Parkway Properties Pte Ltd and Another v United Artists Singapore Theatres Pte Ltd and Another and Another Case
[2003] SGCA 7

Case Number	: CA 83/2002/A, Suit 755/2001/A
Decision Date	: 27 February 2003
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Judith Prakash J; Yong Pung How CJ
Counsel Name(s)	: Tan Wee Kheng Kenneth SC, Kwek Yiu Wing Kevin (Kenneth Tan Partnership) for the Appellants; Christopher Stephen Soh (Arthur Loke Bernard Rada & Lee) for the respondents
Parties	: Parkway Properties Pte Ltd; Management Corporation Strata Title Plan No. 1008 — United Artists Singapore Theatres Pte Ltd; Pacific Media PLC

Restitution – Money had and received – Defence of change of position – Whether defendants meeting requirements of defence

Delivered by Chao Hick Tin JA

1 This was an appeal against a decision of the High Court which granted a judgment in favour of the respondents, United Artists Singapore Theatres Pte Ltd ("UAST") and Pacific Media PLC ("Pacific Media"), on their claim against the appellants, Parkway Properties Pte Ltd ("Parkway") and the Management Corporation Strata Title Plan ("MCST"), for the return of a sum of $1,846,900 paid by the respondents to the appellants on the ground that there was a total failure of consideration. We heard the appeal on 22 January 2003 and dismissed it. We now give our reasons.

2 Since, in this appeal before us, the parties had not differentiated between Parkway and MCST and between UAST and Pacific Media, references in these Grounds to either Parkway or UAST shall include MCST and Pacific Media respectively, unless the context otherwise indicates.

The facts

3 The facts of the case giving rise to the present action were largely undisputed because they were fairly well documented.

4 Situated along Marine Parade Road is a large shopping mall called the Parkway Parade Shopping Centre ("the Shopping Centre"). At all material times, Parkway owned 76% of the strata lots in the Shopping Centre. The MCST was the statutory corporation established under the Land Titles (Strata) Act which owned and maintained the common property of the Shopping Centre. Being the holder of the majority of the strata lots, Parkway effectively controlled the MCST.

5 Sometime in the early nineties, Parkway mooted the idea of converting some of the common areas in the Shopping Centre into a 7-screen cineplex. This involved the demolition of the play deck and construction of a cinema structure from the car park below. The object behind this development plan

was to draw repeat visitors to the Shopping Centre and thus improve the human traffic therein. The first party with whom Parkway discussed the development project was Golden Village Entertainment (S) Pte Ltd. However, that discussion soon ended with no deal concluded.

6 In 1994, Parkway initiated discussions with UAST with a view to realizing that idea. UAST were then managing and/or operating a number of cinemas in Singapore.

7 The discussions with UAST envisaged the latter taking on the role of the developer of the cineplex where they would design, manage and operate it. There would be a Conditional Agreement and Lease Agreement between Parkway and UAST. UAST would fork out the funds required to develop the structure, fit out and operate the cineplex. This plan will hereinafter be referred to as "the original plan".

8 Many drafts of the Conditional Agreement and Lease Agreement were put up. The first was dated 4 December 1995. Negotiations on the drafts were protracted and stretched over some 3-4 years, caused in part by various difficulties which arose from time to time, among which was the imposition of a development premium (DP) by the authorities. The DP was originally fixed by the Land Office at $17.644 million, excluding GST. After several appeals, the Land Office eventually agreed in January 1998 to lower the sum to $8.469 million, without GST. It was understood between the parties that UAST would contribute $3.465 million towards the payment of the DP. On 25 April 1998, Parkway paid to the Land Office the sum of $872,487 towards the DP. Much later, on 14 January 1999, UAST reimbursed Parkway the sum of $346,900, being its share of that payment which Parkway made to the Land Office.

9 In the meantime, between 1998 and early 1999, UAST underwent some structural changes, with Pacific Media becoming the new owner of UAST. That was also the period when this region was reeling under the Asian financial crisis.

10 In March 1999, due to financial constraints, Pacific Media felt that there was a need to alter the basis of cooperation between UAST and Parkway, as UAST were no longer able to continue as the developers of the project. It was proposed that MCST be the developers and UAST would only be responsible for fitting out the works and operating the cineplex under a lease agreement. This plan will hereinafter be referred to as "the revised plan".

