personal enjoyment and that no two pieces of land are identical, do not necessarily hold true for all purchasers and in all cases. I do not think the court should only look at whether the object of the purchase is unique or only at the reason for the purchase. **The court should look at all the facts and circumstances of the case, including importantly, the nature and function of the property in relation to the purchaser in question. In so far as English and Australian law confer** (subject of course to equitable defences) **specific performance as a matter of right in a contract for the purchase of land or real property, they should not, with respect, be followed in Singapore.** [emphasis added]

On the facts, Loh J found that the plaintiff, ECI, was a property developer and, as such, did not purchase the property for personal enjoyment; the property was simply another acquisition at an attractive price. The fact that ECI was prepared *not* to proceed with completion if the compensation offered to it was right made it unrealistic to think that damages would not be an adequate remedy (*E C Investment (HC)* at [108]). The second ground given by Loh J (which overlapped with the first) was that damages were an adequate remedy in this case. The fourth ground, which also seems to be related to the first two grounds, was that ECI was prepared not to complete the purchase (*E C Investment (HC)* at [115]). After the defendant failed to exercise its cancellation right under the option, ECI had entered into two settlement agreements, one after the other. Under each settlement agreement, the plaintiff would allow the defendant to find another buyer for the property and refrain from completing the purchase if a sum of money was given by a certain date.

103 On appeal, Chao Hick Tin JA (delivering the judgment of the Court of Appeal) reiterated at [103] that specific performance was an equitable and discretionary remedy and the court had to, in any event, consider all the circumstances to ensure that it was just and equitable to grant the relief sought. He further stated that it was unnecessary on the facts to rely on the restrictive approach to specific performance in Canada and New Zealand to uphold Loh J's decision.

104 Post-*E C Investment*, the status of the more restrictive approach in Canada and New Zealand in Singapore is not entirely clear. The Court of Appeal certainly did not rule out the possibility that Singapore law may follow the jurisprudence of Canada and New Zealand and it was careful not to express a positive view either way on the preference shown by Chan J, Lee JC and Loh J for the Canadian and New Zealand approach. From academic analysis of Canadian decisions (see Robert J Sharpe, *Injunctions and Specific Performance* (Canada Law Book, Looseleaf Ed, November 2014 release)), it appears that the Canadian authorities view uniqueness as a matter of degree. Even where the purchaser's interest is purely commercial, an inquiry is undertaken as to whether the uniqueness of a property makes an assessment of its income-producing qualities difficult. In my view, in modern conditions of huge high-rise developments accompanied by a substantial market for the acquisition of investment property, this is a more sensible and nuanced approach than the

unquestioning assumption underlying the traditional English and Australian approach that land is unique such that damages will almost invariably be an inadequate remedy.

The facts

105 The equities in favour of the defendant in this case are not as pronounced as those in *E C Investment*. However, there is enough evidence to suggest that damages are adequate to compensate the plaintiff here and that, accordingly, specific performance should not be ordered whether or not the restrictive approach in Canada and New Zealand is applied.

106 The plaintiff notes that one of the considerations to be taken account of is whether the order for specific performance can reasonably be enforced. He cited *Coastland Properties Pte Ltd v Lim Geok Choo* [1993] 3 SLR(R) 890 where the court refused to specifically enforce a contract of sale in which the property was subject to a mortgage and although the sale price was lower than mortgage amount neither the buyer nor the seller wanted to pay the shortfall. The court took the view that forcing completion of the sale in these circumstances would likely prejudice the mortgagee.

107 The plaintiff also acknowledges that his interest in the unit is primarily monetary in the form of an investment and from that perspective damages should be an adequate remedy. Altogether the plaintiff agrees that in the circumstances of this case damages in lieu of specific performance may be the more equitable and practical remedy.

