Ong Khim Heng Daniel v Leonie Court Pte Ltd
[2000] SGHC 237

Case Number : OS 1135/2000 & Suit 586/2000

Decision Date : 17 November 2000

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : VK Rajah SC and Ajinderpal Singh (Rajah & Tann) for the plaintiffs in OS 135/2000 (Defendants in Suit 586/2000); Michael Hwang SC and Edwin Tong (Allen & Gledhill) for the defendants in OS 1135/2000 (Plaintiffs in Suit 586/2000)

Parties : Ong Khim Heng Daniel — Leonie Court Pte Ltd

Contract – Contractual terms – Implied term for reasonable time to obtain requisite approval – Whether contract terminated when approval not obtained in first application – Duty to make best endeavours to obtain approval – Whether duty discharged – Whether party entitled to rely on own default to treat contract as terminated

Land – Strata titles – Strata titles board – Board approval for en-bloc sale of condominium – Reasonable time for obtaining approval from Strata Titles Board – Whether confined to first application – Land Titles (Strata) Act (Cap 158)

: ***Introduction***

There is a condominium development at Mount Sinai Lane known as the Grenville Condominium. There are 68 units in the condominium. The owners of some of the units wanted to take advantage of the recent interest in en-bloc purchases of housing developments. They appointed property consultants to advise them and to market the property.

Eventually tenders were called for the property. Leonie Court Pte Ltd submitted the highest bid of $155m. That was below the reserve price of $170m, and subsequent negotiations led to an increased offer of $157m. The owners held an extraordinary general meeting on 30 November to consider the offer. Owners of 60 units (`the majority owners`) accepted it. This led to the formation of an agreement of sale and purchase of 5 January 2000 (`the agreement`) between those owners and the defendants.

As the owners of eight units (`the minority owners`) had not agreed to the sale it can only proceed with the approval of the Strata Titles Board (`the Board`). Under the amendments to the Land Titles (Strata) Act (Cap 158) (`the Act`) which came into force on 11 October 1999, such an order would bind the dissenting owners.

The provisions of the Act

The principal sections of the Act governing the applications for approvals are:

84A	(1)	An application to a Board for an order for the sale of all the lots and common property in a strata title plan may be made by -		

		(a)	(not applicable)	
		(b)	the subsidiary proprietors of the lots with not less than 80% of the share values where 10 years or more have passed since the date of the issue of the latest Temporary Occupation Permit on completion of any building comprised in the strata title plan or, if no Temporary Occupation Permit was issued, the date of the issue of the latest Certificate of Statutory Completion for any building comprised in the strata title plan, whichever is the later,	
who have agreed in writing to sell all the lots and common property in the strata title plan to a purchaser under a sale and purchase agreement which specifies the proposed method of distributing the sale proceeds to all the subsidiary proprietors ...				

84A	(4)	A subsidiary proprietor of any lot in the strata title plan who has not agreed in writing to the sale referred to in subsection (1) and any mortgagee, chargee or other person (other than a lessee) with an estate or interest in land and whose interest is notified on the land-register for that lot may each file an objection with a Board stating the grounds for the objection within 21 days of the date of the notice served pursuant to the Fourth Schedule or such further period as the Board may allow.		
84A	(6)	Where an application has been made under subsection (1) and no objection has been filed under subsection (4), the Board shall, subject to subsection (9), approve the application and order that the lots and common property in the strata title plan be sold.		
84A	(7)	Where one or more objections have been filed under subsection (4), the Board shall, subject to subsection (9), after mediation, if any, approve the application made under subsection (1) and order that the lots and common property in the strata title plan be sold unless, having regard to the objections, the Board is satisfied that -		

		(a)	and objector, being a subsidiary proprietor, will incur a financial loss; or	
		(b)	the proceeds of sale for any lot to be received by any objector, being a subsidiary proprietor, mortgagee or chargee, are insufficient to redeem any mortgage or charge in respect of the lot.	
84A	(9)	The Board shall not approve an application made under subsection (1) if the Board is satisfied that -		
		(a)	the transaction is not in good faith after taking into account only the following factors:	
			(i)	the sale price for the lots and the common property in the strata title plan;

