Premier Properties Pte Ltd v Tan Soo Tiong and Others
[2000] SGHC 12

Case Number	: OS 789/1999
Decision Date	: 19 January 2000
Tribunal/Court	: High Court
Coram	: Lee Seiu Kin JC
Counsel Name(s)	: Andre Maniam and Lawrence Tan for the plaintiffs; Thio Shen Yi and Earnest Lau for the defendants
Parties	: Premier Properties Pte Ltd — Tan Soo Tiong; Chua Chay Lee; Loei Tiak bin; Eunice Chee Ai Lien; Phoebe Fong

JUDGMENT:

GROUNDS OF DECISION

Background

1. The Plaintiffs are property developers. The five Defendants were owners of various units in two blocks of 24 apartments located along St Martin's Drive. This matter arose in connection with an agreement ("the Agreement") for en-bloc sale of the 24 apartments. The Plaintiffs had procured a banker's guarantee for each of the Defendants in November 1996. On 12 May 1999, the Defendants made demands under these guarantees for the sum of $2,762,603.84 each. In this summons the Plaintiffs sought a declaration that those demands were wrongful and invalid. The Defendants also counterclaimed for various declarations. After hearing counsel for the parties on 11 October 1999, I made the following declarations and orders:

> (i) the demands dated 12 May 1999 by the Defendants collectively for the sum of $2,762,603.84 each on the performance guarantees dated 29 November 1996 issued by the Hongkong and Shanghai Banking Corporation Ltd are wrongful and invalid;
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> (ii) the Plaintiffs have committed a breach of the Agreement dated 22 March 1996 in being unable to deliver vacant possession of the New Flats to the Defendants by the due date under Clause 5.4 of the Agreement;
>
> (iii) the Defendants are not entitled to terminate the Agreement dated 22 March 1996;
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> (iv) the liquidated damages payable by the Plaintiffs under clause 5.4 of the Agreement dated 22 March 1996 are payable monthly in arrears from 29 August 1999;
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> (v) the Defendants have liberty to apply, within two months, concerning the removal from the Court file of the 2nd affidavit of Khoo Choo Inn; and
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> (vi) the Defendants pay costs to the Plaintiffs to be taxed if not agreed.

The Defendants have appealed against my decision and I now give my grounds.

2. The Agreement was made on 22 March 1996 between the Plaintiffs and the owners of the 24

apartments collectively. Under it there were two types of vendors. The first were those who sold their apartments for a cash consideration, called Cash Vendors. The second, called Exchange Vendors, were those who elected to exchange their apartments for new ones (the "New Flats") after the Plaintiffs had completed construction of the new development. Originally there were six Exchange Vendors, but in November 1996 one of them elected to accept cash pursuant to a provision in the Agreement. The Defendants are the remaining five Exchange Vendors. Under the Agreement, all Cash Vendors received $2.4 million, 10% at the date of signing, subject to encumbrances, and the balance upon completion. As for the Exchange Vendors, they would each receive a banker's guarantee in the sum of $2,805,000 as security for the performance by the Plaintiffs of their obligations under clause 5. This is set out in clause 7.2 of the Agreement as follows:

> "7.2 In relation to the Exchange Vendors, on the Completion Date the Purchasers shall furnish … a banker's guarantee for each Exchange [Vendor] in the sum of $2,805,000.00 by way of a performance bond in a form reasonably acceptable to the Exchange Vendors in respect of its obligations under clause 5 hereof. …"

