Panorama Development Pte Ltd v Fitzroya Investments Pte Ltd & Another
[2000] SGHC 238

Case Number : OS No 1365 of 2000

Decision Date : 18 November 2000

Tribunal/Court : High Court

Coram : Woo Bih Li JC

Counsel Name(s) : Oommen Mathew (Tan Peng Chin & Partners) for the plaintiff; Christopher Chuah and Lawrence Tan (Drew & Napier) for both defendants

Parties : —

Contract – Contractual terms – Sale and purchase agreement – Delivery of vacant possession delayed – Vendor wound up and liquidator appointed – Project completed – Whether purchasers entitled to set off liquidated damages against instalments due

Insolvency Law – Bankruptcy – Statutory right of set-off – Express wording in s 88(1) of Bankruptcy Act (Cap 20, 1996 Rev Ed) unlike s 41(1) of pre-1995 Bankruptcy Act (Cap 20, 1985 Rev Ed)

Land – Development – Housing developers – Housing Developers Rules 1985 rr 12(2), 12(3), 15(1) and 15(2) – Statutory set-off – Protection of purchasers over unsecured creditors

(1) The judgment in *Good Property Land Development Pte Ltd (in liquidation) v Societe-Generale* [1996] 2 SLR 239 has decided that under s 41(1) of the pre-1995 Bankruptcy Act, contingent claims are not capable of being the subject of set-off (as seems to be the case), then, the applicable s 88(1) under the existing Bankruptcy Act had changed the position and it allows the Defendants' claims for liquidated damages to be set-off against the contingent claims of the Vendor which have now matured into claims against the Defendants (88).

(2) In this instance, the right of set-off for late delivery of possession is contractually provided for in cl 11(4) of the Sale & Purchase Agreement (S&P). The liquidator had carried on with the S&Ps. It was said that he used the resources of the company to achieve the stages under cll 3(1)(g) and (h). The fact is that he has carried on with the S&Ps. Having done so, he could not, in the court's view, claim the benefits under the S&Ps and yet disclaim the burdens under them. He cannot choose which terms of the S&Ps would continue to apply to him and which would not (94).

(3) Another special feature of the case is that cl 11(4) of the S&P is part of a set of standard terms prescribed by subsidiary legislation ie the Housing Developers Rules 1985. It is quite clear that cl 11(4) of the S&P is to protect the interest of purchasers like the Defendants, see Rules 15(1) and (2). If monies have already been paid under cl 3 of the S&P, they would have to be paid into the Project Account first. The liquidator would then use the moneys for any of the authorised purposes and thereafter have to use it to pay to the purchaser liquidated damages that may arise before making any payment to unsecured creditors, in so far as their claims do not come under s 9(6)(a). In the present case, the Defendants do not have to pay first because of cl 11(4) of the S&P. However, if they happened to pay first, their claim for liquidated damages would still rank ahead of unsecured creditors. Even if the liquidator does not require the monies called for to complete the project or to comply with other obligations under the S&P, this does not mean that the interest of the unsecured creditors negates the right of purchasers to the set-off claimed. As regards the argument for the liquidator that to refuse the set-off would not put purchasers in a worse position because they would be treated like other unsecured creditors, this would not be a valid argument. Purchasers are not supposed to be treated like other unsecured creditors. To do so would put them in a worse position than that envisaged under the Housing Developers legislation and the bankruptcy legislation (109, 113, 120-123, 126).

Case(s) referred to

Good Property Land Development Pte Ltd (in liquidation) v Societe-Generale

[1996] 2 SLR 239 (refd)
Re DW McIntosh Ltd v Royal Bank of Canada [1940] 3 DLR 782 (refd)
Arab Banking Corp v United Overseas Bank Ltd [1991] 2 MLJ 84 (refd)
The Official Assignee of the Property of Lim Chiak Kim v United Overseas Bank Ltd [1988] 3 MLJ 189 (refd)
Stein v Blake [1995] 2 WLR 710 (refd)
In Re Daintrey [1900] 1 QB 546 (distd)
In Re Taylor [1910] 1 KB 562 (distd)
Hiley v Peoples Prudential Assurance Co Ltd (In Liq.) [1938] 60 CLR 468 (distd)
Day & Dent Construction Proprietary Limited (In Liquidation) [1981-1982] 150 CLR 85 (distd)
Gye v McIntyre [1991] 171 CLR 609 (distg)
Re Asphaltic Wood Pavement Company, Lee & Chapman's Case [1885] Ch D 216 (refd)
Re Cyril Wright [1949] 1 Ch 729 (refd)
Re Farrow's Bank, Ld [1921] 2 Ch 164 (refd)
Golden Bay Realty Pte Ltd v Orchard Twelve Investments Pte Ltd [1989] SLR 42 (refd)
Ayerst (Inspector of Taxes) v C & K (Construction) Ltd [1976] AC 167 (refd)
British Eagle International Airlines Ltd v Compagnie Nationale Air France [1975] 2 All ER 390 (refd)

Legislation referred to

Companies Act (Cap 50, 1994 Ed.), ss 327, 328
Land Titles Act (Cap 157, 1994 Ed.), s 68(1)
Housing Developers (Control & Licensing) Act (Cap 130, 1985 Ed.), ss 9(5), 9(6)(a)
Housing Developers Rules 1985, Rules 12(2), (3) and 15(1) and (2)
Bankruptcy Act (Cap 20, 2000 Ed.), s 88(1)

Judgment

GROUNDS OF DECISION

BACKGROUND

1. Panorama Development Pte Ltd ('the Vendor') is the developer of a housing project known as Chateau Le Fame at Ewe Boon Road ('the Project').

2. Each of the Defendants is a purchaser of a unit in the Project. There are other purchasers of units in the Project in the same position as the Defendants. Accordingly the outcome of this action would affect the position of those other purchasers vis--vis the Vendor which is in liquidation.

3. Each of the Defendants entered into a sale and purchase agreement ('the S&P') with the Vendor. The terms of each S&P are alike. In fact, the S&P is prescribed by Rule 12(2) and Form E of the Schedule to the Housing Developers Rules 1985 (as amended from time to time) which were made pursuant to the Housing Developers (Control and Licensing) Act (Cap 130) ('the Housing Developers Act').

4. The dates of the S&Ps are 12 April 1995 (for the First Defendant) and 21 June 1996 (for the Second Defendant).

5. Clauses 3(1)(a) to (i) of the S&P provides for the purchase price to be paid in instalments on the occurrence of each event specified in sub-paragraphs (a) to (i).

6. Clause 11(1) of the S&P imposes an obligation on the Vendor to deliver vacant possession of the unit purchased by 31 December 1997 and cl 11(2) stipulates how this is done. They state:

> '11(1) The Vendor shall complete the building unit so as to be fit for occupation and remove all surplus material, plant and rubbish from the building unit and the housing project and deliver vacant possession of the building unit to the Purchaser

on or before the 31st day of December 1997.

> (2) On delivery of vacant possession of the building unit to the Purchaser, the Vendor shall deliver to the Purchaser or his solicitors a copy of the Temporary Occupation Permit or Certificate of Statutory Completion for occupation of the building unit issued by the Building Authority together with the certificate of the Vendor's architect that the building unit and the housing project and all roads and drainage and sewerage works of the housing project have been constructed in accordance with the plans specifications approved by the Building Authority and that water and electricity supplies have been duly connected to the building unit.'