			(ii)	the method of distributing the proceeds of sale; and
			(iii)	the relationship of the purchase to any of the subsidiary proprietors; or
		(b)	the sale and purchase agreement would require any subsidiary proprietor who has not agreed in writing to the sale to be a part to any arrangement for the development of the lots and the common property in the strata title plan.	
91	A Board shall carry out its work expeditiously and shall make a finding or determination within 6 months from the date it is constituted or within such extension of time as may be granted by the Minister.			

The agreement for sale and purchase

As the sale could only proceed with the Board`s approval, the agreement was a conditional contract.

The clauses in the agreement which refer to the need for and the vendors` obligation to obtain the

approval are

> *7A If not all the subsidiary proprietors of all the 68 units have agreed to join in the sale, the Vendors shall make their best endeavours and with all due expedition to apply to and obtain from the Strata Title Board an order for this sale under Part VA of Land Titles Strata Act.*
>
> *8(c) In the event that the Strata Titles Board does not approve of the sale of the Property, all moneys paid by the Purchaser shall be refunded to the Purchaser but without any interest compensation deduction whatsoever. Each party hereto shall bear their or his own solicitors` costs in the matter and neither party hereto shall have any claims or demands against the other party for damages, costs or otherwise whatsoever in the matter.*
>
> *9(f) Notwithstanding anything herein provided, if not all the subsidiary proprietors of all the 68 units have agreed to join in this sale, the sale and purchase of the Property is conditional and subject to the approval of the Strata Titles Board to the sale herein and in the event that the Strata Titles Board does not approve the sale, all moneys paid by the Purchaser shall be refunded to the purchaser but without any interest compensation deduction whatsoever and the Purchaser shall have no claim whatsoever against the owners but without prejudice to any other rights or remedies available to the owners at law or in equity against the Purchaser. Each party shall bear their or his own solicitors` costs in the matter.*
>
> *10(a) Without prejudice to the terms of this Tender, the sale and purchase price of the Property shall be completed and the balance of the ninety (90%) of the Purchase Price shall be paid at the office of the Solicitors three (3) months from the Date of Acceptance or three (3) months after an order has been made by the Strata Titles Board for the sale under the Land Titles (Strata) Act (if required), whichever is later (the "Completion Date").*

The application

The majority owners made their application on 15 February 2000. The application was opposed by the minority owners.

The application failed to yield the approval. The Board did not decide on the application on the merits under ss 84A(7) and (9). The Board upheld an objection that s 84A(1) of the Act and para 1(a) of the Fourth Schedule thereto were not complied with as no extraordinary general meeting was convened after the agreement was made. It explained in its Written Decision dated 2 June 2000:

> *48 In the Board`s opinion, the proper construction of para 1(a) in the Fourth Schedule is that the subsidiary proprietors who own not less than 80% or 90%, as the case may be, of the share values and who have agreed in writing to sell their development to a specific purchaser must call an EGM to consider the collective sale, before making an application to the Board. Such an EGM can therefore be held only after those owners have agreed in writing to that sale.*

The literal interpretation of the provision is borne out by the materials extraneous to the Act. Such an interpretation is consistent with the legislative object of insisting upon an EGM prior to making an application to the Board.

49 In the present case, the majority have through their counsel conceded that when the EGM was held on 30 November 1999, the percentage of subsidiary proprietors who agreed in writing to the sale of Grenville Condominium to Leonie Court Pte. Ltd at the reduced price of $157m owned less than 80% of the share values. The Board therefore agrees with the sixth respondent that para 1(a) in the Fourth Schedule was not complied with prior to the application to the Board, contrary to the mandatory requirement of s 84A(3). The majority`s application is thus an invalid one. The majority`s application is dismissed.

50 As to costs, the Board is of the view that costs should not be awarded to the sixth respondent. The law is still new and the issue before this Board is novel. There will also seem to have been no intention by the majority to ride roughshod over the minority when they relied on the EGM of 30 November 1999.