3. Clause 5 provides as follows:

> "5.1 In relation to the Exchange Vendors, the Purchaser shall at its own cost and expense construct a residential development consisting wholly of freehold flats on the Land (herein called "the Development") with not less than 6 New Flats ("requisite number of New Flats") to be allotted to the Exchange Vendors at no cost. The total number of units in the Development shall not exceed 40 and shall be at least 24. The Purchaser may include any adjoining land as part of the Development,, and if it is so included, then the total number of units may be more than 40 provided the number of units on the land is not more than 40. There shall be at least 24 units in the Development of not less than the Agreed Area. If the total number of units in the Development is more than the requisite number of New Flats, all units of not less than the Agreed Agree shall be available to the Exchange Vendors for selection up to the requisite number of accordance with the Selection Procedure.
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> 5.2 Where an Exchange Vendor is desirous of acquiring a Developed Unit with a floor area of more than 1,650 sq ft, the Purchaser shall permit such Exchange Vendor to take such Developed Unit (which shall thereafter be regarded as a New Flat and selected in accordance with the Selection Procedure) upon payment of the differential cash consideration calculated as follows:
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> | | | |
> |---|---|---|
> | Area of Developed Unit as stated in the subsidiary strata certificate of title LESS 1,650 sq. ft. | X | ($1,454 or the price in Dollars per square foot initially to be offered to the public, whichever is lower) |
>
> (or if such strata area includes uncovered areas, then the price for the uncovered areas shall be reduced by 50%)
>
> 5.3 For constructing the Development the Purchaser shall appoint reputable architects with a good track record and use internal finishes comparable to the developments at University Park. The Purchaser hereby warrants that the specifications of the buildings in the Development will be comparable to the specifications in Schedule 3 hereto.

> 5.4 The Purchaser shall complete the New Flats so as to be fit for occupation and remove all surplus material, plant and rubbish from the New Flats and the Development and deliver vacant possession of the New Flats to the Exchange Vendors not later than thirty-three(33) months after the Completion Date (the Handing Over Date") failing which the Purchaser shall pay each Exchange Vendor liquidated damages at the rate of 10% per annum on the sum of $2,805,000.00 from the Handing Over Date until such completion, removal and delivery provided that the time for delivery of vacant possession under this Clause 5.4 shall be extended by the time of any delay in delivery of vacant possession under Clause 9.2.
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> 5.5 The Purchaser shall execute in favour of each Exchange Vendor a Transfer of the relevant New Flat and shall deliver to each Exchange Vendor the duplicate Subsidiary Strata Certificate of Title for the New Flat not later than sixty-six (66) months from the Completion Date.
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> 5.6 The Purchaser shall bear the stamp duty payable on the transfer(s) of the Land to the Purchaser but the relevant Exchange Vendor shall bear the stamp duty, if any, payable on the transfer of the New Flat to him.
>
> 5.7 For the avoidance of doubt, each Exchange Vendor shall be entitled to sell his New Flat and/or assign his rights under this Agreement provided that (a) there should be no more than 8 Exchange Vendors; and (b) at the time of such assignment the Purchaser has been granted a Developers Licence for the sale of the units in the Development and the assignment does not infringe the provisions of any law on the part of the Exchange Vendor or the Purchaser to be observed.

4. Clause 5.4 obliges the Plaintiffs to complete and deliver possession of the New Flats to the Defendants within 33 months of the Completion Date, called the Handing Over Date. Should the Plaintiffs fail to do so, it provides that they should pay the Defendants liquidated damages ("L.D.") at the rate of 10% per annum on the sum of $2.805 million for such delay. The parties agree that the Handing Over Date was 28 August 1999 and that the Plaintiffs had failed to deliver possession of the New Flats to the Defendants on that date. Indeed they have still not delivered possession although construction is underway. The Plaintiffs expect to be able to give possession of the New Flats to the Defendants by the end of August 2000. The Plaintiffs say that the reasons for this delay are as follows:

> (a) Difficulties in acquisition of surrounding plots of land for the development. Such acquisition was anticipated in clause 5.1 of the Agreement.
>
> (b) There were problems relating to the acquisition of an adjacent plot of land, Lot 452, on which a sub-station was located. Negotiations for this acquisition took almost a year to complete.
>
> (c) The economic downturn in 1997 and 1998 contributed to the delay. For example contracts with contractors and suppliers had to be renegotiated.