7. Clause 11(3) of the S&P provides for liquidated damages to be payable by the Vendor if the Vendor fails to meet the deadline in cl 11(1). Clause 11(4) allows such liquidated damages to be deducted from any instalment due and payable to the Vendor. They state:

> '(3) If the Vendor fails or is unable to deliver vacant possession of the building unit to the Purchaser on the date specified in paragraph (1) of this clause for any reason whatsoever, the Vendor shall pay to the Purchaser liquidated damages calculated from day to day at the rate of ten (10) per cent per annum on the total sum of all the instalments paid by the Purchaser towards the purchase price for the period commencing immediately after the date specified in paragraph (1) of this Clause and ending on the date vacant possession of the building unit is delivered to the Purchaser.
>
> (4) Any liquidated damages payable to the Purchaser under this Clause may be deducted from any instalment due and payable to the Vendor.'

8. It is common ground that the Vendor failed to meet the deadline of 31 December 1997.

9. It is also common ground that, subsequently, a winding up petition against the Vendor was filed on 20 July 1999 whereupon an order to, inter alia, wind up the Vendor and appoint a liquidator was made on 3 September 1999.

10. Prior to the date of the winding up order and prior to the date of the filing of the winding up petition, the Defendants had made payments up to and including cl 3(1)(f) of the S&P.

11. Also as at the date of the winding up order as well as the date of the filing of the winding up petition, liquidated damages were due and payable by the Vendor to the Defendants and continued to accrue. However as at that date no instalment was due and payable by the Defendants to the Vendor.

12. On 17 September 1999, the liquidator obtained an order to allow him to engage the main contractor to complete the Project.

13. Pursuant thereto, cl 3(1)(g) and cl 3(1)(h) of the S&P were achieved.

14. The liquidator or his solicitors then sought payment by giving notice under cl 3(1)(g) on 22 October 1999 and under cl 3(1)(h) on 4 March 2000.

15. Clause 3(1)(h) is more significant as that is the stage when notice is given to each Defendant to take possession of the unit purchased i.e. compliance with cl 11(1) of the S&P read with cl 11(2). Clause 3(1)(h) states:

> '(h) Within fourteen (14) days after receipt by the Purchaser of the Vendor's notice to take possession and a photographic copy of the Temporary Occupation Permit issued by the Building Authority certified as a true copy of the Vendor's solicitors together with the Certificate of the Vendor's architect that the building unit and all roads, and drainage and sewerage works serving the housing project have been completed and that water and electricity supplies have been duly connected to the building unit, a sum equal to twenty-five (25) per cent of the purchase price; '

16. The Defendants did not pay the full instalments required of them. They took the position that they were entitled to

deduct the liquidated damages from the instalments claimed and paid the balance.

17. The liquidator has taken out this action essentially to seek a determination as to whether the Defendants are entitled to set-off the liquidated damages against the payment of any instalment to be paid by them subsequent to the date of the filing of the winding up petition and the date of the winding up order.

18. After hearing arguments, I decided that the Defendants are entitled to set-off the liquidated damages both before and after each of these dates against any instalment to be paid by them. The liquidator is appealing against my decision.

THE BANKRUPTCY LEGISLATION

19. Section 327(2) of the Companies Act (Cap 50) states:

> '(2) Subject to section 328, in the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and debts provable and the valuation of annuities and future and contingent liabilities as are in force for the time being under the law relating to bankruptcy in relation to the estates of bankrupt persons, and all persons, who in any such case would be entitled to prove for and receive dividends out of the assets of the company, may come in under the winding up and make such claims against the company as they respectively are entitled to by virtue of this section.'

20. Although s 327(2) is subject to s 328 of the Companies Act, s 328 is not relevant for present purposes.

21. Also, in the context of companies, a determination may sometimes have to be made as to which date is the equivalent of the date of the bankruptcy order made under the applicable Bankruptcy Act (Cap 20) i.e. the date of the filing of the winding up petition or the date of the winding up order. For present purposes, it is not necessary for me to determine which of the two dates is the equivalent to the date of the bankruptcy order as the material facts as at each date are the same. I will refer to the equivalent date as 'the relevant date'

22. The relevant provision in the applicable Bankruptcy Act (Cap 20) is s 88(1) which deals with mutual credit and set-off. More will be said about this provision later.

23. Notwithstanding s 88(1) of the applicable Bankruptcy Act, Counsel for the liquidator submitted that the Defendants are not entitled to set-off the liquidated damages against the instalments to be paid. He relied primarily on the decision of the Court of Appeal in *Good Property Land Development Pte Ltd (in liquidation) v Societe-Generale* [1996] 2 SLR 239 ('the *Good Property* case').

24. In the *Good Property* case, a company Good Property Land Development Pte Ltd ('GPLD') had sought to develop two plots of land ('the Properties'). It applied for and obtained a syndicated loan from various banks. Societe Generale ('SG') was the lead manager and agent of the syndicated loan. The loan was secured, inter alia, by a mortgage over the Properties.

25. However, SG had also lent some monies to GPLD which were not secured by the mortgage.

26. On 12 November 1988, SG exercised their power of sale under the mortgage and sold the Properties. Completion was effected on 4 February 1989. The proceeds of sale were more than sufficient to pay the secured debt.

27. Accordingly, after paying the secured debt, SG kept the surplus to pay GPLD's debts to it which were unsecured.

28. On 29 June 1989, SG filed a petition to wind up GPLD and on 28 July 1989, GPLD was ordered to be wound up and liquidators were appointed.

29. On various dates after completion, SG purported to set-off the surplus against the debts owing to it by GPLD.

30. The liquidators then commenced an action to recover the surplus, in so far as GPLD had not earlier consented to the set-off.

31. SG argued that it was entitled to a set-off under the mutual credit and set-off provision of the then Bankruptcy Act (Cap 20). This was before major changes were made to bankruptcy legislation by a new Bankruptcy Act which came into effect on 15 July 1995. I will refer to the prior Bankruptcy Act as 'the pre-1995 Bankruptcy Act' and the Bankruptcy Act applicable as at the relevant date as 'the applicable Bankruptcy Act'.

32. The liquidators argued that SG was not entitled to a set-off under that provision as there was no mutuality for two reasons.

33. First, SG was obliged to apply the monies received from its exercise of its power of sale in accordance with s 68(1) Land Titles Act (Cap 157, 1985 Ed) which states:

> 'The money received by a mortgagee who has exercised his power of sale, after discharge of prior encumbrance to which the sale is not made subject (if any), or after payment into court under the Conveyancing and Law of Property Act of a sum to meet any prior encumbrance, shall be held by him on trust to be applied -
>
> (a) firstly, in payment of all costs and expenses properly incurred as incidental to the sale or any attempted sale, or otherwise,
>
> (b) secondly, in discharge of the mortgage money, interest and costs, other money and liability (if any) secured by the mortgage; and
>
> (c) thirdly, on payment of subsequent mortgages and charges (if any) in the order of their priority,
>
> and the residue of the money so received shall be paid to the person who appears from the land-register to be entitled to the mortgaged property or to be authorised to give receipts for the proceeds of the sale thereof.'