11 At about this time, Parkway was also talking to Cathay Organisation as a possible alternative operator of the cineplex. In June 1999, Parkway informed the URA that the layout of the development would have to be reduced by 10-15% as required by a new potential party (presumably referring to Cathay). On account of this reduction, MCST even asked the Land Office for an adjustment of the DP payable.

12 In the meantime, from March 1999, the parties also discussed, in relation to the revised plan, what sort of rental UAST should be paying for using and operating the cineplex. One proposal explored was that UAST was to contribute $3,046,900 towards the DP and the base rent payable was to be reduced either to $2.75 psf (from $3.75 psf) or 15% of net admissions revenue, whichever was higher. This was not acceptable to Parkway who counter suggested $3.25 psf or 16% of net admission revenue, whichever was higher.

13 On 8 April 1999, Parkway paid the second instalment of $906,331.50 to the Land Office. In making this payment, Parkway also informed the Land Office that there would be a change in the name of the applicant/developer. However, Parkway never informed UAST of their intention to pay that instalment nor did they ask UAST to contribute a share of that payment.

14 On 5 May 1999, the MCST wrote to UAST stating that, in view of UAST's inability to proceed with the original plan, the previous arrangement whereby UAST were to develop the cineplex was "null and void" and that the MCST would take over the project as the developers. On 13 May 1999, UAST replied confirming their agreement to MCST taking over as developers and stating –

> "I sincerely regret the inconvenience caused and wish to re-confirm our commitment and continued *interest in negotiating a new contract* to fit out and operate the cinema. We are ready willing and able to proceed immediately."

15 On 20 May 1999, Chor Pee & Partners (CPP), acting for MCST, wrote to Arthur Loke & Partners (ALP), the solicitors for UAST, confirming the taking over of the development by MCST and stating that the transfer was subject to the following conditions –

> "3. after the satisfactory taking over of the development of the proposed cineplex by our clients and/or nominees within the said two-week period, Parkway Properties Pte Ltd will refund to your clients (without interest) the sum of $346,900 which was paid by your clients *towards* the Differential Premium; and
>
> 4. subject to all of the above, each party shall not require from the other any reimbursement of costs an expenses (including but not limited to administrative costs, legal costs, costs of appeal, submission fees and processing fees) which were incurred by that party in respect of the proposed agreements and/or the development of the proposed cineplex and *the matter shall be treated as null and void and neither party shall have any claims against the other in respect thereof* "

16 On 21 May 1999 Parkway wrote to UAST reiterating that once the handing over of the project to

MCST was completed, Parkway would "return (without deductions or interest) the $346,900 paid on 14 January 1999". It was clear that upon the transfer, Parkway wanted a clean break and that thereafter UAST were to have no further rights in the development. As for UAST's desire to operate the cineplex, that was a separate matter to be negotiated and agreed upon.

17 However, the repayment of $346,900 which Parkway undertook to make to UAST was, in fact, never effected because the parties were then negotiating on the revised plan, and Pacific Media, as the owner of UAST, offered to make some good faith deposit. So the sum of $346,900 was allowed to be retained by Parkway as part-payment of the good faith deposit required by Parkway although ALP had, on 16 July 1999, written to Parkway asking for the return of that sum to Pacific Media. In the words of Gary Quick, a witness for UAST, the refund of that sum was then "rolled into the new proposal."

18 We should add that the requirement of a deposit as a good faith money was again mentioned by Parkway in its letter of 21 June 1999, marked "without prejudice and subject to contract", where it indicated that the revised plan of UAST was being reviewed by MCST which had also requested –

> "… an undertaking from your organisation – as a form of financial commitment during this period of finalisation of the proposed terms and conditions. The form of financial commitment may be in a confirmation of your financial status to commit to the proposed project with a reference from your bank and with a 'performance guarantee'".

We should add that in the subsequent correspondence between the parties, Parkway had also marked their correspondence "subject to contract".

19 Apparently UAST were not willing or able to provide a banker's performance bond. But they were prepared to provide $500,000 as good faith money which would be forfeited should UAST fail to complete the project. They also stated that –

> "This offer is made without prejudice and subject to contract expressly on the understanding that it would be available to us to complete the contract and would not be held by you once the cineplex had commenced operations."