5. The second Defendant filed an affidavit on 28 June 1999 on behalf of all five Defendants. She said that they had faithfully performed all their obligations under the Agreement. Pursuant to clause 9.1, they had transferred their titles to the apartments to the Plaintiffs on 29 November 1996, which was the Completion Date. And in accordance with clause 9.2, they delivered vacant possession of the

apartments sometime in late February 1997. However the only events that took place from their point of view was a preview of the proposed development in January 1998 and the receipt of the preliminary layout on 13 February 1998. The Plaintiffs informed the Defendants then that they would have to attend a session to select the New Flats "*very soon*". However it was not until 22 April 1999 that they were served with a notice to attend the selection. The Defendants had prior to that inquired many times by telephone and personal visits to the Plaintiffs' offices as to the progress of the development. Each time they received assurances from the Plaintiffs' representatives that everything was in order. It was only when they received the Plaintiffs' solicitors' letter dated 3 May 1999 that they learnt that the Plaintiffs had obtained the various approvals on the following dates:

(a) Approval of name on 6 February 1998;

(b) URA Grant of Written Permission on 25 February 1998;

(c) Housing Developer's Licence on 3 March 1998;

(d) PWD Approval on 25 March 1999;

(e) BCA Approval on 12 April 1999; and

(f) Corrigendum on URA Approval on 20 April 1999.

The second Defendant noted that under clause 10.2 of the Agreement, the Plaintiffs were obliged to act expeditiously in obtaining items (a), (b), (c), (e) not later than 29 January 1998.

6. The second Defendant also complained that the Plaintiffs had not provided them with information about the delay and had misled them when they made inquiries at the time. In 1998 and early 1999, there were newspaper articles that reported that the Plaintiffs and their related companies were in financial difficulties and that the Plaintiffs intended to sell off the development. Some of the Defendants then began to make inquiries with the Plaintiffs through solicitors as well as informally with the staff of the project architect. They were informed by one of the latter's architectural draughtsmen that the project had been shelved and only reactivated in 1999. When some of the Defendants visited the site in 1998 they discovered that apart from the piling works which had been completed, no substantive works were being carried out. The site was overgrown with vegetation and appeared to be abandoned.

7. On 5 May 1999, the first and third Defendants attended a preview of the selection. They discovered that the date for Temporary Occupation Permit in the brochure given to them by the Plaintiffs was stated to be 31 December 2002. The Defendants say that an inspection of the site in June 1999 showed that the construction work had barely started. The Defendants concluded that it would be impossible for the New Flats to be constructed and handed over by 28 August 1999. Also they had lost confidence in the Plaintiffs' ability to complete the development. After the setting out the factors above and some further factors which I need not relate here, the second Defendant continued at paragraph 57 of her affidavit:

> "In the light of the foregoing, we instructed our solicitors to accept the Plaintiffs' repudiation of the Agreement and terminated the same on 11 May 1999."

8. The Defendants' solicitors' letter of 11 May 1999 to the Plaintiffs' solicitors appears to be written on behalf of the second Defendant because it makes mention of other Exchange Vendors. However in their earlier letter of 29 April 1999, the solicitors state that they act for the five Defendants. I have

therefore taken the position stated in the letter of 11 May 1999 to be that for all the Defendants. The last five paragraphs of this letter purport to terminate the Agreement. They state as follows:

> " … our clients have perused the Brochure and wish to express their shock and utter dismay that your clients' expected T.O.P. date for the St. Martin Residence is on 31 December 2002. This is contrary to your clients' expressed intention to honour … all the terms of the Agreement.
>
> As we have constantly reiterated in our previous letters, our clients had entered into the Agreement solely on the basis that their home would be exchanged for another at the same premises by 28 August 1999. The unreasonable delay of 3 years and 4 months constitutes a blatant breach of a fundamental condition of the Agreement. In fact, your clients' own performance guarantee is only valid up to 28 May 2002. Our clients' worst fears have been confirmed and it was for this very reason that our clients had persistently attempted to contact your clients through ourselves and their previous solicitors over the last two years to check on the progress status of the development in order to prevent and pre-empt any delays. Further, our clients feel that taking into account your clients' prior knowledge of this unreasonable delay, the reassurances contained in your letter dated 3 May 1999 that your clients would honour all their obligations in the Agreement are of no comfort whatsoever.
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> By reason of the foregoing, your clients have repudiated the Agreement. In light of your clients' repudiation of the Agreement, **TAKE NOTICE** that we hereby, for and on behalf of our clients, accept your clients' repudiation of the Agreement thereby terminating the same without prejudice to any of our clients' rights and remedies in law and/or equity against your clients for their breach.
>
> **TAKE FURTHER NOTICE**
>
> , that our clients intend to exercise their rights under Clause 5.4 and 7.2 of the Agreement to call on the respective Performance Bonds issued to them … for the full sum of S$2,805,000/-.
>
> All our clients' rights to claim against your clients for their repudiation of the Agreement are hereby expressly reserved."

9. It should be noted that on 12 May 1999 delivery of the New Flats was not due for another three months. The Defendants took the position that in view of the impossibility of delivery by that date and the fact that brochure had stated that the T.O.P. was expected to be in December 2002, as well as the actions of the Plaintiffs' representatives, the Plaintiffs had repudiated the Agreement which the Defendants purported to accept by way of their solicitors' letter of 11 May 1999. Immediately following this, on 12 May 1999, the Defendants' solicitors wrote to the bank to make demands under the guarantee for each of them. They each claimed the sum of $2,762,603.84 in damages comprised as follows:

"1. Price of the property as at the date of the Agreement (being the amount our client agreed to forgo in return for a 'New Flat')	- S$2,400,000/-
2. Interest at the rate of 6% per annum from 22 March 1996 (date of the Agreement) to 28 November 1996 on S$240,000/-	- S$9,902.47

3. Interest at the rate of 6% per annum from 29 November 1996 to 12 May 1999 on S$2,400,000/-	- S$352,701.37
Total	S$2,762,603.84"

10. On 21 May 1999 the Plaintiffs took out this Originating Summons to ask for a determination whether the demands under the guarantee were valid. They also applied for an interim injunction restraining the Defendants from receiving any payment under the guarantees until this Summons could be determined. I understand the Defendants have agreed to hold their hands in this matter until determination of the Summons. On 29 June 1999 the Defendants filed their Notice of Counterclaim.

Whether Plaintiffs repudiated the Agreement

11. The main issue that I have to determine is whether in the circumstances, the Plaintiffs have repudiated the Agreement thereby entitling the Defendants to terminate it. Counsel for the Defendants submitted that notwithstanding that there is provision in the Agreement for payment of L.D. for delay, it cannot apply to a situation where such delay is inordinately long. As a proposition, I think this argument is impeccable. Notwithstanding that there is no express provision for it, the parties could not have agreed that the Plaintiffs is entitled to delay completion of the development for as long as they wished. Conversely I do not see anything in the Agreement that grants the Defendants the right to treat the slightest delay as a repudiation entitling them to terminate it. Indeed the existence of clause 5.4, the L.D. provision, indicates clearly that the parties envisaged that there could be some delay on the part of the Plaintiffs and that clause sets out the remedy available to the Defendants. Therefore the question is whether in the circumstances, the actions of the Plaintiffs, or lack of it, may be treated by the Defendants as a repudiatory breach. This is not always an easy question to answer. As Devlin, J said in *Universal Cargo Carriers Corporation v Citati* [1957] 2 QB 401 at p.406, which concerned a delay on the part of the charterer of a ship to nominate a berth and provide cargo:

> "This case gives rise to a difficult question. How long is a ship obliged to remain on demurrage, and what are the rights of the owner if the charterer detains her too long? Translated into the terms of general contract law, the question is: Where time is not of the essence of the contract - in other words, when delay is only a breach of warranty - how long must the delay last before the aggrieved party is entitled to throw up the contract? The theoretical answer is not in doubt. The aggrieved party is relieved from his obligations when the delay becomes so long as to go to the root of the contract and amount to a repudiation of it. The difficulty lies in the application, for it is hard to say where fact ends and law begins. The best solution will be found, I think, by a judge who does not try to draw too many nice distinctions between fact and law, but who, having some familiarity both with the legal principle and with commercial matters and the extent to which delay affects maritime business, exercises them both in a common-sense way."