34. The liquidators' argument was that as SG was holding the surplus on trust, SG was a trustee and therefore it could not set-off the surplus against the monies owing to it in its own capacity.

35. Secondly, SG was not even holding the surplus for itself but as agent of the syndicated banks who were the true mortgagees and who were liable in law to give effect to s 68(1) of the Land Titles Act. Accordingly, again, there was no mutuality which would entitle SG to set-off the surplus against monies owing to it.

36. The Court of Appeal allowed the appeal of the liquidators but on different grounds.

37. At p 246E to F of the report, the Court of Appeal said:

> 'We think that whether the surplus funds were held for the mortgagor or all subsequent encumbrancers, one position is undoubted and it is this: the proceeds of sale were held on trust but the right of the mortgagor to any residue will only crystallize or, to phrase it in another way, the beneficial interest will only become clear and ascertained after all prior encumbrancers are paid. This is part of the wider principle that for mutuality to exist, two conditions must generally be satisfied. First, each claimant must be personally liable for the debt he owes to the other claimant. Mutuality sees through to the real beneficial ownership, regardless of who is the legal, nominal, titular or procedural holder of the claim or procedurally the appropriate plaintiff. Secondly, each claimant must beneficially own the claim which is owed to him by the other claimant and his ownership interest in that claim must be clear and ascertained without inquiry.

The second condition is most pertinent to our present case. We think that the most obvious rationale for this condition is that there must be no real risk of one person's claim being used to pay another's liability: see *Jones v Mossop* (1844) 3 Hare 568; 67 ER 506 at p 574. This rationale also forms the underlying principle on which mutuality is based. A set-off might involve the use of property to pay a debt where that property or part of it was allocated to the payment of prior creditors or to the payment of other beneficiaries, as under a mortgage trust. The following case, though not involving a mortgage trust, is illustrative of this rationale. In *Bishop v Church* (1748) 3 Atk 691; 26 ER 1197, a beneficiary of a will trust owed a loan to a bank and the bank in turn owed a credit balance to the trustee of the trust in which the beneficiary had an interest. As the estate was not fully administered, it was held that there could be no set-off because, if the bank were to set off the beneficiary's loan against the credit balance, this might involve the credit balance being used to pay the beneficiary's private loan in circumstances where the credit balance, or part of it, should be allocated to the payment of creditors entitled to pari passu payment out of the trust fund and to other beneficiaries. The size of the interest of the beneficiary in the credit balance would only appear on completion of the administration of the estate when all prior creditors and other beneficiaries had been paid (also see *Re Willis Percival & Co, ex p Morier* [1879] 12 Ch D 491 and *Phillips v Howell* (1901) 2 Ch 773). The same rationale could also apply, *mutatis mutandi*, to the present case of a mortgage trust. The mortgagor, GPLD, had a beneficial interest in the proceeds of sale which only became clear and ascertainable after all the relevant payments were made. It was only at this point that mutuality could exist. In the event that no surplus was left thereafter, then no interest would ever crystallize.

…

In our opinion, once it was established that GPLD did not have a clear and ascertained interest in the surplus funds under items 20 and 21 before the commencement of winding-up, the matter was not so much whether trust moneys could be set-off. Rather, the issue to consider was when such an interest crystallized. And when it finally did, was it too late for a right of set-off to exist? In particular, we were concerned as to whether the surplus funds, when crystallized, would vest in GPLD or the liquidators since this was an issue that went towards mutuality. The right of set-off cannot encompass amounts paid to the credit of the insolvent customer's account after the commencement of the winding-up. Such amounts are not funds deposited to the credit of the bank's customer but are funds belonging to the liquidator (see *Re West Bay Sales Ltd* (1979) 30 CBR (NS) 274 at p 280).'

38. After citing a passage from *Re DW McIntosh Ltd v Royal Bank of Canada* [1940] 3 DLR 782 at p 785, the Court of Appeal said, at p 248:

'Likewise in *Re S Piscione & Sons Ltd* [1965] 1 OR 515, following the debtor's bankruptcy, the mortgagee realized the mortgage and sought to set off the surplus proceeds against unsecured indebtedness. No set-off was allowed due to the lack of mutuality as the debtor was indebted to the creditor and the creditor to the trustee in bankruptcy. Had the mortgage been realized before the bankruptcy, that would have made all the difference. Smily J held, at p 520-521, as follows:

> With respect to the second issue, whether United [the chattel mortgagee] is entitled to apply any surplus realized from the sale of equipment covered by either or both of the chattel mortgages against the unsecured account owing to it by Piscione, this, of course, depends on whether United is entitled to set-off any surplus against the unsecured account. There does not appear to be any question apart from the rule of set-off, that United would not be entitled to apply such surplus against the other account. For such right of set-off to apply, there must of course be mutuality of debts. In the instant case this does not exist. At the time the trustee is entitled to receive the surplus from United, there is no indebtedness to be set off. The trustee is not indebted to United.
>
> The cases referred to by counsel for United were all cases where the mutual debt arose before the assignment in bankruptcy, including the case of *Stephens v Boisseau* (1896) 26 SCR 437, much relied upon by said counsel. *Under the Bankruptcy Act, RSC 1952 (c 14) s 41(5), all the*

> *property of Piscione, the chattel mortgagor vests in the trustee and this of course would include any equity in the property covered by the chattel mortgage. So that while the unsecured account of United was against the estate of the bankrupt and not against the trustee, the indebtedness of United was a debt to the trustee. There is therefore no mutuality of debts, so the right of set-off does not apply and United was not entitled to apply any surplus realized from the sale of the equipment covered by either or both of the chattel mortgages against the unsecured account owing to it by the bankrupt.* The liability or debt of United for the surplus did not arise until after the bankruptcy, which distinguishes it from the case of *Stephens v Boisseau* and other cases mentioned by counsel for United. [Emphasis added.]

We did not see how our present case was very different. …'

39. At p 251D/E, the Court of Appeal also said,

'In *Arab Banking Corp v United Overseas Ltd* [1991] 2 MLJ 84, a similar issue arose before this court. There sums were due and payable to the respondents under a guarantee. The mortgaged property was sold by the respondents with surplus funds left from the sale. LP Thean J, at p 91, held the following:

> … the last issue, namely, whether the respondents were entitled to set [off] the amount owing by Sng [the bankrupt] against the surplus proceeds of sale does not arise. *The respondents at the date of completion became obliged to hold the surplus amount in trust for the appellants; that amount does not belong to Sng and no question of any se-off arises*. [Emphasis added.]

Likewise, GPLD's right to the sum of $28,744.98 had not crystallized. This amount did not belong to it. Hence there was no mutuality and the set-off was invalid.'

40. However in *Arab Banking Corp v United Overseas Bank Ltd* [1991] 2 MLJ 84 ('the *Arab Banking* case'), the dispute was not between the liquidator of a company and a creditor of the same company but between two banks, Arab Banking Corp ('ABC') and United Overseas Bank Ltd ('UOB'), who were creditors of an individual Sng Hock Seng ('Sng').

41. Sng was the beneficial owner of a property which was mortgaged to UOB to secure a debt owing by one Sim Lek Tee ('Sim') in whose name the property was registered.

42. Sng had in the meantime, executed a guarantee in favour of UOB and another in favour of ABC to secure the liability of a company called City Securities (Pte) to each of these two banks.