20 On 13 July 1999, Pacific Media assured Parkway that they had the financial ability to operate the cineplex and re-affirmed the offer to place $500,000 as good faith money in addition to the $346,000 which was to be refunded to UAST. Pacific Media wrote:-

> "I believe that you currently have a deposit from us of $345,000 (sic) towards the premium payable to the Land Office. I would be happy to give you a further deposit of $500,000 upon signing a lease making a total of

> $845,000. This money would be used as a final payment of our portion of the premium …
>
> I am sure you will agree this proposal is a significant gesture of good faith regarding our intention and our ability to complete the project ... I suggest we now ask our respective lawyers to prepare a new lease for signature in the very near future …"

21 A week later, Pacific Media offered to increase the deposit sum of $500,000 to $600,000. A further 3 days later UAST proposed a corporate guarantee from Pacific Media to secure the performance of the lease by UAST. Representatives of Pacific Media even appeared before a meeting of MCST to explain their position and that was followed by a letter where Pacific Media stated that upon the execution of a lease between Parkway/MCST and UAST, a sum of $600,000 would be paid over to Parkway:-

> "We send you the sum of S$600,000 within five working days of execution for the lease. The current agreement between us is for us to pay you six quarterly instalments of $450,000 towards our proportion of the premium due to the Land Office, the first instalment becoming due on 9 September 1999. I suggest that this deposit is used to provide a part payment of $100,000 towards each of these six payments."

22 On 28 July 1999 Parkway wrote to Pacific Media asking for the remittance of the $600,000 "within the next 2 working days" and seeking their confirmation that this sum –

> "shall remain as good faith deposit until we hand over the cinema to UAST for fitting-out works. We will consider the utilisation of this sum against your contribution towards UAST's contribution to the premium in our negotiation for the revised terms for the draft lease agreement for the proposed cineplex,"

and that Pacific Media would furnish a corporate guarantee to ensure that UAST would fulfil their obligations under the proposed lease.

23 Pacific Media replied on 28 July 1999, giving substantially the assurances requested. The relevant portions of this reply were the following:-

> "1. We will instruct our bankers to send S$600,000 to you tomorrow, Thursday 29th July, this money to be sent to the same bank and account details as the *previous deposit* [i.e. $346,900].
>
> 2. We confirm that UAST will pay six quarterly instalments of S$450,000

> towards its contribution of the premium due to the Land Office with the first instalment being paid on or before 9th September 1999.
>
> 3. I appreciate your agreement to discuss the utilisation of the S$600,000 *good faith payment* towards UAST's contribution to the premium once you have handed over the cinema to us for fitting out. My suggestion would be that we pay the quarterly instalments of S$450,000 due 9th September 1999 and 9th December 1999 in full and that the four remaining payments are then reduced to S$300,000 per instalment with S$150,000 of the S$600,000 being applied to each of the four instalments."

24 Interestingly, the day before, on 27 July, in anticipation of the sum of $600,000 from Pacific Media, there was an internal note from Elizabeth (of Parkway) to Linda (of MCST) in these terms:-

> "Please note … that $600,000 shld be in our bank (PPPL). You will need to clarify with TKS on whether this is to be transferred to MCST – since this is a *holding deposit* for landlord who is MCST. Plse let me know on Monday am when the money is in."

25 On 3 August 1999, Parkway transferred the $600,000 it received to the account of MCST. It should be mentioned that this sum was transferred back to Parkway on 29 February 2000 after Parkway sold their interest in the Shopping Centre to Lend Lease.

26 Thereafter, the parties continued their negotiations on the appropriate rental package for the lease of the cineplex by UAST.

27 On 9 September 1999, and as promised, UAST remitted the sum of $450,000 as being their contribution toward Parkway's DP instalment payment to the Land Office. The next payment of $450,000 to Parkway was effected on 15 December 1999. In the meantime, on 10 September 1999, Parkway paid the remaining 80% of the DP in full to the Land Office. Before doing so, they sought the Land Office's concurrence to waiving interest payment due. But this was not acceded to. UAST were not informed of Parkway's intention to pay up the entire DP.

28 While the parties were negotiating, drafts of a lease were to-ing and fro-ing between them. But none was executed.

29 Towards the end of 1999, Parkway decided that they would sell their interest in the Shopping Centre. The sale was effected in February 2000. UAST were only told of it the following month. Thereafter the negotiations between Parkway and UAST simply ceased. In July 2000, UAST notified

the new owners, Lend Lease, that they did not wish to proceed with the proposal to lease the cineplex from MCST.