12. It is necessary therefore to examine all the circumstances surrounding the Agreement in order to arrive at the determination of this issue. In a subsequent affidavit filed on the Plaintiffs' behalf on 18 August 1999, they responded to the Defendants' allegations. The Plaintiffs pointed out that the development was to be carried out in two phases. The Defendants' New Flats were in the first phase. Accordingly, of the approvals covered under clause 10.2 (a) to (d), the Plaintiffs had obtained item (a) in time in respect of Phase I. Approvals in respect of items (b), (c) and (d) were obtained

between 6 February and 13 March 1998, which is between 2 and 7 weeks later than the 14-month period. The contractors for the project had stated that they would take 87 weeks to complete the project, viz. From 1 June 1999 to 30 June 2001. However this covered both Phases. The contractors were obliged to complete Phase I within 61 weeks, i.e. by late July 2000. The building contract had been awarded to the contractor in May 1999 on this basis and construction was underway. Accordingly the Plaintiffs advised the first Defendant by letter of 5 May 1999 that the delay would be about one year. The Plaintiffs say that the Defendants cannot rely on the expected T.O.P. date stated in the brochure used by them to market the development because such dates were usually conservatively stated.

13. The first argument of the Defendants is that the completion date in the Agreement refers to that of all phases and not just Phase I. This turns on a minute examination of clause 5.1 which I do not propose to discuss in any detail. While there is some ambiguity in the manner in which that provision is drafted, it is clear that the Agreement entitles the Plaintiffs to purchase additional surrounding land so as to increase the size of the development in order to enhance its value. And this would benefit the Defendants. It cannot be that the Plaintiffs would have bound themselves to the time limits set for land the subject of the Agreement in respect of land to be acquired in the future. To so bind them would also deter them from acquiring land if the opportunity did not come early enough and this would be to the detriment of the Defendants as well. Accordingly I see nothing in the Agreement preventing the Plaintiffs from acquiring more land at a later stage and completing the buildings on such land in a second phase of the project.

14. The Defendants say that even in relation to Phase I, the estimates given for its completion was overly optimistic as it would be impossible to complete even Phase I of the development. However the Defendants did not produce any expert evidence on this. On the other hand, the Plaintiffs have produced evidence that the building contract was awarded on this basis as well as the architects' letters in this regard. On my part I am unable to say that this estimate of the time required is clearly wrong. I therefore have to accept the Plaintiffs' evidence that the period is realistic.

15. In my view, the circumstances of this case do not justify the Defendants treating the Plaintiffs as having repudiated the contract. The factors that led me to this conclusion are as follows:

> (i) Clause 5.4 of the Agreement makes provision for delay in delivery of the New Flats. The Plaintiffs would be obliged to pay each Defendant L.D. at the rate of 10% per annum of the sum of $2.805 million. It is silent as to the extent of such delay.
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> (ii) The Cash Vendors received payment of $2.4 million each in November 1996. That would reflect the valuation of the parties of each of the old apartments. The rate of L.D. is prescribed at 10% on the sum of $2.805 million. Therefore $2.805 million would appear to be the parties' estimation, at the time of the Agreement in March 1996, of the value that each of the New Flats would attain in August 1999. This would amount to an annual appreciation of slightly under 6%, which appears to correspond roughly with the housing loan rates prevailing at the time. The 10% L.D. rate is substantially higher than a 6% appreciation rate. There is therefore an additional 4% built into it to compensate for delay beyond the Handing Over Date.
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> (iii) The L.D. rate of 10% is sufficiently high as to give the Plaintiffs no incentive to unnecessarily delay the completion of the development.