43. Eventually City Securities (Pte) had financial difficulties and ABC called on the guarantee from Sng. As Sng did not pay on the guarantee, ABC initiated action and obtained judgment against him on 31 July 1986. ABC then obtained a charging order nisi on the property on 7 August 1986. On 3 October 1986, ABC obtained a charging order absolute and on 10 October 1986, it obtained an order to appoint a receiver over the property.

44. In October 1986 or thereabouts, Sim was in default of payment of monies to UOB. On 21 October 1986, UOB exercised its power of sale and the sale was completed on 22 January 1987. After applying the proceeds of sale to pay Sim's liability, there was a surplus.

45. UOB wanted to use the surplus to pay Sng's liability under his guarantee to UOB to secure the liability of City Securities (Pte) which was also indebted to UOB.

46. On 27 January 1987, Sng committed what was then known as an act of bankruptcy and on 29 January 1988, a receiving and an adjudication order were made against him.

47. ABC claimed the surplus on the ground that that it held a charge on the property in view of the charging orders it had obtained. Therefore, ABC contended that it was a subsequent encumbrancer and UOB was a trustee of the surplus and was obliged to pay it to ABC under s 26(3) of the then Conveyancing and Law of Property Act (Cap 61) 1985 Edition. Section 26(3) is, for present purposes, similar to s 68(1) of the then Land Titles Act (Cap 157) 1985 Edition.

48. Relying on *The Official Assignee of the Property of Lim Chiak Kim v United Overseas Bank Ltd* [1988] 3 MLJ 189, UOB argued that ABC had not completed its process of execution under the charging orders before the date of the receiving order against Sng because ABC had not completed its sale of the property by receiving the proceeds of sale. It will be recalled that UOB was the one who had sold the property and was hanging onto the surplus. Accordingly, as ABC had not completed its sale prior to the receiving order, UOB's argument was that ABC could not obtain the benefit of its charging orders under s 49 of the pre-1995 Bankruptcy Act.

49. Section 49 of the pre-1995 Bankruptcy Act states:

> '(1) Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due, or property belonging to him, he shall not be entitled to retain the benefit of the execution or attachment against the Official Assignee unless he has completed the execution or attachment before the date of the receiving order and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor.
>
> (2) For the purposes of this Act -
>
> > (a) an execution against goods or land is completed by seizure and sale, or in the case of an equitable interest in land by the appointment of a receiver;
> >
> > (b) an attachment of a debt is completed by receipt of the debt;
> >
> > (c) an attachment of property is completed by the sale of such property and the satisfaction out of the proceeds of the sale of the judgment in execution of which the attachment was made.'

50. The Court of Appeal in the *Arab Banking* case disagreed with the contentions for UOB. It held, inter alia, that s 49 of the pre-1995 Bankruptcy Act did not apply.

51. Under s 49, a creditor could not retain the benefit of its execution against the Official Assignee if it had not completed the execution before the date of the receiving order. However, the Official Assignee was not a party to the action and there was nothing in the pre-1995 Bankruptcy Act to deny ABC the benefit of its charging orders as between ABC and UOB or to prevent the trust imposed under s 26(3) of the CLPA from arising.

52. It was in that context that the Court of Appeal in the *Arab Banking* case said that the surplus did not belong to Sng (but to ABC) and no question of set-off arose. The Court of Appeal in that case did not say that because the receiving order had already been made, the surplus vested in the Official Assignee and hence there could be no set-off as between UOB and the Official Assignee.

53. Coming back to the decision of the Court of Appeal in the *Good Property* case, there is an article by Mr Lee Eng Beng on it. His article is entitled 'Trust Funds, Ascertainability of Beneficial Interest and Insolvency Set-Off' (1966) 8 S. AcLJ 489.

54. At p 494 to 496 he says,

‘The requirement of ascertainability

The Court of Appeal is quite correct in stating that, in order for set-off to apply, each claimant must, at the relevant date, beneficially own the claim which is owed to him by the other claimant. However, the subsequent proposition that, at that date, his ownership interest in the claim must also be clear and ascertained without inquiry raises some interesting questions.

The Court, in formulating the latter proposition, appears to have derived substantial assistance from Wood’s treatise. But it is respectfully submitted, as recognised by Derham, that the rule is in fact one which applies only in the special context of executors and administrators. The cases relied on by Wood and the Court merely establish that the claim of a legatee to sums comprised in a deceased’s estate cannot be set off, during the currency of administration, against his personal liability owed to a debtor of the estate; there is no mutuality since the claim of the estate does not beneficially belong to the legatee. This is because of the distinctive rule that, while a deceased’s estate is in administration, the persons entitled to the estate under the will or according to the laws of intestacy have no beneficial interest in the estate. They only have a right to have the estate properly administered. While the estate is being administered, it is impossible to identify the person in whom the beneficial ownership of any particular asset forming part of the estate is vested, and it is in this sense that it is said that he does not have a clear and ascertained beneficial interest in the estate. Accordingly, the requirement is really another facet of the rule that the parties to the set-off must, at the relevant date, beneficially own the claims purported to be set off. It relates to the *existence* of the beneficial interest, not its *quantification*.

That this is the correct analysis is supported by the rule that contingent and unliquidated claims may be set off. …

…

And the House of Lords recently held that a claim for damages for breach of contract and a counter-claim for damages for misrepresentation, both of which are unliquidated at the relevant date, will be automatically set off at the relevant date such that only the net balance of the two claims is left owing [citing *Stein v Blake* [1995] 2 WLR 710J]. The uncertainty in the quantification of a claim should never defeat set-off, as long as the claim is an existing one at the relevant date. Furthermore, it has long been recognised that, as long as a debt is provable, it is capable of being set off (provided the other requirements are made). It would be contrary to this rule to hold that only claims the quantum of which at the relevant date are ‘clear and unascertainable without inquiry’ may be set off, since it is statutorily provided that a claim is provable even if it is unliquidated or contingent at the date of the winding up order.

….

The vesting of the claim in the liquidator

The final comment is with regard to the Court of Appeal’s statements to the effect that a claim of a company which arises after the commencement of winding up is not capable of being set off as it vests in the liquidator and not the company. These statements appear to equate the effect of bankruptcy on a bankrupt’s assets with the effect of winding up on a company’s assets. But one of the key differences between bankruptcy and winding up is that in bankruptcy the whole estate is taken out of the bankrupt and is vested in his trustee, whereas in a winding up the legal estate still remains in the company. In a winding up, there is no transfer of the company’s property to the liquidator whose duty is merely to take into custody and take control of the company’s property. This is also implicit in the terms of section 269 of the Companies Act. As such, a claim acquired by the company never vests in the liquidator, regardless of the date of acquisition, unless the Court expressly makes an order to that effect. The cases which hold to the contrary and which were relied on by the Court were *Canadian* cases - a feature of the Canadian bankruptcy regime, which is not found in the local model (or in that of England and Australia), is that it applies to corporations as well as individuals. In Canada, a receiving order may be made against a corporation, whereupon a trustee in bankruptcy would be appointed as trustee of the corporation’s property.

