# Travista Development Pte Ltd v Tan Kim Swee Augustine and Others
# [2007] SGHC 94

**Case Number** : OS 538/2007

**Decision Date** : 18 June 2007

**Tribunal/Court** : High Court

**Coram** : Judith Prakash J

**Counsel Name(s)** : Francis Goh and Gordon Oh (Central Chambers Law Corporation) for the plaintiff; Hri Kumar and Tham Feei Sy (Drew & Napier LLC) for the defendants

**Parties** : Travista Development Pte Ltd — Tan Kim Swee Augustine; Allen Chan Pow Kong; Liang Meng To; Double Up Pte Ltd; Yong Meng; Lim Joke Ngan; Chua Yat Chai @ Chua Hock Tat; Jioe Ie Mien; Wong Chun Keung; Eu Teck Soon; Shek Ling Mary Ann; Yew Chong Kew; Kwan Mee Sin

*Contract – Breach – Construction of sale and purchase agreement – Obligation on property redevelopment company to use "best endeavours" to obtain qualifying certificate and to do so "without delays" – Whether actions taken satisfying "best endeavours" test – Whether sale and purchase agreement rescinded*

*Equity – Estoppel – Estoppel by convention – Principles – Whether any estoppel by convention in relation to specific date which bound property redevelopment company so that it was prevented from denying that that date was contractual completion date*

18 June 2007

Judith Prakash J:

1 The defendants are, collectively, the owners of all the strata title units in the development known as 55 Devonshire Road, Singapore, also called Mayer Mansion ("the property"). On 12 December 2006, the defendants entered into a sale and purchase agreement ("the agreement") whereby they agreed to sell the property to the plaintiff, Travista Development Pte Ltd, a company especially incorporated for the purpose of purchasing and redeveloping the property.

2 On 3 April 2007, the plaintiff commenced these proceedings whereby it asked the court for, *inter alia*, the following orders:

> (a) a declaration that the plaintiff shall be at liberty to complete the sale and purchase of [the property] at the office of the vendors' solicitors within six (6) weeks from the date of the receipt by the plaintiff of the Qualifying Certificate from the Land Dealings Unit by virtue of the express terms of the sale and purchase agreement made between the plaintiff and the defendants dated 12 December 2006; and
>
> (b) a declaration that the 21 days' Notice to Complete issued by the defendants' lawyer dated 13 March 2007 was null and void.

3 The matter came on for hearing before me on 8 May 2007. By then, the plaintiff had filed four affidavits in support of its case and the defendants had filed six affidavits. The defendants had also asserted a counterclaim. After hearing the arguments, I took time for consideration. On 14 May 2007, I dismissed the plaintiff's application. Further, in respect of the defendants' counterclaim, I declared and adjudged:

(a) the 21-day notice issued to the plaintiff on 13 March 2007 was valid and effective;

(b) the agreement dated 12 December 2006 made between the plaintiff and the defendants was rescinded;

(c) the deposit of $3,050,000 paid by the plaintiff was validly forfeited by the defendants;

(d) the caveats set out in the schedule attached to the order were to be expunged from the land register on the Registrar of Land Titles; and

(e) the plaintiff was to pay the defendants damages as may be assessed by the assistant registrar pursuant to s 128 of the Land Titles Act (Cap 157, 2004 Rev Ed).

4 Shortly after my decision was made, the plaintiff changed solicitors. The new solicitors wrote in for further arguments. They also filed a further affidavit in support of the plaintiff's case. The defendants' solicitors objected to the request for further arguments and gave written responses to the points made by the plaintiff's new solicitors. After considering these letters, I decided that there was no need to hear further arguments. The plaintiff then filed its appeal against my decision.

**The facts**

5 In mid 2006, the defendants formed a sale committee for the purpose of negotiating and finalising the collective sale of the property. By early November 2006, the sale committee was in contact with a prospective purchaser, a Malaysian company named Malton Berhad ("Malton"). The sale committee informed Malton on 9 November 2006 that the defendants would accept an offer of $30.5m for the purchase of the property on the terms and conditions set out in its letter of that date. Malton was agreeable to the price but shortly afterwards it was replaced as the prospective purchaser by Skymas Ventures Sdn Bhd ("Skymas"), another Malaysian company. On 11 November 2006, a draft sale and purchase agreement was sent to Skymas. Skymas accepted the draft but requested that the purchasing entity should be changed to a Singapore entity. The defendants agreed.