(iv) The L.D. amounts to a sum of $280,500 per year or $23,375 per month. Such a sum would more than pay for the most luxurious of equivalent accommodation for the Defendants, even if one used the rental rates prevailing in March 1996. Indeed it would leave a tidy sum for any relocation costs.

(v) In the context of the 33 months given to the Plaintiffs to complete the New Flats, 12 months does not appear an unreasonably long period of delay given the 10% L.D. rate.

(vi) The L.D. rate is expressed as 10% per annum. It could just as easily be expressed as 8.33% per month, or 0.2% per week, or 0.274% per day. Although not significant by itself, it is one possible manifestation of the contemplation by the parties that a delay can extend into a year or more.

(vii) Another factor is the regional economic crises in 1997 and 1998. The uncertainty it engendered had an impact on the progress of the development. While it does not excuse the Plaintiffs from an inordinately long delay, in my view it would be unreasonable to say that the provision for L.D. does not cover a certain amount of delay caused by such an eventuality.

16. Accordingly, taking into account all the above considerations, I held that the delay of the magnitude that obtains in this case does not amount to a repudiation by the Plaintiffs. I should add that the Plaintiffs had cited the case of *A.G. v Wong Wai Cheng* [1978-1979] SLR 151 but I do not find it useful because it essentially dealt with a provision in the contract there that specifically provided that any delay, even if it materially impeded or delayed execution or completion, shall not vitiate the contract, and it shall only entitle the contractor to compensation from the employer. There is no such specific provision in the present case and everything must turn on its own set of facts.

17. The Defendants also argue that the length of the delay amounts to frustration of the Agreement. They cite *Pioneer Shipping Ltd v B.T.P. Tioxide Ltd (The Nema)* [1982] AC 724 at p.752, which said that the test was:

> "… whether the delay … will make any ultimate performance of the relevant contractual obligations 'radically different' … from that which was undertaken by the contract … "

The Defendants also cite *Chitty on Contracts* (27th Ed) at p.1113 which states:

> "To frustrate a contract, the delay must be abnormal, in its cause, its effects, or its expected duration, so that it falls outside what the parties could reasonably contemplate at the time of contracting. The fact that the delay was caused by 'a new and unforeseeable factor or event' is a relevant matter. The probable length of delay must be assessed in relation to the nature of the contract, and to the expected duration of the contract after the delay is expected to end. There can be no frustration if the delay in question was within the commercial risks undertaken by the parties."

18. I have no difficulty accepting authorities cited by the Defendants. What they require is an examination of whether the delay in question so alters the nature of the bargain as to make it radically different from the original contract. The factors that I have to examine are exactly the same in my analysis as to whether the delay would amount to a repudiatory breach. Furthermore the

learned editors of *Chitty on Contracts* find that "a new and unforeseeable factor or event" is a relevant consideration. In this case, one of the causes of the delay was the regional economic crises. Therefore, for the same reasons I have given above, I do not think that the delay of 12 months in the circumstances of the case has so altered the nature of the bargain as to frustrate the contract. While the term "frustration" may aptly describe the emotions of those of the Defendants who had hoped to move into the New Flats in time to greet the new millennium, in my view, as a contractual doctrine it does not arise in this case.

Condition precedent of guarantee not met

19. The Plaintiffs also have another basis for their claims. They say that the demands made by the Defendants were invalid because the terms of the guarantees were not complied with. Term 1 of the guarantee provides as follows:

> "If the Purchaser … fails to deliver vacant possession of the New Flat … in accordance with Clause 5.4 of the Agreement … the Guarantor will indemnify the Exchange Vendor … against all losses, damages, costs and expenses that may be incurred by him by reason of any default on the part of the Purchaser in performing and observing the provision of Clauses 5.4 and/or Clause 5.5 aforesaid and/or any other provisions of Clause 5 of the Agreement provided that the aggregate maximum liability … [is $2.805 million]."