The aftermath of the Board`s decision

The defendants reacted swiftly and decisively on learning the Board`s ruling. On 8 June their solicitors Allen & Gledhill informed the majority owners` solicitors, Rodyk & Davidson that

1 We note that the Strata Titles Board did not approve the majority owners` application to the Strata Titles Board for an order of sale of the above development.

2 Clause 8(c) and 9(f) of the tender conditions provide that `In the event the Strata Titles Board does not approve the sale of the Property, all moneys paid by the Purchaser shall be refunded to the Purchaser but without any interest compensation or deduction whatsoever. Each party hereto shall bear their or his own solicitors` costs in the matter and neither party hereto shall have any claims or demand against the other party for damages, costs or otherwise whatsoever in the matter.`

3 In the premises, as instructed by our clients, we hereby give you notice as the stakeholders to refund to our clients the sum of $7,850,000.00 being the deposit paid by our clients and held by you as stakeholders.

The solicitors exchanged correspondence, Rodyk & Davidson asserting that the agreement was not terminated and Allen & Gledhill maintaining the defendants` position. Rajah & Tann were appointed to act in place of Rodyk & Davidson, and legal proceedings were instituted by both parties.

The second application

In the meantime the plaintiffs took fresh steps to obtain the approval. They convened an extraordinary general meeting on 26 June 2000 and made a second application to the Board on 19 July 2000.

This application was opposed by the minority owners, with the additional objection that the validity of the agreement was in doubt in view of the letter of 8 June. When the application came on for hearing on 28 September the Board ordered that it was to be heard after the High Court has ruled on the validity of the agreement.

In the meantime the majority owners had taken out these originating summons on 28 July to determine the following questions:

> *(1) Whether the plaintiffs are entitled to assert that the Sale By Tender Agreement continues to be valid and binding until a decision of the Strata Titles Board on the merits of the application filed by the plaintiffs on 19 July 2000 is made;*
>
> *(2) That the defendants are not entitled to assert that the Sale By Tender Agreement is no longer valid and binding, pending a decision of the Strata Titles Board on the merits of the application filed by the plaintiffs on 19 July 2000 is made.*

Leonie Court Pte Ltd issued a writ on 3 August against the majority owners seeking a declaration that the agreement had been terminated and a declaration that it is entitled to a full refund of the deposit of S$7,850,000.00 paid.

The majority owners will be referred to as the plaintiffs and Leonie Court Pte Ltd as the defendants from here on.

Both actions were fixed for hearing together. The parties agreed that the originating summons was to be proceeded with first and that the writ action will follow the outcome of the originating summons.

The issues before me

After hearing counsel, I found that the following issues had to be determined for a decision to be made on the summons -

> *(i) whether the agreement allowed for only one application to be made to the Board for approval;*
>
> *(ii) what is a reasonable time for obtaining the approval;*
>
> *(iii) what the plaintiffs` undertaking to make their best endeavours entailed;*
>
> *(iv) whether by 2 June the plaintiffs had failed to make their best endeavours to obtain the approval;*
>
> *(v) whether by 2 June the approval could be obtained within the reasonable*

time;

(vi) whether on 19 July 2000 when the second application was filed approval could be obtained within the reasonable time;

(vii) whether the plaintiffs made their best endeavours by filing the second application on 19 July 2000; and

(viii) whether the defendants can rely on the failure to obtain the approval by 28 September to assert that the agreement has terminated.

Whether the agreement allowed for only one application to be made

There is nothing in cll 7A and 8(c) that stipulates or implies that the plaintiffs must obtain the Board`s approval on the first application. There is also no fixed time by which the approval is to be obtained. Consequently, a term must be implied that the approval was to be obtained within a reasonable time as perceived by the parties when they entered into the agreement, if they gave thought to it.

Counsel for the defendants argued in the course of submissions that the approval is a condition precedent to the completion of the sale and purchase agreement, and if the approval was not obtained within a reasonable time, the contract is discharged and comes to an end by itself.