6 The plaintiff was incorporated in Singapore on 6 December 2006. Its sole shareholder was stated as being Travista International Ltd, a British Virgin Islands company. This meant that the plaintiff was considered a foreign company for the purposes of purchasing land in Singapore and was required to apply to the Singapore Land Authority ("SLA") for approval to purchase the property.

7 On 12 December 2006, the plaintiff and the defendants entered into the agreement whereby the plaintiff agreed to buy, and the defendants agreed to sell, the property for $30.5m. The relevant clauses of the agreement for present purposes are the following:

3.2 The sale and purchase of the Property shall be completed at the office of the Vendors' Solicitors within six (6) weeks from the date of the receipt of the Qualifying Certificate from Land Dealing Units *(sic)* or within three (3) months from the date of this Agreement, whichever is later, whereupon in exchange for the items set out in Clause 3.1, the Purchaser shall pay the balance 90% of the Consideration …

…

7. The sale of the Property may be made to a foreign company or person on the following additional terms:-

(a) The sale of the Property is subject to the Purchaser obtaining the approval of the Land Dealings (Approval) Unit or such other relevant authorities pursuant to the Residential Property Act (Chapter 274) for the purchase of the Property (the "Approval") on or before the Completion Date.

(b) The Purchaser shall within ten (10) days from the date of this Agreement submit his application for the Approval and copies of his application submitted shall be furnished to the Vendors or the Solicitors within three (3) days of the said application and the Purchaser shall use his best endeavours to obtain the Approval without delay.

(c) Notwithstanding Clause 9(c), in the event that the Approval is not obtained on or before the Completion Date or is not granted by the relevant authorities, the Purchaser shall direct the purchase herein to be completed by its related company which is an "approved purchaser" or a person qualified to purchase the Property under the Residential Property Act. If on the Completion Date, the Purchaser has not obtained the Approval, or has not so directed, this Contract may be rescinded by the Vendors whereupon the Vendors shall be entitled to forfeit for their benefit the Deposit in full. Nothing herein shall prejudice the Vendors' right for *(sic)* interest for late completion and shall be without prejudice to Clause 15.

…

9. …

(b) If the Purchaser shall refuse, neglect or fail to complete the purchase as herein stipulated or shall fail to comply with any of the terms and conditions herein contained, the Vendors shall be at liberty after giving twenty-one (21) days' written notice to the Purchaser or the Purchaser's solicitors to rescind the sale and purchase of the Property and to treat the Deposit as forfeited.

8 Pursuant to the agreement, the plaintiff made the requisite deposit payment of ten percent of the purchase price (*i.e.*, $3.05m) to the defendants' solicitors to be held by them as stakeholders pending completion. Thereafter, on 21 December 2006, the plaintiff made the necessary application to the SLA for the Qualifying Certificate ("QC").

9 The plaintiff's application was approved by the SLA on 29 December 2006. Its approval letter, which was received by the plaintiff on 3 January 2007, imposed only one condition for the issue of the QC. The condition was that the plaintiff had to submit a banker's or insurer's guarantee in the sum of $3.05m to guarantee that that plaintiff would comply with the terms of the QC. A draft of the format of the guarantee required was attached to the letter. The letter also stated that if the guarantee was not received by the SLA within six months of the date of the letter, the plaintiff's application for a QC for the purchase of the property would be treated as having been withdrawn.

10 The plaintiff's then solicitors, M/s Central Chambers Law Corporation ("CCLC"), sent the defendants' solicitors, M/s William Oh & Partners ("WO&P"), a copy of the approval letter. Thereafter, WO&P and CCLC corresponded to bring the matter to completion.