Decision below

30 In respect of the original plan, the trial judge held that there was no "concluded free-standing agreement" binding on UAST to contribute towards the DP. As for the period post Parkway/MCST taking over from UAST as developers of the cineplex, the trial judge held that it was the understanding between Parkway and UAST that UAST's proposed contribution of $3.046 million towards the DP was an integral part of the rental package. It was because of this contribution that UAST's package was viewed as being more attractive than that of Cathay's. This contribution was important to Parkway as it would reduce their up-front costs and the funding needed for the project. Parkway were also then concerned about the financial standing of UAST/Pacific Media. Thus Parkway's emphasis on the need for good faith money. The payments were made in anticipation of the intended lease, i.e., as security for the liabilities under the intended lease. They were not intended to be outright payments. They were to be kept aside and held against the conclusion of a lease. The moneys deposited were to be used after the lease was signed. As regards the sum of $346,900 which should have been refunded to UAST, the court held that UAST subsequently permitted Parkway to retain it as part of the good faith deposit.

31 While the trial judge noted that UAST knew that whatever sums paid as DP to the Land Office would not be refundable, she held that that was not the question. The relevant question was what was the basis upon which the payments were made by UAST. The parties never addressed their mind to the question as to what would happen to the payments if no lease was eventually executed. Relying on *Sydney Harbour Casino Holdings Ltd v NMBE* (1999) 9 BPR 16; 679 she held that pre-contract deposit, which was the nature of the present payments made by UAST, was recoverable. The negotiations were held "subject to contract". She ruled that the payments should be returned on the ground of a total failure of consideration.

Issues

32 In the Appellants' Case, Parkway raised two arguments to contend that the respondents were not entitled to ask for the refund of $1,846,900:-

> (i) the payments were made pursuant to an agreement between the parties under which the respondents would contribute in part towards the non-refundable payment of the DP imposed by the Land Office to obtain permission to convert the use of the common areas of the shopping centre into a multi-screen cineplex.
>
> (ii) there was a change of position on the part of Parkway as the moneys received from UAST were paid over to the Land Office and were non-refundable.

Change of position

33 Quite rightly, before us, counsel for Parkway concentrated his arguments on the second ground. On the facts as we have enumerated, there was no reasonable basis to argue that there was an agreement whereby UAST would make outright contributions towards the DP, irrespective of whether or not they were given a lease of the cineplex by Parkway.

34 The judge below noted the defence of change of position but did not think there was a need for her to go into a detailed examination of that issue. All she said was –

> "Given my findings, the facts in evidence fall short of satisfying the elements of the defence of change of position."

35 Counsel submitted that the judge was wrong to rule that the defence of change of position must fail. He said that the very premise upon which this defence could be raised was that the payment was made pursuant to a vitiated transaction and relied upon the following passage from Jeffrey, *The Nature and Scope of Restitution* at p. 225-6:-

> "A defendant may receive a vitiated transfer and, on the assumption that he is to that extent wealthier, spend money that he would not otherwise have spent. If the defendant remains liable for the full value that he received, he will be worse off than if he had never received the payment. This would be unjustified (unless as will be seen below, one can say that the defendant ought to have known that he was liable to return the money received). The restitutionary liability is based on the fact that the defendant has received a windfall – that he is in surplus, as it were – and therefore that overall he will not be prejudiced by the restitutionary liability; if it would prejudice him, it should be reduced accordingly. This is the "change of position" defence: the plaintiff's claim diminishes to the extent that the defendant's position has changed in consequence of the receipt."

36 This defence would appear to have its origin in *Lipkin Gorman v Karpnale* [1991] 2 AC 548 where Lord Goff said (at p.580):-

> "At present I do not wish to state the principle any less broadly than this: that the defence is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full."

37 A little earlier in his judgment (at p. 579) Lord Goff gave the following illustration as to how such a defence could be invoked:-

> "If the plaintiff pays money to the defendant under a mistake of fact, and the defendant then, acting in good faith, pays the money or part of it to charity, it is unjust to require the defendant to make restitution to the extent that he has so changed his position. Likewise, on facts such as those in the present case, if a thief steals my money and pays it to a third party who gives it away to charity, that third party should have a good defence to an action for money had and received. In other words, bona fide change of position should of itself be a good defence in such cases as these."

38 In *Management Corporation Strata Title No. 473 v De Beers Jewellery Pte Ltd* [2003] 2 SLR 1 this Court distilled the three elements in this defence which must be satisfied before it can be successfully raised:-

> (i) The payer has changed his position;
>
> (ii) The change is bona fide;
>
> (iii) It would be inequitable to require him to make restitution or to make restitution in full.