Nevertheless, it is correct to say that a claim of the company which arises after the date of the winding up order is not capable of being set off. But this is due to another reason: the operation of set-off is automatic and self-executing at that date and only the net balance of the mutual claims remains in existence. Set-off operates only on the mutual claims existing at the date of the winding up order.'

55. In Mr Lee's article, he considers that the relevant date as to when to consider mutual debts is the date of the winding up order and not the date of the filing of the winding up petition. As I have said, for present purposes, it is not necessary for me to determine which is the relevant date.

56. In the present case before me, Counsel for the liquidator argued that the Defendants were not entitled to set-off the liquidated damages they were entitled to claim against the payments due from them under cll 3(1)(g) and 3(1)(h) of the S&P because as at the relevant date, the monies to be paid by the Defendants under cll 3(1)(g) and 3(1)(h) were not clear or ascertainable. This was because it was not clear then whether the liquidator would carry on with the Project and therefore the actual sum of monies payable to the liquidator was not clear or ascertainable.

57. If I were not bound by authority, I would be of the view that the difficulty of quantifying the monies owing to the liquidator cannot deny the Defendants from relying on the mutual credit and set-off provision under s 41(1) of the pre-1995 Bankruptcy Act for the reasons mentioned in Mr Lee's article.

58. I would also cite a passage from the judgment of the House of Lords in *Stein v Blake* [1995] 2 WLR 710.

59. There the House of Lords was considering s 323 of the Insolvency Act 1986 which is similar to s 41(1) of the pre-1995 Bankruptcy Act.

60. At p 713 to 714 of the report, Lord Hoffmann said:

> 'Legal set-off is confined to debts which at the time when the defence of set-off is filed were due and payable and either liquidated or in sums capable of ascertainment without valuation or estimation. Bankruptcy set-off has a much wider scope. It applies to any claim arising out of mutual credits or other mutual dealings before the bankruptcy for which a creditor would be entitled to prove as a "bankruptcy debt". This is defined by section 382 of the Insolvency Act 1986 to mean:
>
>> "(1) … any of the following - (a) any debt or liability to which he is subject at the commencement of the bankruptcy, (b) any debt or liability to which he may become subject after the commencement of the bankruptcy (including after his discharge from bankruptcy) by reason of any obligation incurred before the commencement of the bankruptcy … (3) For the purposes of references in this Group of Parts to a debt or liability, it is immaterial whether the debt or liability is present or future, whether it is certain or contingent or whether its amount is fixed or liquidated, or is capable of being ascertained by fixed rules or as a matter of opinion; and references in this Group of Parts to owing a debt are to be read accordingly."
>
> 5. *Taking the account under section 323*
>
> Bankruptcy set-off therefore requires an account to be taken of liabilities which, at the time of bankruptcy, may be due but not yet payable or may be unascertained in amount or subject to contingency . Nevertheless, the law says that the account shall be deemed to have been taken and the sums due from one party set off against the other as at the date of the bankruptcy. This is in accordance with the general principle of bankruptcy law, which governs payment of interest,

conversion of foreign currencies etc., that the debts of the bankrupt are treated as having been ascertained and his assets simultaneously distributed among his creditors on the bankruptcy date: see *In re Dynamics Corporation of America* [1976] 1 W.L.R. 757, 762. It is clear, therefore, that when section 323(2) speaks of taking an account of what is "due" from each party, it does not mean that the sums in question must have been due and payable, whether at the bankruptcy date or even the date when the calculation falls to be made. The claims may have been contingent at the bankruptcy date and the creditor's claim against the bankrupt may remain contingent at the time of the calculation, but they are nevertheless included in the account. I consider next how this is done.

6. *Quantifying the cross-claims*

How does the law deal with the conundrum of having to set off, as of the bankruptcy date, "sums due" which may not yet be due or which may become owing upon contingencies which have not yet occurred? It employs two techniques. The first is to take into account everything which has actually happened between the bankruptcy date and the moment which it becomes necessary to ascertain what, on that date, was the state of account between the creditor and the bankrupt. If by that time the contingency has occurred and the claim has been quantified, then that is the amount which is treated as having been due at the bankruptcy date . An example is *Sovereign Life Assurance Co. v. Dodd* [1892] 2 Q.B. 573, in which the insurance company had lent Mr. Dodd 1,170 on the security of his policies. The company was wound up before the policies had matured but Mr. Dodd went on paying the premiums until they became payable. The Court of Appeal held that the account required by bankruptcy set-off should set off the full matured value of the policies against the loan.

But the winding up of the estate of a bankrupt or an insolvent company cannot always wait until all possible contingencies have happened and all the actual or potential liabilities which existed at the bankruptcy date have been quantified. Therefore the law adopts a second technique, which is to make an estimation of the value of the claim. Section 322(3) says:

> "The trustee shall estimate the value of any bankruptcy debt which, by reason of its being subject to any contingency or contingencies or for any other reason, does not bear a certain value."

This enables the trustee to quantify a creditor's contingent or unascertained claim, for the purposes of set-off or proof, in a way which will enable the trustee safely to distribute the estate, even if subsequent events show that the claim was worth more. There is no similar machinery for quantifying contingent or unascertained claims *against* the creditor, because it would be unfair upon him to have his liability to pay advanced merely because the trustee wants to wind up the bankrupt's estate.'

61. I would add that the pre-1995 Bankruptcy Act and the applicable Bankruptcy Act also have provisions for the quantum of contingent claims of a creditor to be estimated.

62. Counsel for the liquidator had another argument. He argued that, as at the relevant date, there was nothing for the Defendants to set-off against because no claim had yet been made under cll 3(1)(g) and 3(1)(h) of the S&Ps.

63. The comments of Mr Lee Eng Beng in his article seem to support this argument, eg. at p 496 of the journal, he says:

> 'The uncertainty in the quantification of a claim should never defeat set-off, as long as the claim is an existing one at the relevant date.'

64. At p 497 he says:

> 'Nevertheless it is correct to say that a claim of the company which arises after the date of the winding up order is not capable of being set-off.'

65. Mr Lee appears to rely on *Stein v Blake* for this proposition. In my view, *Stein v Blake* is not authority for this proposition. On the contrary that case recognises that a contingent claim may be set-off against an existing claim. A contingent claim is one which may or may not arise but its basis i.e. the contract from which it may or may not arise, exists as at the relevant

date.

66. Furthermore, Mr Lee's assertion that a claim which arises after the relevant date is not capable of being set-off seems to run counter to his other assertion that contingent claims may be set-off.

67. The liquidator's Counsel relied on two other cases in support of his argument:

(a) The Ince Hall Rolling Mills Company Limited v The Douglas Forge Company

(1882) 8 QBD 179, and

(b) *P.Lyall & Sons Construction Co. Ltd (in liquidation) v Baker Et Al* (1933) O.R. 286.

68. On the other hand, Counsel for the Defendants relied on the principle that where beneficial ownership has passed to the buyer prior to the relevant date, then the sale price should be eligible for set-off against what is payable to the buyer even though the sale price is not payable until some future date. For convenience, I will refer to this as 'the Beneficial Ownership Set-Off Principle'. He relied on *In Re Daintrey* [1900] 1 QB 546 and *In Re Taylor* [1910] 1 KB 562.