11 On 19 January 2007, WO&P informed CCLC that since the SLA had given the plaintiff in-principal approval letter to purchase the property, completion would take place shortly. Mr William Oh of WO&P requested that the draft transfers be prepared quickly as some of the defendants were elderly or had indicated that they might not be in Singapore at the time of completion. At that time, Mr Oh expected

completion to take place on 12 March 2007, the date falling three months after the date of the agreement. This was because he thought that the condition attached to the issue of the QC could be satisfied fairly quickly and therefore the date falling six weeks after the issue of the QC would be earlier than 12 March 2007. It would be recalled that under cl 3.2 of the agreement, completion was to take place on the date falling six weeks after the issue of the QC or 12 weeks after the date of the agreement, whichever was the later.

12 CCLC did not send the draft transfers to WO&P by 24 January 2007, so Mr Oh called CCLC again on that day to remind them to send the draft transfers over quickly. On 26 January 2007, CCLC sent ten sets of transfers to WO&P for the defendants' execution. All ten transfers had been dated 12 March 2007 by CCLC. Thereafter, WO&P prepared draft discharge documents in respect of each of the units of the property. These draft discharge documents were sent to CCLC on 14 February 2007. The next development was that on 27 February 2007, WO&P wrote to CCLC furnishing the completion accounts for the property. Each completion account was stated to be as of 12 March 2007.

13 On 6 March 2007, CCLC wrote to WO&P stating that the plaintiff was not in receipt of the QC and therefore completion would take place within six weeks from receipt of the QC.

14 The defendants were upset. The next day, WO&P wrote to express the defendants' shock and disagreement on the stand taken by the plaintiff. The material paragraphs of this letter read:

> We are instructed to place on record that your clients were well aware at all material times that time is of the essence in the sale transaction as your clients are obliged under Clause 7(b) of the Sale & Purchase Agreement dated 12th December 2006 to expedite the process of obtaining QC by arranging for the Bankers' Guarantee in compliance with the condition as stated in LDU's approval letter dated 29th December 2006.
>
> By failing to obtain the Bankers' guarantee which is a pre-requisite for the formal issuance of QC following in-principle approval, your clients had breached the terms and conditions of Clause 7 of the Sale & Purchase Agreement dated 12th December 2006.
>
> Therefore your aforesaid letter came as a complete shock to our clients as our respective firms had proceeded on the basis that completion shall taken place on the 12th March, 2007 as your firm had sent to us the engrossed Transfers for our approval subject to there being no amendments and even accepted our completion accounts as at 12th March, 2007.
>
> …
>
> Our clients were indeed baffled by your clients' conduct in the transaction by making a complete U-turn to delay completion on the 12th March, 2007 by relying on Clause 3.2 that completion shall be six (6) weeks from the date of receipt of QC from LDU which is highly unacceptable to our clients as your clients had had ample time from the 29th December, 2006 to arrange for the Bankers' guarantee and financing of the project.
>
> …
>
> By reason of your clients' wilful default in obtaining QC expeditiously and which constitute *(sic)* a breach of clause 7 of the Sale & Purchase Agreement, we are further instructed by our clients that if this transaction is not completed on 12th March, 2007 our clients shall proceed to serve 21

days' notice to complete in accordance with our clients' rights under condition 29 of the Conditions of Sale and clause 9 of the Sale & Purchase Agreement.

15 The plaintiff did not accept this position. Through its solicitors, it insisted that at all material times it had complied with cl 7 and that there was no delay in completion because it was entitled to and had relied on the completion date as defined in cl 3.2.

16 The plaintiff did not complete on 12 March 2007. On 13 March 2007, the defendants issued a 21-day notice to complete. This notice expired on 3 April 2007 without the plaintiff completing the purchase of the property. The plaintiff then issued the originating summons in these proceedings.

17 I should perhaps mention that the plaintiff obtained financing for the development and construction of the project from OCBC Bank on 3 April 2007. This facility included the provision of the guarantee required by SLA. That guarantee was submitted to the SLA a few days later and, on 10 April 2007, the QC was issued.