39 For easy reference, Parkway had in their Case set out the following table showing the dates on which Parkway made the DP payments to the Land Office and UAST to Parkway:-

Payments by Parkway to the Land Office	Payments by UAST to Parkway
(a) 25 Apr 1998 $872,487.00	
(b)	14 Jan 1999 $346,900
(c) 5 Apr 1999 $906,331.50	
(d)	30 Jul 1999 $600,000
(e)	9 Sep 1999 $450,000
(f) 10 Sep 1999 $6,978,456.00	
(g)	5 Dec 1999 $450,000

a.	(h) 29 Dec 1999	$532,483.38	
b.			
Total	$9,289,757.88		$1,846,000

40 Parkway contended that they made the DP payments to the Land Office only because of their belief that UAST were committed to contribute at least $3,046,900 in that regard and, consistent with that, UAST did, in fact, make payments to Parkway on that account. UAST had intended that their payments be used towards paying the DP and knew that such payments, when made, were non-refundable. Parkway said that while, in the light of the negotiations between the parties, there might be a question mark whether there was an enforceable agreement that UAST would pay their share of the non-refundable DP, in any event, there was a "compelling case" that Parkway honestly believed that such was the position. Parkway had, in good faith, changed their position by paying the $1,846,000 to the Land Office as part of the DP in the honest belief that it was UAST's contribution towards their share of the DP which, when paid to the Land Office, would be non-refundable. Therefore, Parkway had satisfied both the first and the second elements.

41 As for the third element, Parkway argued that they no longer held the $1,846,000 as it was paid over to the Land Office and no refund could be obtained. It would be unjust to require them to refund the whole sum, or any part of it, to UAST. While it was true that Parkway had sold their interest in the Shopping Centre, no additional value was given by the purchasers on account of the fact that Parkway had made the DP payments. In any event, the development of the cineplex did not proceed and the URA's written permission to develop the cineplex had also lapsed.

Our views

42 We shall now consider the fact situation of the case to determine whether the three elements of the defence had been fulfilled.

43 To satisfy the first element, the appellants must show that they had, in the light of the understanding with UAST, paid the money remitted by UAST over to the Land Office. From the table shown at ¶39 it would be seen that the appellants made the first 10% DP payment over to the Land Office while still negotiating with UAST on the original plan. It was some eight and a half months later that UAST paid their share to Parkway. So in respect of that first payment, at best it could be said that UAST reimbursed Parkway their share of the contribution.

44 The second instalment payment was made by Parkway to the Land Office after UAST had already indicated that they would not be able to be the developers for the cineplex project and had proposed the revised plan. The second payment of $600,000 made by UAST to Parkway on 30 July 1999 had nothing to do with the second DP payment made by Parkway to the Land Office. It was a "good faith"

money which Parkway were pressing UAST to effect as a demonstration of UAST's financial soundness and their commitment to take a lease of the cineplex under the revised plan.

45 The third payment made by Parkway to the Land Office more or less coincided with the third payment made by UAST to Parkway. But it is vitally important to note that by this payment Parkway paid up all the remaining sums due in respect of the DP. In December 1999 it made a fourth payment to the Land Office because the latter declined to waive the interest charge. However, the third payment of $450,000 by UAST to Parkway was in accordance with the negotiations then (which was "subject to contract") that the rental package for the lease of the cineplex would include a component whereby UAST would make payments upfront to assist Parkway to pay up the DP. The fourth payment made by UAST on 15 December 1999 was also on the same premise.

46 It would be seen that really Parkway had made the DP payments to the Land Office entirely on their own volition. In every instance, Parkway used their own resources to effect the payment as they were keen to see the early realization of the project. We do not think that in order to rely upon the defence of change of position, it is necessary for the defendant to prove that payment must first have been received before payment out may be made. So long as the payment out by the defendant is in clear expectation of an imminent payment in by the plaintiff, the first element would have been satisfied. However, looking at the overall circumstances of this case, we did not think this element was satisfied. The first two payments made by Parkway to the Land Office were effected on their own volition, with no expectation of an imminent reimbursement from UAST. Parkway were determined to go on with the project. Their third payment also showed their commitment to it, come what may.