I accept that the agreement would come to an end if the approval is not obtained within a reasonable time. However, I do not see any basis for bringing the agreement to an even earlier end because the first application was unsuccessful. If the reasonable time period had not run out, there was no reason for barring the plaintiffs from further efforts to obtain the approval. To the contrary, the plaintiffs would have failed to use their best endeavours if they did not make any further efforts.

There was a second aspect to the issue. This has to do with clause 8(c) which provides that if the Board did not approve the sale, the deposit paid by the defendants was to be refunded to them and neither party shall have any claims against the other.

The plaintiffs submitted that when cl 8(c) refers to the Board not approving a sale, it contemplates a decision made taking into account the matters listed in ss 84A(7) and (9) that the Board is obliged to consider. It argued that the Board`s decision of 2 June was not such a decision as it did not consider the substantive aspects of the proposed sale.

That is a valid point. The Board had not ruled definitively on the application. The Board had not considered the merits of the matter. The plaintiffs had attempted to get the Board to consider their application, but the Board had not really considered the application yet and had not decided whether the sale should be approved or not.

What is a reasonable time for obtaining the approval

Both parties agreed that reasonable time must be determined against the backdrop of the parties` knowledge on 5 January and not against any industry practice which may develop subsequently. On 5 January the procedure for obtaining the approval has been established for less than three months,

and neither party professed familiarity with the process at that time.

Both parties presented their formulations. They divided it into two components, the time required to prepare and file the application, and the period for the Board to hear the application and make its decision. The difference between the periods put forward by them arose from the first period. Both parties accepted that the second period should be 6 months as the Board is obliged under s 91 to make its decision within that time in the normal case.

When I looked at the Act, I found that there were in fact three components to be considered. Between filing and hearing, there is an intermediate component, the constitution of the Board.

What is the reasonable period for preparing and filing the application? The plaintiffs contended that it should be two months, the defendants submitted that it should be one month.

Mr Francis Lim Hin Hian, the head of the Investment Sales Department of Knight Frank Pte Ltd and a member of the Strata Titles Board was called as a witness for the defendants. In his affidavit of evidence-in-chief Mr Lim set out a time frame between the award of a tender and the filing of an application to the Board to be eight weeks.

Mr Yap Kok Kiang, a practicing lawyer involved in collective sales, gave evidence for the defendants. He thought that `a reasonable time between the award of tender and the filing of an application with the Strata Titles Board is about two months.`

Both witnesses did not refer to the intermediate component. There was no evidence as to when the parties expected a Board would be constituted.

The constitution of a Board is regulated by s 86(6) read with reg 5 of the Land Titles (Strata Titles Board) Regulations 1999. Under these provisions the Registrar of the Board shall inform the President of when an application is received, and the President would select the members to serve on the Board. After the members are selected, the Registrar is to notify the parties of the members selected. A party objecting to a member must file its objection within seven days from the date of the notification. When an objection is received the President may require the party objecting to furnish him with any information he considers necessary. Thereafter he may disallow the objection or uphold it and select a new member to replace the one objected to.

Section 86(6) stipulates that the Board is constituted (a) when no objections are received, seven days after the notification, (b) when an objection is received and upheld, when another member is selected to serve on the Board, and (c) when an objection is received and disallowed, when the objection is disallowed.

Only the seven-day period for filing the objection is fixed. No time is specified for the Registrar to inform the President of the application, for the President to select the members, for the Registrar to issue the notifications, for the President to request for information from an objecting party, for the objecting party to supply the information, and for the President to rule on the objection, and if necessary to select a new member. I think 14 days would be a reasonable period to provide for these other events, and that 21 days should be allowed for a Board to be constituted after an application is received.

I found that the reasonable period for obtaining the approval must allow for time for the application to be filed, the Board to be constituted and the decision to be made. I set that at two months, 21 days and six months, or eight months and 21 days in total.

On that basis, the Board`s approval should be obtained by 26 September.