**The approach of the parties**

18 It was clear from the various affidavits filed on behalf of the parties that they took very different approaches as to the legal consequences of the agreement and of the facts as they had occurred.

19 The first affidavit filed on behalf of the plaintiff was that of one Mr Tee Kien Moon who described himself as the legal consultant overseeing the plaintiff's involvement in the sale and purchase of the property. Mr Tee claimed that the plaintiff was aggrieved by the defendants' stance which was wholly inconsistent with the terms for completion as set out in the agreement. The plaintiff denied any allegations of delay or bad faith. The explanation was that the plaintiff had six months from 29 December 2006 within which to procure the guarantee for the SLA. The plaintiff, however, also wanted to complete the purchase quickly and therefore did its best to try to make it by 12 March 2007 which, he said, was the earliest targeted date for completion under the terms of the agreement. When that date approached, the plaintiff still could not obtain satisfactory arrangements for its procurement of the guarantee and, therefore, pursuant to the terms of the agreement, the plaintiff had informed the defendants that completion would be within six weeks of obtaining the QC.

20 In his second affidavit, Mr Tee asserted that two completion dates were provided for under cl 3.2 of the agreement and the plaintiff had done its best to complete the purchase by the earlier of the two dates, namely 12 March 2007. When it was unable to obtain financing to do so, the plaintiff worked towards the second completion date which would have been the date falling six weeks after the issue of the QC.

21 The defendants filed an affidavit by a retired banker named Lim Yian Poh who stated that during his 20 years as a banker he had dealt with numerous applications for banker's guarantees and performance bonds for commercial and statutory requirements. Before issuing a banker's guarantee on behalf of a customer, he averred, a bank would typically require the customer to furnish security at least in an amount equal to the value of the guarantee and if the customer was able to furnish such security, it would not take more than a week to issue the guarantee. The issuance could be expedited at the request of the customer. Mr Lim also indicated that the terms of the banker's guarantee required by SLA were fairly standard and no bank would have difficulty in issuing a guarantee on those terms.

22 Mr Eu Teck Soon, the tenth defendant and chairman of the sale committee, said in his affidavit

that on the basis of Mr Lim's evidence and a letter from the SLA confirming that a QC could be issued within five working days of receipt of the banker's guarantee, he believed that if the plaintiff had used its best endeavours to use the banker's guarantee, the QC would have been obtained not more than three weeks after the SLA letter. In those circumstances, the completion date would have been 12 March 2007. Mr William Oh in his first affidavit also stated that, in his experience, the issue of the banker's guarantee and QC were fairly routine matters which should not take more than two to three weeks. Since the SLA had given its in-principle approval to the plaintiff to purchase the property at the end of December 2006, Mr Oh considered that the contractual date of completion would be 12 March 2007.

23 When the matter came on for hearing, the divergence in the approaches was equally marked. The plaintiff submitted that the main issue was whether, on a true construction of cl 3.2 of the agreement, the plaintiff was entitled to complete its purchase of the property within six weeks from the date of the receipt of the QC from the SLA. The defendants, on the other hand, submitted that the issue was what the agreed date of completion of the sale of the property was in the light of the contractual requirement that the plaintiff use its best endeavours to obtain QC without delay. The parties were agreed, though, that the second issue to be considered was whether there had been any estoppel in relation to the date of 12 March 2007 which bound the plaintiff so that it was prevented from denying that that date was the contractual completion date.

**Construction of the agreement and best endeavours**

24 The plaintiff submitted that cl 3.2 of the agreement had to be given its plain and ordinary interpretation. As the language of the clause provided that completion would take place "within six (6) weeks from the date of the receipt of the Qualifying Certificate from the Land Dealing Units *(sic)* **or** within three (3) months from the date of this Agreement, **whichever is later**" (emphasis added), it was not open for the defendants to unilaterally rewrite the agreement by insisting on 12 March 2007 as the exclusive completion date. Further, there had been no unequivocal election by the plaintiff to commit to 12 March 2007 as the completion date to the exclusion of its right to insist on adherence to cl 3.2 of the agreement which provided for the date to be contingent upon the happening of an event.