47 Turning to the second and third elements, we propose to deal with them together because on the facts of this case the two elements are very much linked. The following pertinent features of this case, which we have alluded to earlier, should be noted:-

> (i) From the early nineteen nineties Parkway were keen to develop some of the common areas of the Shopping Centre into a cineplex in order to increase the number of shoppers. They thus embarked on a search for a suitable developer/operator of the proposed cineplex.
>
> (ii) Upon UAST withdrawing as the developers, Parkway agreed to refund the first payment of $346,900 made by UAST. This was significant. Although this sum was never actually refunded to UAST, Parkway were allowed to retain it as part of the good faith money which UAST were willing to place with Parkway.
>
> (iii) The negotiations between Parkway and UAST on the rental package in relation to the revised plan were on the premise that UAST would make up-front contributions to Parkway in respect of the DP which was required to be paid to the Land Office in order to get the project going.
>
> (iv) Parkway paid up the DP in full on 10 September 1999 without even

consulting or informing UAST.

(v) In the drafts of the lease agreement, it was envisaged that MCST would refund to UAST the sums paid by UAST to assist Parkway/MCST to pay up the DP if the lease was not renewed for a second seven-year term.

48 It was clear to us that up to the time Parkway made full payment of the DP, Parkway were determined to proceed with the development of the cineplex even though the negotiations with UAST on the terms of the lease were still underway. But to show their good faith, a total sum of $946,900 was at that point in time placed by UAST with Parkway. Later, two further payments of $450,000 were made by UAST to Parkway. It was clear that all such payments were made on the understanding that they formed a part of the rental package which UAST were prepared to pay for the operation of the cineplex. It was never intended that the payments by UAST were to be outright contributions to Parkway to help the latter make the DP payments to the Land Office.

49 We would also point out that Parkway often marked their correspondence "subject to contract". So they would have realized that all the negotiations could come to nought if no final agreement was reached with the signing of a lease and, in consequence thereof, all payments made by UAST would have to be refunded.

50 On the question of equity, we were unable to see how it could be said that requiring the appellants to make full restitution in the present circumstances would be inequitable. In the context of the revised plan, Parkway were looking for a person or entity who had the financial resources and the know-how to run a cineplex successfully. As we mentioned above, the package offered by UAST was more attractive than that of Cathay because of the up-front lump sum contributions. The DP had to be paid because Parkway wanted to proceed with the development in order to improve the human traffic in the Shopping Centre.

51 Parkway sought to argue that the DP payments made were completely lost because the Land Office would not make any refund and the purchasers eventually decided not to proceed with the cineplex development. However, this argument that the DP payments were completely lost was not true as far as Parkway were concerned. This was evident from clause 19.2 of the Sale & Purchase Agreement entered into between Parkway and the purchasers which provided that -

(f) The Purchaser will, subject to its rights under clauses 7 and 17.4, use reasonable endeavours to enter into a loan agreement with the Management Corporation to fund the Cinema Development. The amount of the loan must be exclusive of the amount referred to in clause 7.4A(b). The agreement must contain the terms set out in clause 19.2(a) and such other terms as are acceptable to the Purchaser, acting reasonably.

(g) The Vendor must do all things reasonably required by the Purchaser prior to Completion to obtain the approval of the Management Corporation to the terms of the proposed loan agreement referred to in clause 19.2(f).

(h) Without limiting clause 19.2(d), the Vendor may not recover from the Management Corporation the amount of the differential premium paid by it with respect to the Existing Written Permission and it waives any rights which it may have with respect to recovery of that amount.

(i) The Purchaser acknowledges that the Management Corporation has been in negotiation with United Artists Singapore Theatres Pte Ltd as possible operator of the cinema. The Purchaser will act in good faith and use reasonable endeavours to procure the Management Corporation to continue those negotiations."

52 By these provisions it was plain that the purchasers were interested in the cineplex project. By clause 19.2(h) it was apparent that the purchasers would have factored in their price offered to Parkway, the DP paid to the Land Office. It was really disingenuous on the part of Parkway to argue otherwise in the face of such clear terms. The fact that subsequently the purchasers abandoned the cineplex project could not alter the position that consideration was, in fact, given by the purchasers to Parkway in respect of the DP paid to the Land Office.

53 In our judgment, the defence of change of position was not available to Parkway. They had failed to satisfy all three elements, particularly the third element, required to raise the defence. Equity was not on the side of Parkway. Thus, the appeal had to be dismissed.