Whether the agreement was terminated on 2 June because the approval was not obtained

There was more than three months left to 26 September when the first application was dismissed on 2 June; time has not run out.

Nevertheless it is open to the defendants to argue that it was not necessary to wait for time to run out if it can be anticipated that the approval cannot be obtained in time. If they take that position, they must show that the approval cannot be obtained by 26 September. The defendants led no evidence to establish that. There was nothing in the evidence that suggested that as at 2 June any further application for approval would not yield any results in time.

What the undertaking to make best endeavours entailed

Counsel for the plaintiffs drew to my attention the English Court of Appeal`s decision in **IBM United Kingdom Ltd v Rockware Glass Ltd** [1980] FSR 335. This was a dispute arising from a contract for sale of land. The sale was conditional to the purchaser obtaining planning permission, with the comment that the purchaser will `use its best endeavours` to obtain the permission. The purchaser duly applied for the permission. When the application was turned down, the purchaser did not take the matter further by filing an appeal.

A dispute arose whether the purchaser had used its best endeavours to obtain the planning permission. The court found that the purchaser had not. Geoffrey Lane LJ held at p 345:

> *Those words, as I see it, oblige the purchaser to take all those reasonable steps which a prudent and determined man, acting in his own interests and anxious to obtain planning permission, would have taken.*

The defendants submitted that the law is best stated in **Sheffield Railway Co v Great District Railway Co** [1911] 27 TLR 451, a decision referred to in the ***IBM UK*** case. In this case the defendant company undertook to use their best endeavours to develop the through and local traffic of the plaintiff company. The plaintiff company complained that the defendant company had not used its best endeavours by continuing to treat them as a competing railway.

AT Lawrence J held:

> *We think `best endeavours` means what the words say; they do not mean second-best endeavours. We quite agree with the argument ... that they cannot be construed to mean that the Great Central must give half or any specific proportion of its trade to the Sheffield District.* ***They do not mean that the Great Central must so conduct its business as to offend its traders and drive them to competing routes. They do not mean that the limits of reason must be overstepped*** *with regard to the cost of the service: but short of these qualifications the words mean that the Great Central Company must, broadly speaking, leave no stone unturned to develop traffic on the Sheffield District line. (Emphasis added)*

The authorities are not inconsistent. A covenant to use best endeavours is not a warranty to produce the desired results. It does not require the covenantor to drop everything and attend to the matter at once; the promise is to use the best endeavours to obtain the result within the agreed time. Nor does it require the covenantor to do everything conceivable; the duty is discharged by doing everything reasonable in good faith with a view to obtaining the required result within the time allowed.

Whether by 2 June the plaintiffs had failed to use their best endeavours to obtain the approval

As I have stated, the endeavours have to be judged against the time available. The approval was to be obtained by 26 September.

The plaintiffs were earnest in seeking the approval. Although the first application failed because of the procedural defect, there was no suggestion that they were not carrying on with their best endeavours to get the approval.

Whether by 2 June the approval could be obtained within a reasonable time (by 26 September)

On 2 June the deadline was more than three months away. Nevertheless the defendants do not have to wait if they can show that as matters stood on 2 June, the approval cannot be obtained by 26 September. But they led no evidence on that and there was no basis to suppose that a further application for approval by the plaintiffs would not be granted by 26 September.

Whether the plaintiffs made their best endeavours in filing the second application on 19 July

The second application was filed on 19 July. The plaintiffs did not explain why it was not filed earlier. A perusal of the relevant provisions of the Act shows that an application cannot be filed at once when the decision to file is made. There has to be an extraordinary general meeting of the owners with at least 14 days` notice. After the meeting has resolved to proceed with the application, particulars of the application must be advertised in the newspapers. Then notices of the proposed application have to be served on every owner.

Before embarking on that, it would be reasonable for the majority owners to seek and consider legal advice on the failure of the first application, the prospects of success of a second application, the validity of the defendants` decision not to proceed with the purchase, and to decide whether they should continue their efforts with the same solicitors or to appoint new ones.