25 Whilst in Mr Tee's affidavit, the plaintiff had taken the stand that the agreement provided for two completion dates and if the first one was not achievable, it could use the second date as the completion date instead, in their further arguments, the plaintiff's new solicitors took a different course. They agreed that there was only one completion date under cl 3.2 of the agreement, *i.e.*, the one that fell six weeks from receipt of the QC or the one that fell three months from the date of the agreement, whichever was the later. They contended that the agreement contemplated on its express terms that the completion date, and therefore the date by which the requisite approval had to be obtained would be a moving one, with the date of receipt of the QC forming the outer limit if the QC was not obtained by 29 January 2007 (which was the date falling six weeks before the end of the three-month period after the agreement was executed).

26 The defendants had asserted all along that there was only one completion date. They construed the clause to provide (and I agreed with this construction), that if the QC was received on or before 29 January 2007, completion would take place on 12 March 2007. That was because 12 March 2007 (being three months from the date of the agreement) would be the later date compared to six months from receipt of the QC. If the QC was received after 29 January 2007, however, completion would take place six weeks from the date of that receipt, as that date (whatever it might be) would be later than 12 March 2007.

27 Whilst the defendants accepted that on the face of the agreement, the completion date had to be adjusted in accordance with the date of the receipt of the QC, they stressed that the provisions of cl 7(b) placed an obligation on the plaintiff to use its "best endeavours" to obtain the QC and to do so "without delay". The provisions of that sub-clause were very specific. It placed three obligations on the plaintiff. The first was to submit its application for the approval of the SLA within ten days of the execution of the agreement. The second was to submit copies of that application to the defendants or their solicitors within three days of the application so as to establish that the plaintiff had complied with the deadline. The third obligation was to use its best endeavours to obtain the approval without delay. These conditions made it clear that the parties contemplated that the plaintiff would proceed expeditiously to obtain the QC. The main plank of the defendants' case was that the plaintiff had not used its best endeavours to obtain the QC without delay and therefore it was not entitled to argue that the completion date should be the date falling six weeks after receipt of the QC rather than the date falling three months after the execution of the agreement.

28 There is no dispute on what "best endeavours" means. As I stated in a recent judgment, *MacarthurCook Property Investment Pte Ltd v Khai Wah Development Pte Ltd* [2007] SGHC 93, the law as established by *Justlogin Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2004] 1 SLR 118 and the appeal from that decision at [2004] SGCA 20 is that a person who is obliged to use his best endeavours must take all those reasonable steps which a prudent and determined man acting in his own interest and anxious to obtain the QC would have taken. It does not mean that the plaintiff, being the person who had to use its best endeavours, had to act irrationally, but that it had to do everything reasonable in good faith with a view to obtaining the required result within the time allowed.

29 In the circumstances while the completion date was determined by the date of receipt of the QC, the plaintiff was not entitled to drag its feet in procuring the QC and thereby delay completion. It had to act with determination and do whatever was reasonable in good faith to ensure that the QC was issued without delay. After considering the evidence before me at the hearing, I was satisfied that the plaintiff had not discharged this obligation.

30 The evidence was that the plaintiff had received the SLA approval letter on 3 January 2007. The submission of the banker's guarantee was the only condition attached to obtaining the QC. This was a matter entirely within the control of the plaintiff. It appeared to me that if the plaintiff had used its best endeavours, it could have procured the issuance of the QC on or before 29 January 2007 and this would have made 12 March 2007 the completion date. Mr Lim's evidence, as I stated above, was that as long as the necessary security was furnished, such a banker's guarantee could have been procured within a week or even sooner if the customer needed the process to be expedited. Further, the SLA itself had confirmed that a QC can be issued within five working days of the submission of the banker's guarantee. In this case, it would have been perfectly possible for the QC to have been issued by 29 January if the banker's guarantee had been submitted on or before 24 January 2007. The plaintiff therefore had three weeks from 3 January in which to obtain the banker's guarantee and, since obtaining the guarantee was basically a matter of putting up security, the plaintiff had to show how it had exercised its best endeavours to put up such security within the requisite period and why it was unable to do so.