69. In my view, *In Re Daintrey* is not authority for the Beneficial Ownership Set-Off Principle. It is authority for the principle that it is enough for a debt to qualify for a set-off if, at the relevant date, the debt was a contingent one which in due course might become due and payable. For convenience, I will refer to this principle as 'the Contingent Debt Set-Off Principle'.

70. *In Re Taylor* is also authority for the Contingent Debt Set-Off Principle, although it is as well an authority for the Beneficial Ownership Set-Off Principle.

71. The Contingent Debt Set-Off Principle has been approved and applied in Australia in *Hiley v Peoples Prudential Assurance Co Ltd (In Liq.)* [1938] 60 CLR 468 and in *Day & Dent Construction Proprietary Limited (In Liquidation)* [1981-1982] 150 CLR 85, both of which were decisions of the High Court of Australia.

72. These decisions were followed in a more recent decision of the High Court of Australia i.e. *Gye v McIntyre* [1991] 171 CLR 609. In that case, the High Court of Australia considered the effect of s 86(1) of the Bankruptcy Act 1966 which states:

> '(1) Subject to this section, where there have been mutual credits, mutual debts or other mutual dealings between a person who has become a bankrupt and a person claiming to prove a debt in the bankruptcy -
>
> (a) an account shall be taken of what is due from the one party to the other in respect of those mutual dealings;
>
> (b) the sum due from the one party shall be set off against any sum due from the other party; and
>
> (c) only the balance of the account may be claimed in the bankruptcy, or is payable to the trustee in the bankruptcy, as the case may be.'

73. At p 623 to 624 of the report, the High Court said:

> 'In the context of s. 86, the word "mutual" conveys the notion of reciprocity rather than that of correspondence. It does not mean "identical" or "the same". So understood, there are three aspects of the section's requirement of mutuality. The first is that the credits, the debts, or the claims arising from other dealings be between the same persons. The second is that the benefit or burden of them lie in the same interests. In determining whether credits, debts or claims arising from other dealings are between the same persons and in the same interests, it is the equitable or beneficial interests of the

parties which must be considered: see, e.g., *Hiley* (52). The third requirement of mutuality is that the credits, debts, or claims arising from other dealings must be commensurable for the purposes of set-off under the section. That means that they must ultimately sound in money.

The requirement that the credits, the debts or the claims arising from other dealings be commensurable does not mean they must be vested, liquidated or enforceable at the decisive date, that is to say, at the time of the sequestration order or special resolution accepting the composition. Provided they exist as contingent at that date and are of a kind which will ultimately mature into pecuniary demands susceptible of set-off, the requirement of the section may be satisfied in relation to them. In so far as "dealings" are concerned, Dixon J. pointed out in *Hiley*:

> "It is enough that at the commencement of the winding up mutual dealings exist which involve rights and obligations whether absolute or contingent of such a nature that afterwards in the events that happen they mature or develop into pecuniary demands capable of set off. If the end contemplated by the transaction is a claim sounding in money so that, in the phrase employed in the cases, it is commensurable with the cross-demand, no more is required than that at the commencement of the winding up liabilities shall have been contracted by the company and the other party respectively from which cross money claims accrue during the course of the winding up." '

74. This approach in *Gye v McIntyre* is similar to that of the House of Lords in *Stein v Blake* (see the part of its judgment which I have cited in para 60 above).

75. Again, if I were not bound by authority, I would be of the view that under s 41(1) of the pre-1995 Bankruptcy Act, a contingent claim which arises after but is based on an existing contract as at the relevant date is capable of being set-off against an already existing claim and it would not be necessary for me to consider the argument of the Defendants based on the Beneficial Owner Set-Off Principle. In any event, I do not intend to consider that argument in the light of the other points which are made below.

76. As regards the argument that after the relevant date, the creditor is not the company but the liquidator and thus debts owing by the company as at the relevant date cannot be set-off against debts owing to the liquidator after the relevant date, I would also be of the view that this is not a valid argument. If it were, existing claims by a company can never be set-off against contingent claims against the company which mature after the relevant date.

77. Likewise, existing (and continuing) claims against the company can be set-off against contingent claims by the company.

78. I now refer to s 41(1) of the pre-1995 Bankruptcy Act which states:

'41(1) Where there have been mutual credits, mutual debts, or other mutual dealings between a debtor against whom a receiving order is made under this Act and any other person proving or claiming to prove a debt under the order, an account shall be taken of what is <u>due</u> from the one party to the other in respect of such mutual dealings, and the sum <u>due</u> from the one party shall be set off against any sum <u>due</u> from the other party, and the balance of the account and no more shall be claimed or paid on either side respectively.'

[Emphasis added.]

79. This is similar to:

(a) Section 86(1) of the Australian Bankruptcy Act 1966 (considered in *Gye v McIntyre* and set out in para 72 above), and

(b) Section 323 of the English Insolvency Act 1986 (considered in *Stein v Blake* where the provision is set out in p 712 of the report).

80. The comparable provision of s 41(1) in the applicable Bankruptcy Act is s 88(1) which states:

'88(1) Where there have been any mutual credits, mutual debts or other mutual dealings between a bankrupt and any creditor, the debts and liabilities to which each party is or may become subject as a result of such mutual credits, debts or dealings shall be set-off against each other and only the balance shall be a debt provable in bankruptcy.'

[Emphasis added.]

81. As can be seen, the words in s 88(1) of the applicable Bankruptcy Act are different from those in s 41(1) of the pre-1995 Bankruptcy Act.

82. Neither Counsel for the liquidator nor for the Defendants made any submission about the difference.

83. My consideration of the following has not yielded any explanation for the difference:

(a) the explanatory statement to the Bankruptcy Bill No 16 of 1994 which eventually led to the passing of the applicable Bankruptcy Act,

(b) the Report of the Select Committee on the Bankruptcy Bill [Bill No 16/94], and

(c) the Parliamentary Debates on this Bankruptcy Bill.

84. I am of the view that if, as seems to be the case, the judgment in the *Good Property* case has decided that under s 41(1) of the pre-1995 Bankruptcy Act, contingent claims are not capable of being the subject of set-off, then, the applicable s 88(1) has changed the position and it allows the Defendants' claims for liquidated damages to be set-off against the contingent claims of the Vendor which have now matured into claims against the Defendants.

85. Aside from the judgment in the *Good Property* case, I would be of the view that s 88(1) does not change the position because even under s 41(1) of the pre-1995 Bankruptcy Act, contingent claims are capable of being the subject of set-off.

86. My view of the position under s 88(1) is reinforced when other provisions of the applicable Bankruptcy Act are considered.

87. For example, s 88(2)(a) of the applicable Bankruptcy Act states:

'(2) There shall be excluded from any set-off under subsection

(1) any debt or liability of the bankrupt which -

(a) is not a debt provable in bankruptcy; or

(b) …'

88. Sections 87(1) and (3) of the applicable Bankruptcy Act state what debts are provable:

'87(1) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust shall not be provable in bankruptcy.

(2) …

(3) Subject to this section and section 90, any debt or liability to which the bankrupt -

(a) is subject at the date of the bankruptcy order; or

(b) <u>may become</u> subject before his discharge <u>by reason of any obligation incurred</u> before the date of the bankruptcy order,

and any interest on such debt or liability which is payable by the bankrupt in respect of any period before the commencement of his bankruptcy shall be provable in bankruptcy.'