108 There are other points which indicate that in this case the traditional remedy may be departed from. The KG Avenue Unit is not a particularly unique piece of property. It is one unit in a strata title development comprising many units. There are 30 units on the same floor and in the same block, ten of which have an identical or mirror-image layout *and* are located along the same corridor. Further, it is not as if the plaintiff went out looking for an investment property and selected the KG Unit because it met his investment criteria – rather he became involved because the defendant asked him to take an interest in it to replace part of the defendant's debt. More important than the features of the unit was the defendant's ability to acquire it at a good price thus giving the plaintiff value.

109 The plaintiff also has the means to prove the market value of the KG Avenue Unit with reasonable accuracy. He prepared a chart which shows the average price per square foot at which private properties in District 8 (like the KG Avenue Unit) have been transacted. He is also aware of the factors which shift the value of units like the KG Avenue Unit away from that average value. While it could be argued that each unit in a block of flats is unique because there would be differences between them even if only in the number of flights of steps one has to take to reach them, such minute differences between units should not be exaggerated. The difference in the view between two parcels of land should not be regarded as the same as differences in "locality, character, vicinage, soil, easements" or "the same precise conveniences and accommodations" between two parcels of land (A E Randall, *Story's Commentaries on Equity Jurisprudence* (London: Sweet & Maxwell, 3rd Ed, 1920) at p 314). The plaintiff has indeed conceded that he places no subjective importance on the KG Avenue Unit at all.

110 Thirdly, as the defendant submits, the plaintiff has shown that he was, at some point in time, prepared to accept monetary compensation if it was right. Between 6 March 2013 and 7 May 2013 (when he commenced this action), the plaintiff seemed to be prepared to accept the payment of $200,000 as shown by his letters to the defendant dated 6 March 2013 and 29 March 2013.

111 I think too, that the plaintiff has acted correctly in accepting that an order of specific performance would be likely to cause a little hardship to the defendant and NC Tan.

Prejudice to third parties

112 The plaintiff also concedes that it would be impractical and difficult to expect the plaintiff and the defendant to be able to co-operate fully and/or agree on management and investment decisions with regards to the KG Avenue Unit as co-owners given their current relationship. Secondly, NC Tan is also a co-owner and, according to the defendant, he was not in favour of the defendant transferring a 46.5% interest in the unit to the plaintiff. Ordering specific performance would, therefore, force three hostile parties to work together and this would likely end up in stalemate and further resort to the court to solve disagreements amongst them. This is therefore another important factor in favour of not granting specific performance.

113 In the circumstances, there is no pressing need to address the defendant's arguments but I will do so briefly for completeness.

Clean hands

114 The defendant asserts that the plaintiff has come to court with unclean hands as his conduct shows that he was a "shrewd calculative individual seeking to take unconscionable advantage of" the defendant. In particular, he highlights the fact that the initial loan was for $240,000 only and that the plaintiff refused to accept the cheque tendered by the defendant for the balance of the principal sum. However, I cannot see any merit in this submission. I have rejected the defendant's description of the plaintiff. Indeed, between the two men, the defendant was the more calculating while the plaintiff, to a large extent, was accommodating to the defendant's requests and frequent changes of position.

115 Even if the defendant has in mind the fact that the 46.5% share in the KG Avenue Unit would be transferred at a notional undervalue, I do not find that the plaintiff has come to court with unclean hands. The third of five grounds given by Loh J for refusing specific performance in *E C Investment (HC)* is relevant here. He stated that the plaintiff there had come to court with unclean hands (*E C Investment (HC)* at [114]) for three reasons. The first reason was that the plaintiff's conduct related to the equity sued for in the sense that the plaintiff was asking to purchase the property at an undervalue (the purchase price stated on the option had no relation to the then market value as the defendant's sole shareholder-director thought that he could exercise the cancellation right therein). However, this was firmly rejected on appeal (*E C Investment* at [96]). The Court of Appeal stated:

> 96 We have … explained why we do not share the Judge's view that Ridout did not intend to grant to ECI (via the First Option) a genuine option (although cancellable by Ridout within the 60-Day Period) to purchase the Property. For the same reasons, Ridout must be taken to have agreed to sell the Property to ECI at the price of $20m. **It is not for the court to review**, ***ex post facto*** **, the reasonableness of a transaction freely concluded between (what are essentially) two commercial entities. The court should not substitute its views on commercial wisdom for those of the contracting parties, especially in a case like the present where both parties** (*viz*, Anwar acting via Ridout, and KC Tan and Poh acting via ECI) **are men of business**. It must be borne in mind that the property market at the material time was very much affected by the unprecedented global financial collapse. The real effects of that financial collapse on the Singapore property market were not something which any person could reasonably predict at that time. **We should not use the benefit of hindsight to determine the wisdom of the Transaction.** Perhaps because of the then uncertainty in the property market, ECI acted cautiously (by offering a low price for the Property); or, alternatively, knowing of Anwar's financial desperation, ECI tried to "squeeze" him, which was what the Judge thought was the case (see [30] of the Judgment). **Whatever might have been the case, ECI's conduct in**

> **driving down the purchase price of the Property as much as it could was neither legally improper nor unconscionable. Thus, on the question of the low purchase price of the Property alone, there is, in our view, nothing "unclean" on that account in ECI seeking to enforce the Sale Agreement. We would reiterate that both parties were represented in the Transaction by solicitors.** [emphasis added]

In this case, both parties were financially sophisticated enough to appreciate the transaction into which they were entering, including the fact that the price of Unit 08 TC as stated in the April 2008 Option bore little relation to its then market value. In fact, it should be noted that the defendant here, much like the defendant's sole shareholder-director in *E C Investment*, was very confident that he could exercise his cancellation right and that it was the defendant who, at the last minute, raised the purchase price from $240,000 to $300,000. In my view, the fact that this transaction was entered into between two parties in their personal capacities and that the parties did not obtain formal legal advice is also not a good enough reason for the court to substitute its views on the transaction for that of the parties'. The quantum involved in this transaction was small enough for parties not to seek any additional and specific legal advice. Accordingly, the "clean hands" factor is in my view a neutral one.

Delay and/or laches

116 The defendant argues that specific performance should also be refused on the ground of laches on the basis that the plaintiff has come to court long after the October 2010 Agreement had been entered into. This argument is obviously wrong as a matter of law. The relevant time is not when a contract was entered into but when the plaintiff should have been reasonably aware of the facts constituting the breach of contract. In this case, it should have been 1 January 2012 when the defendant repudiated the October 2010 Agreement and, in any event, it must have been *after* 8 November 2011, the date on which the resale of the KG Avenue Unit to the defendant was completed. The defendant's reliance on *Toh Tiong Huat v P M Gunasaykaran (personal representative of the estate of Mayandi s/o Sinnathevar, deceased) and another* [1995] 3 SLR(R) 627 does not help him since the facts were different. There, Lai Siu Chiu J refused specific performance on the ground of an unexplained 18-month delay during which the plaintiff did nothing. Conversely, the time between repudiation and the institution of legal proceedings in the present case was not only shorter but also saw a number of demands made by the plaintiff (or his solicitors) on the defendant.

Whether the October 2010 Agreement provides for damages

117 The defendant also argues that the October 2010 Agreement provides that "In case of any failure to complete the [KG Avenue Unit], the outstanding amount of $200,000 owned by LNS to LBC can be used to caveat" either Unit 08 TC or Unit 18 TC and, therefore, it could not be construed that the parties intended the plaintiff to have a right of specific performance. This argument cannot work for two main reasons. First, I interpret the "failure to complete" to mean the failure to complete the sale from the defendant's ex-tenant to him (and not the transfer of a 46.5% share to the plaintiff). This is reinforced by the fact that the parties intended the plaintiff to lodge a caveat against either Unit 08 TC or Unit 18 TC but not the KG Avenue Unit should completion not take place. In my view, the parties contemplated that if there was a "failure to complete", the defendant would not have had an interest in the KG Avenue Unit as the proprietor. This part of the contract did not provide the defendant with alternative modes of performance; it was a condition precedent to the defendant's obligation to transfer a 46.5% share in the KG Avenue Unit to the plaintiff which was, in the event, fulfilled. Second, the court's discretion to grant specific performance cannot be fettered by any contractual agreement to the contrary (*Tay Ah Poon v Chionh Hai Guan* [1997] 1 SLR(R) 596 at [17] *per* M Karthigesu JA).