31 The plaintiff's evidence did not establish, to my satisfaction, that it had exercised its best endeavours to procure the guarantee. It should be recalled in this connection, that the plaintiff had committed itself to buying a property costing some $30.5m. The plaintiff was not buying the property to use in its existing condition. It bought the same with the intention of redeveloping the land and knew that such redevelopment was a requirement for it to obtain a QC. The plaintiff therefore must have anticipated spending far more than $30.5m on the property and its redevelopment. In this

connection, it should be noted that the financing package that the plaintiff eventually obtained from OCBC Bank comprised a land loan of $21.35m (being 70% of the purchase price of the property), a construction loan of $9.2m (being 80% of the development cost of the property) and the guarantee facility of $3.05m. The plaintiff therefore anticipated paying $30.5m for the property and another $11.5m for the construction, a total of $42m, whilst receiving financing of only $30.55m. This meant it would have to find another $11.45m from its own resources (of this it had already procured $3.05m for the deposit) and at least $6.1m of this amount would have to be paid to the defendants on completion of the purchase, *i.e.*, fairly soon. No indication was given by the plaintiff that it would not be able to meet all these necessary payments and therefore I concluded that the plaintiff did have resources or access to resources that had nothing to do with any financing it was obtaining in Singapore. The plaintiff did not explain to me what these resources were or why some of them could not be used to assist in the obtaining of the guarantee. It was relevant in this connection that the agreement was an unconditional one and the plaintiff was legally obliged to complete whether or not it could obtain financing.

32 I turn to the evidence that the plaintiff gave before me of its efforts to obtain the banker's guarantee. In para 16 of his first affidavit, Mr Tee stated:

> The Plaintiffs have endeavoured to secure financing for the purchase of the Property from several banks in Singapore:
>
> (a) The Plaintiffs' representative Mr. Lau Yik Wai began discussions with a representative of Malayan Banking Berhad ("Maybank") sometime at the end *(sic)* December 2006. The Plaintiffs gave Maybank the details of the LDU application, details of the Plaintiffs' proposed development and construction timeline of the Property, cashflow and profit forecasts, and evidence of the increase in paid up capital of the Plaintiffs.
>
> (b) Maybank rejected the Plaintiffs' request for financing on 14 February 2007.
>
> (c) At the same time the Plaintiffs also approached DBS Bank, Hongkong and Shanghai Banking Corporation ("HSBC") and the Oversea-Chinese Banking Corporation ("OCBC"). The Plaintiffs were unable to obtain financing from DBS and HSBC.
>
> (d) OCBC responded to the Plaintiffs' Mr. Lau in mid-February 2007 with a term sheet. An in principle approval of the credit facilities was granted to the Plaintiffs on 2 April 2007.

In his second affidavit, Mr Tee used the above evidence to dispute the defendants' allegation that the plaintiff did not use its best endeavours to obtain the banker's guarantee. The second affidavit did not give any additional evidence on what the plaintiff did. Neither affidavit said anything about what steps the plaintiff actually took to obtain the banker's guarantee because what the first affidavit talked about really was the plaintiff's endeavour "to secure financing for the purchase of the Property".

33 The defendants contended that the evidence, as well as the documents exhibited to the plaintiff's affidavits, demolished the plaintiff's case on the best efforts proposition. The defendants summarised these documents as showing the following:

> <u>Maybank</u>
>
> Date of 1st Approach : Before 9 January 2007.

| | |
|---|---|
| Facilities requested | : "*financial facilities to complete the acquisition and to partially fund the construction costs of the said development.* |
| Result | : Rejected on 14 February 2007. No explanation why facilities rejected. |

DBS

| | |
|---|---|
| Date of 1st Approach | : Before 24 January 2007 |
| Facilities requested | : No documents provided. |
| Result | : No documents provided. |

HSBC

| | |
|---|---|
| Date of 1st Approach | : Before 9 February 2007 |
| Facilities requested | : No documents provided. |
| Result | : No documents provided. |