Now the contract between the bank and each of the Defendants under the guarantee is separate from that between the Plaintiffs and the Defendants. It is a condition precedent under term 1 of the guarantee that the Plaintiffs shall have failed to deliver vacant possession of the New Flat by 28 August 1999, the Handing Over Date. The demands were made on 12 May 1999, i.e. more than 3 months before that date. Therefore the condition precedent for the demand, i.e. the failure to deliver vacant possession of the New Flats by 28 August 1999, was not met. Therefore, the Plaintiffs submit, the call was invalid.

20. I agree with this submission of the Plaintiffs. The guarantee is a contract between the bank and each of the Defendants which is separate from the Agreement. It entitles the beneficiary to make a demand only if the conditions stated in it are met. Clause 7.2 of the Agreement affords the Defendants an opportunity to negotiate the terms of the guarantee. They had agreed to accept the guarantee in the present form. The condition that there must be a failure to deliver the New Flat by the Handing Over date was clearly not met at the time of the demand. Even if the Plaintiffs had committed an anticipatory breach which entitled the Defendants to rescind the Agreement, as regards the bank the only basis for the demand can only be the conditions under the guarantee. Therefore the demands of 12 May 1999 are not valid and the bank is not obliged under the guarantee to make payments pursuant to them.

The counterclaim

21. The Defendants prayed for the following declarations in their counterclaim:

> (1) Whether the Plaintiffs have committed a breach of the Agreement if:

(a) they were unable to deliver vacant possession of the New Flats by 28 August 1999;

(b) they had indicated to the Defendants subsequent to the Agreement that they were only able to do so:

(i) 12 months after the Handing Over Date;

(ii) 28 months after the Handing Over Date; or

(iii) any time between 12 and 28 months after the Handing Over Date.

(2) If the Plaintiffs had committed a breach in any of the instances in (1), whether such breach constitutes:

(a) a total or substantial failure of consideration under the Agreement; and/or

(b) a repudiatory breach of the Agreement which entitles the Defendants to terminate the Agreement.

(3) If the answer to (2) is "yes", whether the call by each of the Defendants on 12 May 1999 on the guarantees were proper.

(4) If the answer to (2) is "no", what is the date on which the Defendants are entitled to terminate the Agreement.

(5) If the answer to (3) is "yes", or if a date in question (4) is specified whether the amount that the Plaintiffs are liable to pay each of the Defendants by reason of the Plaintiffs' breach of the Agreement is:

(a) $2,805 million; or

(b) $2.4 million plus interest accruing on such sum at the rate of 6% per annum for such period as the Court deems fit; or

(c) such other sum to be assessed by the Court.

22. On the basis of my findings, it follows that the answer to question (1)(a) is "yes". However I find questions (2) and (4) to be speculative and inappropriate for me to make a declaration on. They essentially require me to determine at what stage of delay beyond the 12 months will the Plaintiffs be deemed to have repudiated the Agreement such as would entitle the Defendants to terminate it. However whether any situation gives rise to this position depends on the entirety of the facts and not simply on the period of delay. The court will not in general make a declaration based on assumed facts and I see no reason to do so in this case. Question (3) has been answered in the negative. As for issue of the nature of damages in question (5), since the answer to question (3) is "no" and I have declined to give an answer to question (4), I am not required to answer that question. Accordingly I

answered question 1(a) in the positive and declined to answer the remaining questions posed. However I was prepared to hold that the L.D. payable under clause 5.4 of the Agreement was payable monthly. This is a term that can be implied from the Agreement. The L.D. is there to compensate the Defendants for late delivery of the New Flats. As they may have to rent alternative accommodation or forgo rent that may be earned from their current residence, the L.D. provision ought to be payable monthly in arrears in order to achieve this result in a practicable manner.

LEE SEIU KIN

JUDICIAL COMMISSIONER

SUPREME COURT