All that would take time, and in the context of the 26 September deadline for obtaining the approval, I did not consider the filing of the second application on 19 July was a failure by the plaintiffs to use their best endeavours.

There was a related issue - whether the second application would fail to produce results by 26 September. There was no evidence that if the second application was allowed to proceed on a normal course, the Board would not have made its decision by that date.

The determination of the foregoing issues would have dealt with the plaintiffs` application as it was framed. However the parties took a more pragmatic approach to the matters and extended the scope of the proceedings to cover events beyond 19 July, up to the date of hearing, so that a decision can be made as to whether the agreement was valid and binding up to the time of the hearing. On that basis, there was one further issue to be considered.

Whether the defendants can rely on the failure to obtain the approval by 28 September to assert that the agreement was terminated

On 28 September when the hearing of the second application was adjourned, reasonable time for obtaining the approval had lapsed. As the obligation was on the plaintiffs to obtain the approval, the defendants would in normal circumstances be entitled to treat their obligation to buy as terminated.

The question was whether this was a normal case. The plaintiffs contended that the defendants` unilateral decision to treat the agreement as terminated led to the Board`s decision to defer hearing the second application till the High Court has ruled on the issue whether the agreement was still in force. They argued that the defendants cannot rely on their own default to get out of the agreement.

Counsel referred to the passage in ***Chitty on Contracts*** (28th Ed) Vol 1 para 25-031 that:

> *... the court will readily imply a term that each (party to a contract) will co-operate with the other to secure performance of a contract, and neither party will, by his own act or default, prevent performance of the contract.*

and to 9 ***Halsbury`s Laws of England*** (4th Ed) para 359 that

> *... if an agreement can operate only during the continuance of a certain state of circumstances existing at the time when the contract is made, the parties will usually impliedly promise not to do anything of their own initiative to put an end to those circumstances; and if no contract is made subject to a condition precedent, the contract will generally be construed as imposing an obligation on the parties to do nothing to prevent the fulfilment of that condition.*

Bournemouth and Boscombe Athletic Club v Manchester United Football Club Ltd (Unreported) decision of the English Court of Appeal dated 21 May 1980 was cited. This case arose from the transfer of the footballer Ted MacDougall from Bournemouth to Manchester United in September 1972. Under the terms of the transfer Manchester United paid Bournemouth Â£175,000, with another Â£25,000 to be payable when MacDougall scored 20 goals for Manchester United. MacDougall performed well between October and December and scored four goals, but events took a turn in December when there was a change of managers in Manchester United with Tommy Docherty being appointed. Docherty did not want MacDougall in the team, and MacDougall was transferred to West Ham in February, before he had scored the 20 goals. Bournemouth sued for the Â£25,000 and succeeded.

The matter went on appeal to the Court of Appeal, where judgment was affirmed. Lord Denning MR held:

> *Suppose that Mr MacDougall had done exceedingly well for Manchester United. Suppose he had scored 18 goals, and then another club, such as Arsenal, had offered Â£250,000 for him: and Manchester United had accepted that offer. Could Manchester United, in those circumstances, refuse to pay the Â£25,000 to Bournemouth because Mr MacDougall had not scored 20 goals? The answer surely is that they could not. They could not, by their own action in selling Mr MacDougall at a higher price, deprive Bournemouth of their dues under the contract.*
>
> *The implied term can be put in many ways. One way was that Manchester United were bound to afford Mr MacDougall a reasonable opportunity of scoring 20 goals in first team competitive football for the defendants. That was a term which the judge was ready to imply ... Another way of formulating an implied term was put by Lord Justice Brighton in the course of the argument. It was that Manchester United would not transfer Mr. MacDougall without just cause so as to deprive Bournemouth of their dues of Â£25,000. Whichever way it is put, I think there was a breach by Manchester United of an implied term.*

Donaldson LJ said in his judgment:

> *Mr Docherty may well have been acting in the interests of Manchester United. It may be quite wrong to criticize him, and I do not criticize him, for transferring or agreeing to transfer this player. What I do say is that I entirely agree with the learned judge that in taking that action Manchester United were breaching their contract with Bournemouth.*