[Emphasis added.]

89. Although ss 87(1) and (3) apply to debts owing by the bankrupt and not to the bankrupt, it is significant for its approach i.e. it includes any contingent debt to which the bankrupt may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy order.

90. I am of the view that similarly for s 88(1) which applies to any debt which 'each party … may become subject' to, contingent debts of one party may be set-off against existing debts owing to that party.

91. Thus, the S&P is the obligation incurred by each Defendant before the relevant date and each Defendant's liability to pay under cl 3(1)(g) and (h) of the S&P is the debt which it/he 'may become subject' to and now has become subject to.

DISTINGUISHING FACTS

92. In any event, there are other facts in the present case before me which distinguish it from the *Good Property* case.

Contractual set-off

93. First, the right of set-off for late delivery of possession is contractually provided for in cl 11(4) of the S&P. This is a material difference.

94. The liquidator has carried on with the S&Ps. It is said that he used the resources of the company to achieve the stages under cll 3(1)(g) and (h) but that is besides the point. The fact is that he has carried on with the S&Ps. Having done so, he cannot, in my view, claim the benefits under the S&Ps and yet disclaim the burdens under them. He cannot choose which terms of the S&Ps would continue to apply to him and which would not.

95. The point is not so much whether the liquidator is the same person as the Vendor but whether he is choosing to enforce the same contracts or not.

96. For example, in *Re Asphaltic Wood Pavement Company, Lee & Chapman's Case* [1885] Ch D 216, a company had contracted with the Commissioners of Sewers to pave a street. The Commissioners were to pay 60% of the moneys a month after the engineer's certificate of completion, 30% within three months afterwards and 10% at the expiration of two years. During the two years, the company was to keep the wood surface of the roadway in repair and if, before the expiry of the two years, the Commissioners should give notice accordingly, the company was to keep the roadway in repair for fifteen years at a certain annual rate.

97. On 9 December 1882, the company presented a petition for a winding up order and on 12 and 16 December 1882 the provisional official liquidator was empowered and ordered to complete the contract. On 13 January 1883, the winding up order was made.

98. On 29 January 1883, the liquidator sent a claim to the Commissioners and on 8 March 1883, the engineer certified the

work to be complete.

99. On 19 March 1883, the Commissioners sent to the liquidator a claim of set-off for anticipated breach of contract to repair for fifteen years. They also claimed to set off damages accrued and anticipated under other contracts for paying other streets.

100. One of the arguments for the liquidator there was that the company after the winding up order was made was not the same as the company which entered into the contract.

101. At p 204 of the report, Brett M.R. said:

> 'When the company went into liquidation, the liquidator evidently thought it for the benefit of the estate that he should complete the contract, so as to obtain the payment for it. He got the leave of the Court to carry on the contract. It has been argued that the company which carries on the contract, is not the same company as that which entered into the contract. Be it so: but the contract remained the same; and if the company were to carry on the contract so as to earn the money, it is obvious to my mind that they were to carry it on subject also to the liability that if they were requested so to do they were to keep the road in repair for fifteen years. But they are disabled from performing a part of the contract, and that gives a right to the person with whom they have contracted to damages under that contract.'

102. Cotton LJ also held a similar view. At p 224 he said:

> 'But if I rightly understand the argument of the counsel for the liquidator, it was somewhat subtle. He said that it is impossible that any such notice should be given, inasmuch as one company entered into the contract under which this sum is payable, and that company no longer exists; another and different company is now going on. The liquidator can only carry on contracts which have been entered into by the company. He has adopted and acted on that contract, and it is impossible to say that a different company is acting under the winding-up to what there was before. It is true that the liquidator does many things merely as liquidator, but his right, if any, to claim this sum of money is in respect of a contract entered into by this going company, and it is only to this going company and the liquidator as its representative that any sum can be due. In my opinion, therefore, as between the Commissioners and the liquidator under the mutual credit clause there is this right of set-off.'

103. Although these statements were made in respect of the statutory right of set-off, I am of the view that they are equally applicable to the contractual right of set-off.

104. Defendants' Counsel submitted that a reason why the liquidator is bound by the S&P is because he comes within the definition of 'Vendor' in the S&P. In cl 23 thereof 'the Vendor' is defined to include its successors-in-title and assigns.

105. Counsel then referred to *Re Cyril Wright* [1949] 1 Ch 729 in which a trustee in bankruptcy was said to come within the definition of 'successors-in-title'.

106. However, in that case, the title vested in the trustee in bankruptcy whereas under the Companies Act (Cap 50), the title of the company does not vest in the liquidator. That is why the court in *Re Cyril Wright* referred (at p 736) to the judgment of Lord Sterndale MR in *Re Farrow's Bank, Ld* [1921] 2 Ch 164 where he said,

> 'Now, as has been pointed out, the position of the trustee in bankruptcy is quite different from that of a liquidator. He does not act on behalf of the bankrupt; he does not dispose of the bankrupt's property as such; all the property is vested in him.'

107. I note that under ss 9(5) and 9(6)(a) of the Housing Developers Act, the moneys in the Project Account vests in the liquidator upon compulsory liquidation but this is only for the purpose of withdrawing monies in the Project Account but not otherwise, see also s 9(6)(b). Sections 9(5), 9(6)(a) and (b) will be set out later in this judgment.

108. Accordingly I doubt if the liquidator is a successor-in-title of the Vendor but it is, in the circumstances, not necessary for me to decide this.

The Housing Developers legislation

109. Another special feature of the case before me is that cl 11(4) of the S&P is part of a set of standard terms prescribed by subsidiary legislation.

110. Furthermore, while Rule 12(2) of the Housing Developers Rules 1985 provided for the S&P to be in Form E of the Schedule thereto, Rule 12(3) goes on to say:

> '(3) No amendment, deletion or alteration shall be made to the agreement referred to in paragraph (1) or (2) without the prior approval in writing of the Controller.'

111. Accordingly any argument about the parties trying to circumvent the pari passu principle in a liquidation cannot carry much weight because the Vendor and the Defendants did not choose the terms of the S&P on their own free will. Therefore unless the Rules were ultra vires the Housing Developers Act they had to be given effect to as the Act itself, see *Golden Bay Realty Pte Ltd v Orchard Twelve Investments Pte Ltd* [1989] SLR 42.

112. In so far as Counsel for the Defendants has referred me also to Rule 12(4), this is not applicable as it was introduced in 1997 after the dates of the S&Ps.

113. It is quite clear to me that cl 11(4) of the S&P is to protect the interest of purchasers like the Defendants.

114. This is reinforced by Rules 15(1) and (2) of the Housing Developers Rules 1985 which state:

> '15(1) A housing developer shall not, without the prior consent in writing of the Controller, seek from a purchaser of a unit in a housing project -
>
> > (a) any waiver of the purchaser's rights under an agreement for the sale and purchase of the unit; or
> >
> > (b) any release from the performance of the housing developer's duties and obligations under the agreement for the sale and purchase of the unit.
>
> (2) Any undertaking given by a purchaser of a unit in a housing project to a housing developer which seeks to waive the purchaser's rights or claims against the housing developer for a breach of, or to release a housing developer from the performance of, the housing developer's duties and obligations under an agreement for the sale and purchase of the unit shall be unenforceable unless the prior consent in writing of the Controller has been obtained.'