OCBC

| | |
|---|---|
| Date of 1st Approach | : Before 17 February 2007 |
| Facilities requested | : "*Development Financing for Proposed Development at 55 Devonshire Road"* |
| Result | (i) Indicative Term Sheet given by OCBC for the Plaintiff's signature on 17 February 2007. **No documents provided indicating whether Indicative Term Sheet was signed by the Plaintiffs**<br><br>(ii) Letter of Offer for credit facilities issued to the Plaintiffs on 3 April 2007. No explanation as to what transpired between 17 February and 3 April 2007. |

34 As the defendants submitted, those documents did not give any or any explanation as to what steps were taken to secure the banker's guarantee and why these steps failed. On the contrary, the documents revealed that the plaintiff did not approach banks simply to obtain the banker's guarantee but wanted an entire package to finance its development and purchase of the property. Mr Tee himself stated that as at mid-February 2007, the plaintiff was still in the process of negotiating with banks to obtain the guarantee and (significantly from my point of view) credit facilities for the development of the property. It appeared that the plaintiff wanted complete financing. Whilst it was

of course entitled to approach the banks for whatever financing it needed, the plaintiff was still obliged to procure the banker's guarantee "without delay". The banker's guarantee was for only $3.05m which was much less than the package apparently sought by the plaintiff (if the facility it obtained from OCBC is anything to go by) and it would probably have been easier to simply obtain a facility for only that guarantee. I agreed with the defendants that a prudent and determined man anxious to obtain the QC would have applied for the banker's guarantee first, or kept that application separate from his negotiations for other facilities. As I pointed out earlier, since the agreement was not conditional on the plaintiff obtaining financing to purchase and develop the property, any difficulty that it faced in raising money for that purpose was irrelevant to its obligation to obtain the QC without delay.

35 At the time of hearing before me, the plaintiff did not give any evidence that it had applied for the banker's guarantee alone promptly or, even if it did, evidence why that application was not successful. Nor did it give evidence that it could not obtain a banker's guarantee separately from the other financing it needed. There was no explanation either why the banker's guarantee could not have been funded out of other reserves since, in any case, the plaintiff must have had such reserves to fund the difference between the facility and its anticipated expenditure.

36 One other point was raised in Mr Tee's affidavit and that was that the plaintiff could not be criticised for not having obtained the banker's guarantee by 29 January 2007 because the SLA had given it six months to procure the same. That point was, however, not relevant to the matters that I had to consider. The deadline set by the SLA for submission of the banker's guarantee to it could have no impact on the plaintiff's contractual obligations under the agreement. The SLA might have thought that six months was a reasonable period but the contract obliged the plaintiff to obtain the QC without delay. The defendants also submitted that if the plaintiff genuinely believed that it had six months to procure the QC, that would only suggest that it did not act as quickly as it reasonably could have to obtain the same.

**Further arguments**

37 For the reasons given above, I held that the plaintiff had acted in breach of cl 7 of the agreement. It had not used its best endeavours to obtain the QC without delay and was therefore not entitled to take advantage of its own failure to postpone completion of the sale. The evidence before me indicated that had the plaintiff acted in the way that the law required, it would have procured the QC before 29 January 2007 and that completion would then have taken place on 12 March 2007. The defendants therefore were entitled to issue the 21-day notice when completion did not take place on 12 March 2007 and to rescind the agreement when the notice period expired without completion being effected.

38 As I have stated, the plaintiff changed solicitors after I made my decision. The new solicitors wrote two letters asking for further arguments and also filed another affidavit to put further evidence before the court on the plaintiff's efforts to procure the banker's guarantee. The defendants objected to the introduction of the further affidavit on the basis that the plaintiff was trying to get a second bite of the cherry when it had known from March 2007 that the issue of best endeavours was an important one and yet had not seen it fit to give the court full information that was in its possession before the decision was made. I agreed with the defendants that the best endeavours issue had become apparent at a very early stage. Further, it was not correct to put in additional evidence after the decision had been made (and this was in the nature of a final rather than an interlocutory decision) without asking for the leave of court as there are certain requirements that must be met before new evidence can be adduced in such circumstances. In any case, as the defendants submitted, the purpose of further arguments is to highlight to the court an argument which was not

made, or not made properly previously, but the new argument must be based on the existing evidence. Otherwise, a party after having had the benefit of hearing the grounds of the court's decision will simply adduce evidence to address flaws or gaps in its evidence and ask for the matter to be re-heard. This will affect the finality of the court's decision. That does not mean that new evidence can never be introduced but the proper procedure has to be followed and the evidence should be brought up on the appeal and not before the judge of first instance.