The defendants referred to Lord Diplock`s judgment in **Cheall v Association of Professional Executive Clerical and Computer Staff** [1983] 2 AC 180 at p 189 that:

> *To attract the principle, whether it be one of construction or one of law, that a party to a contract is not permitted to take advantage of his own breach of duty, the duty must be one that is owed to the other party under that contract; breach of a duty whether contractual or non-contractual owed to a stranger to the contract does not suffice. I have no hesitation in rejecting the argument based upon the supposed rule of law.*

That is a statement of the established law. In the same paragraph the judge referred to another argument made before him that a distinction should be made between a conscious and deliberate breach and a breach that was merely inadvertent, and declared `... I know of no principle of law which justifies this distinction.`

The defendants in para 27 of their closing submissions contended that :

> *Contractually, the actions of the defendant can have no impact on the rights and obligations of the parties and no authority has been cited for the proposition that the mere assertion of legal rights (even wrongly) comes within the principle of a party taking advantage of his own wrong. The situation might be different if the defendant had sought to intervene in the second STB application or to injunct the plaintiffs from proceeding with the second STB application, but that is not the case here.*

The authorities establish that the motive for the intervention is not relevant. The issue is whether the intervention prevented the contract from being performed.

Of course if the plaintiffs were right in their assertion that the agreement had come to an end, the whole matter would stop there. If the plaintiffs were wrong, did they prevent the performance of the agreement?

In the oral submissions counsel drew attention to the fact that the defendants were not a party in the application before the Board. He argued that as the objection was actually raised by the minority owners, there was no causal connection between the plaintiffs` act and the postponement of the hearing.

If that analysis is right the concession that `(t)he situation might be different if the defendant had sought to intervene in the second STB application` was unnecessary. If one were to construe causation in the manner proposed, it would not have mattered if the defendants appeared before the Board and argued that the agreement was terminated because it was the Board, and not the parties arguing before it, which adjourned the hearing.

On the facts, the defendants asserted that the agreement was at end. That position was made known to the Board. The Board was faced with an application to approve a sale that was already aborted if the defendants were right. It quite properly decided to adjourn the hearing of the application till the validity of the agreement has been determined by the High Court. There can be no question that the defendants` act caused the adjournment.

On that finding and the finding that the agreement had not come to an end on 2 June, they cannot rely on the plaintiffs` inability to obtain the approval under the second application in time.

The defendants ran another argument on this issue. They pointed out that the application did not come on for preliminary hearing till 14 September when it was set for hearing on 28 September. By the day of hearing, reasonable time had elapsed.

An examination of the process showed there was more to be taken into account. The second application was filed on 19 July. Under the Act, objections were to be filed in 21 days, by 10 August. An objection was made on the subsistence of the agreement which caused the Board to adjourn the hearing. In its letter dated 4 September the Board stated that:

> *As the validity of the sale and purchase agreement is in dispute, the Board`s preliminary view is that it would not be appropriate at this juncture for the Board to proceed to hear the application for the collective sale of Grenville Condominium. Rather, the application should only be heard if and when the High Court has ruled that the sale and purchase agreement continues to be valid and binding upon the Purchaser.*

Even before the preliminary hearing the Board had formed the view that the matter should not be heard before the High Court has ruled on the question. No one can say whether the hearing could have been scheduled earlier if the objection was not raised. The defendants had to show that even if they did not intervene the application could not be heard by 26 September and they had not done that.

In the course of the closing submissions counsel indicated that the plaintiffs are content to have a declaration that the agreement is valid pending the decision of the adjourned application. They were right to do that because any further application would have gone beyond the reasonable time period. Consequently, I declared that the plaintiffs are entitled to assert that the agreement continues to be valid and binding until the Board has ruled on the second application to the Board and that the defendants are not entitled to assert that the agreement is no longer valid and binding until that time, and I dismissed the defendants` action for the refund of the deposit.

Outcome:

Order accordingly.