115. The paramount interest of the purchasers is further reinforced by the requirement in the Housing Developers Act for every developer, within the meaning of the Act, to maintain a Project Account. Under s 9(3) of the Housing Developers Act, all purchase moneys received by the developer from the sale of units in the project are to be paid into the Project Account. Under s 9(4), the developers cannot withdraw any money from the Project Account except as authorised by rules under the Housing Developers Act.

116. In addition, ss 9(5) and (6) state:

> '(5) Subject to subsection (6)(b), all moneys in the Project Account shall, notwithstanding any other written law to the contrary, be deemed not to form part of the property of the licensed housing

developer in the event -

> (a) the licensed housing developer enters into any composition or arrangement with his creditors or has a receiving order or adjudication order made against him; or
>
> (b) the licensed housing developer, being a company, goes into voluntary or compulsory liquidation.

(6) Upon the happening of any of the events referred to in subsection (5) -

> (a) the moneys in the Project Account shall vest in the official receiver, trustee in bankruptcy or liquidator, as the case may be, to be applied for all or any of the purposes for which moneys in the Project Account are authorised by rules made under this Act to be withdrawn; and
>
> (b) any money remaining in the Project Account, after all payments have been made pursuant to paragraph (a) and <u>all</u> liabilities and obligations of the licensed housing developer <u>under the sale and purchase agreements</u> in respect of the building project <u>have been fully discharged and fulfilled</u>, shall be held by the official receiver, trustee in bankruptcy or liquidator, as the case may be, as money belonging to the licensed housing developer to be applied in accordance with the law relating to bankruptcy or the winding up of companies.'

[Emphasis added.]

117. Sections 9(5) and 9(6) make it clear that the monies from payments (under cl 3 of the S&P) which are required to be put into the Project Account are not the property of the developer and vest in the liquidator only to carry out the purposes for which moneys in the Project Account are authorised, by rules made under the Housing Developers Act, to be withdrawn.

118. Furthermore, under s 9(6)(b), it is only when payments made pursuant to paragraph 6(a) have been made and all liabilities of the developer under the S&P have been 'fully discharged and fulfilled' that the balance remaining in the Project Account is to be held by the liquidator as money belonging to the developer to be applied in accordance with the law relating to bankruptcy or the winding up of companies.

119. One of the liabilities and obligations of a developer under the S&P is to ensure that vacant possession is delivered to purchasers by a certain deadline (under cl 11(1)) failing which the developer is liable to pay liquidated damages (under cl 11(3)).

120. Accordingly, if monies have already been paid under cl 3 of the S&P, they would have to be paid into the Project Account first. The liquidator would then use the moneys for any of the authorised purposes and thereafter have to use it to pay to the purchaser liquidated damages that may arise before making any payment to unsecured creditors (in so far as their claims do not come under s 9(6)(a)).

121. In the present case before me, the Defendants do not have to pay first because of cl 11(4) of the S&P. However, if they happened to pay first, their claim for liquidated damages would still rank ahead of unsecured creditors.

122. Counsel for the liquidator cited *Ayerst (Inspector of Taxes) v C & K (Construction) Ltd* [1976] AC 167 and submitted that the liquidator is making calls for payment under cll 3(1)(g) and (h) of the S&P for the benefit of a pool of unsecured creditors. This is not a valid argument. The liquidator, in making the calls, does so to complete the project and then to comply with obligations under the S&P like paying the liquidated damages to the purchasers. The unsecured creditors rank last.

123. Even if the liquidator does not require the monies called for to complete the project or to comply with other obligations under the S&P, this does not mean that the interest of the unsecured creditors negates the right of purchasers to the set-off claimed.

124. As regards an argument by Counsel for the liquidator that if a set-off is allowed, it might be preferring the purchasers against other creditors, which should not be the case, this again is not a valid argument. The entire scheme under the Housing Developers Act is that the purchasers are to be preferred to other creditors generally.

125. Furthermore, the mutual credit and set-off provision in the bankruptcy legislation itself acknowledges that some creditors may be in a better position than others provided they can satisfy the requirements of mutuality.

126. As regards another argument by Counsel for the liquidator that to refuse the set-off would not put purchasers in a worse position because they would be treated like other unsecured creditors, this again is not a valid argument. Purchasers are not supposed to be treated like other unsecured creditors. To do so would put them in a worse position than that envisaged under the Housing Developers legislation and the bankruptcy legislation.

Further arguments

127. The liquidator's Counsel also raised the following arguments in the course of further arguments.

128. He referred to s 94 of the applicable Bankruptcy Act read with Rule 185 of the Bankruptcy Rules.

129. Section 94 deals with interest on debts which are proved and Rule 185 of the Bankruptcy Rules prescribes the rate of interest to be 8% per annum.

130. He argued that the liquidated damages under cl 11(3) were in the nature of interest and suggested that therefore they should be reduced to 8% per annum.

131. The short answer to this argument is that these provisions relate to debts which are proved. The Defendants are not seeking to prove the liquidated damages in the liquidation of the Vendor. They are setting-off the liquidated damages against the amounts payable by them under cl 3(1)(g) and (h) of the S&P. After doing so there is a balance due from each of the Defendants which each has paid.

132. The liquidated damages is 10% of the total sum so far paid under cl 3 of the S&P whereas the interest under s 94 and Rule 185 is 8% on the sum proved after the set-off has been effected. The two are different.

133. Next, the liquidator's Counsel relied on *British Eagle International Airlines Ltd v Compagnie Nationale Air France* [1975] 2 All ER 390 ('the *British Eagle* case') to support his argument that parties cannot contract out of a provision in the Companies Act relating to the principle of distributing a company's property pari passu.

134. I have already stated that the terms in each S&P are dictated by subsidiary legislation made pursuant to a statute. The general principle of a pari passu distribution in a liquidation must be subject to these specific terms and not the other way around.

135. Besides, the general principle of pari passu distribution is also subject to the provision on mutual credit and set-off in bankruptcy legislation. I note that in the *British Eagle* case, the mutual credits and debits as between each of various airlines and British Eagle had been set-off first (see p 407 of the report), presumably under a mutual credit and set-off statutory provision.

136. The question there was whether those airlines which had a net debit balance had to pay the liquidator and those with a net credit balance had to prove in the liquidation or a clearing house arrangement was binding on the liquidator. In that context

the House of Lords decided that the clearing house arrangement was not binding on the liquidator.

137. The *British Eagle* case has sometimes been used as an authority to champion the general principle of pari passu distribution over set-off generally.

138. It must be borne in mind that there are different bases for set-off.

139. As far as statutory set-off under any particular legislation is concerned, that set-off should prevail over the principle of pari passu distribution under the Companies Act (Cap 50).

140. As to whether the principle of pari passu distribution prevails over contractual set-off, this would depend on the particular facts of each case.

141. I have decided on various grounds that the Defendants are entitled to the set-off they claim.

142. The grounds are (a) statutory set-off under s 88(1) of the applicable Bankruptcy Act, (b) contractual set-off because the S&Ps have been adopted by the liquidator, and (c) statutory set-off because the S&Ps are in any event binding on the liquidator in view of the Housing Developers legislation.

Sgd:

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JUDICIAL COMMISSIONER