Election

118 Finally, the defendant argues that the plaintiff is accordingly precluded from claiming specific performance after having elected to claim the return of $200,000 in his e-mails dated 6 March 2013 and 29 March 2013. In my view, these e-mails are not to be viewed as elections. Although the plaintiff demanded the return of $200,000, his e-mail dated 6 March 2013 showed his intention to sue "for failure to honour the agreement as well as for the return of the amount $200,000 plus losses". This court action was referred to in the 29 March 2013 e-mail again. To my mind, the plaintiff was at the end of his tether and prepared to settle the matter if the defendant quickly returned the $200,000. The letter which had been sent by his solicitors earlier did in fact demand specific performance of the October 2010 Agreement. This situation is quite different from one where an innocent party makes an unequivocal election to accept a repudiation and sue for damages.

Conclusion on whether specific performance should be granted

119 On the basis that damages are an adequate remedy and that an order of specific performance would lead to a stalemate between three hostile parties, I order damages in lieu of specific performance.

Issue 1B: If damages in lieu of specific performance are ordered, what should be the date at which the KG Avenue Unit is valued

120 The plaintiff submits that the damages should be assessed as at the date of judgment. He relies on the opinion of Megarry J in *Wroth v Tyler* [1974] 2 WLR 405 at 430 that damages to be awarded in lieu of specific performance should be assessed at the date of judgment to reflect the fact that specific performance is a continuing remedy.

121 Although the general rule is that damages are assessed as at the time of breach, this is not an inflexible rule. Thus, it was stated by Lord Wilberforce in *Johnson v Agnew* [1980] AC 367 at 400 that if to follow it would give rise to injustice, the court has the power to fix such other date as may be appropriate in the circumstances. His Lordship further observed:

> **In cases where a breach of a contract for sale has occurred, and the innocent party reasonably continues to try to have the contract completed, it would to me appear more logical and just** rather than to tie him to the date of the original breach, **to assess damages as at the date when** (otherwise than by his default) **the contract is lost.** … [emphasis added]

122 This passage was cited with approval by the Court of Appeal in *Tay Joo Sing v Ku Yu Sang* [1994] 1 SLR(R) 765. At [37], M Karthigesu JA observed that the key issue was whether the innocent party "ought to have mitigated his loss in the circumstances." It would be fair to say that an innocent buyer in a contract for the sale of land, being *generally* entitled to specific performance, is not expected to mitigate his loss if he is pursuing specific performance. Put another way, the reasoning that damages should be assessed as at the date of breach because the innocent purchaser can purchase a replacement from the market on the date of the breach does not hold true for contracts for the sale of unique goods where specific performance is a possible (and, in fact, desired) remedy. Thus, where damages are awarded in lieu of specific performance, the principle that damages should be assessed as at the date of the breach do not normally apply; a buyer's entitlement to such damages should be assessed from the date that specific performance is no longer available.

123 In *Ho Kian Siang v Ong Cheng Hoo* [2000] 2 SLR(R) 480 ("*Ho Kian Siang*"), a case cited by the plaintiff in support of his position, the sellers failed to complete the sale of a property. On the first

day of trial, the parties entered into a settlement agreement under which the buyers abandoned their claim for specific performance and prayed for damages instead. The sole issue faced by the court was that of quantum. Lee JC thought that assessing damages as at the date of the breach would place an innocent buyer in an invidious position. He explained:

> 30 Mr Sreenivasan's first submission is that damages should be assessed as of the date of breach which in the present case is the contractual date of completion, *viz* 29 June 1999. He cited several authorities in support of this proposition, to which I will turn later. But it seems to me that apart from authority, **if this be the law, then the right given to the innocent party to seek specific performance would be worthless. If the innocent party were required to mitigate his damages from the time of breach he would in effect be confined to seeking his remedy in damages.** I shall illustrate this with the following example. X enters into a contract to purchase a property from Y. On the date of contract, X had taken the view that the property will rise in value. Y fails to complete on the contractual completion date. X decides to sue for specific performance. In a situation where damages, if awarded in lieu of specific performance, are assessed at the time of breach then X, having taken the view that the market is on the rise, would have to go into the market and purchase an equivalent property. But should X succeed in obtaining an order for specific performance and Y then completes the transaction, X would be saddled with 2 properties. This is all very well if the market has moved up. But if it moved down instead, it would have doubled his losses in a situation where he had bargained for only half the exposure. The other reason why the right would be futile is a practical one. X would have paid to Y a deposit of about 10% of the purchase price. If X seeks an order for specific performance, he is not entitled to ask for the refund of this deposit. Without that money he is not likely to be able to purchase another property to mitigate his damages. [emphasis added]

On the facts, Lee JC held that the date of assessment of damages was the date on which the buyers lost their right to specific performance, *ie*, the date on which they elected for damages.

124 In the present case, assessing damages based on the current value of the KG Avenue Unit would best reflect the plaintiff's true loss. Assessing the value of the KG Avenue Unit based on its historical value would, while protecting the plaintiff against any subsequent decrease in the value of the KG Avenue Unit, also deny him the benefit of any subsequent appreciation in the value of the KG Avenue Unit. In fact, it was precisely because of the appreciation in the value of the KG Avenue Unit that the plaintiff was so insistent on having the contract specifically performed. I see no good reason why damages should be assessed as at the date of the breach instead. I have already stated my view that the defendant cannot argue that the plaintiff has brought this action late. It is quite clear from the correspondence that the plaintiff has given the defendant many chances to honour his promise. I have also stated my view that the plaintiff's e-mails of 6 March 2013 and 29 March 2013 did not amount to an election to accept the repudiation. The defendant's argument that the plaintiff did not contribute directly to the purchase of the KG Avenue Unit is hardly relevant. In the circumstances, I am of the view that damages in lieu of assessment should be assessed as at the date of judgment.

Issue 2: Whether damages or account of profits for the loss of use of the KG Avenue Unit should be awarded

125 The plaintiff has also claimed damages for the loss of use of the KG Avenue Unit. By reason of the defendant's breach, the plaintiff did not enjoy the rental income which he would otherwise have enjoyed. The unit has been an income-earning unit since purchase and since the plaintiff should have been a co-owner he is entitled to an equivalent share of the net income of the unit. The quantum should be 46.5% of the net profits from the uses to which the KG Avenue Unit has been put. In the

absence of evidence to the contrary, the tenants-in-common of the KG Avenue Unit must be presumed to have intended to share the profits in the proportions of their respective shares in the KG Avenue Unit.

126 The plaintiff has claimed damages from 1 December 2011 onwards even though the defendant's repurchase of the KG Avenue Unit was completed on 8 November 2011.The defendant has not given any evidence to contradict the assumption that rental income accrued from 1 December 2011. That, however, is a matter that can be dealt with on assessment. On assessment, any money which the defendant paid the plaintiff after the sum of $79,352 had been settled and in purported settlement of part of the remaining $200,000 can be deducted from the plaintiff's profit share and other damages. Secondly, the plaintiff, in his statement of claim, claims damages in respect of the loss of use of the KG Avenue Unit from 1 December 2011 "to date". This should be read as the date of judgment.

Issue 3: Whether a sale of the KG Avenue Unit should be ordered

127 Since I am awarding the plaintiff damages in lieu of specific performance, an order for the sale of the KG Avenue Unit would not be appropriate; the plaintiff has no proprietary interest in it. A second reason is that a sale of the KG Avenue Unit will prejudice the rights of NC Tan, who holds a 3% stake in the KG Avenue Unit.

Conclusion

128 For the reasons given above there will be judgment for the plaintiff for damages to be assessed (in accordance with the guidelines above), interest from the date of judgment and/or assessment (as decided at the assessment) and costs.