39 The new affidavit had to be disregarded. In any case, the new affidavit contained no material or explanation as to the plaintiff's other resources apart from those that it was trying to obtain from the banks. As I have stated, my decision was partially influenced by the fact that the plaintiff had committed itself to completing the transaction without conditions and, as a reasonable commercial entity, must have realised that it could not finance the whole project from banks and therefore must have considered that it had sufficient resources to overcome any shortfall. It would have been a different situation had the completion been subject to the obtaining of adequate financing.

40 The arguments in the plaintiff's new solicitors' letters were, in my view, basically a repetition of arguments that had been made before me in court and were also attempted rebuttals of the points made by the defendants. Having considered them carefully in the context of the defendants' own responses, I found that my views on the case remained firm. I therefore declined to hear further arguments.

**The estoppel argument**

41 When I delivered judgment I informed the parties that my decision was made only the basis of the best endeavours point and that I had not come to any conclusion on the estoppel point. Since then, however, I have had the opportunity of considering this point further and I think that it may be helpful to the Court of Appeal if I express my views on it, *obiter* though they may be.

42 The type of estoppel relied on by the defendants here is the doctrine known as estoppel by convention. The principles of this type of estoppel were set down by the Court of Appeal in *Singapore Island Country Club v Hilborne* [1997] 1 SLR 248. To establish this estoppel, the following must be shown:

(a) that there was a course of dealing between the parties who were in a contractual relationship;

(b) that the course of dealings were such that it showed that both parties must have proceeded on the basis of an agreed interpretation of the contract; and

(c) that it must be unjust to allow one party to go back on the agreed interpretation.

43 In this case, the defendants submitted also that it was irrelevant whether the common understanding was correct or not or whether the parties were mistaken or not. In this connection, they relied on the observation by Justice Woo Bih Li in *Candid Water Cooler Pte Ltd v United Overseas Bank Ltd* [2006] 3 SLR 216 ("the *Candid Water Cooler* case") at para 43 as follows:

> [T]he doctrine of estoppel by convention applied when both parties had proceeded on a certain interpretation of a contract although estoppel by convention is not confined to an interpretation of a contract. It did not matter whether the parties' interpretation was right or wrong or whether [a party] had suffered any detriment.

44 The defendants' submission was that the criteria required for an estoppel by convention had been satisfied. First, there was no dispute that the parties were in contractual relationship. Next, they contended that it was clear from the documents that both parties understood and took the position that the completion date was 12 March 2007. The context was that the plaintiff had been informed as early as 3 January 2007 that it had received in-principle approval from the SLA for the purchase of the property. All that needed to be done was for the plaintiff to procure the banker's guarantee and the QC. That was entirely within the plaintiff's control and the defendants were entitled to assume that the plaintiff would honour its contractual obligation to do this without delay.

45 Then, the defendants submitted, *both* parties had proceeded on the basis that completion would take place on 12 March 2007. The defendants relied on the following conduct in relation to the plaintiff:

(a) on 26 January 2007, CCLC sent ten sets of Transfers (*i.e.*, the formal documents by which each of the defendants would transfer his interest in the property to the plaintiff) to WO&P for the defendants' execution and each of these transfers had been dated 12 March 2007 by CCLC. CCLC had also signed the certificates of correctness appearing on the Transfers;

(b) on 13 February 2007, the plaintiff sent an e-mail to Maybank and asked for a response on its application for financing as soon as possible because "the completion date of 12 March is drawing very near",

(c) on 17 February 2007, OCBC sent the plaintiff an e-mail together with an indicative term sheet for the plaintiff's execution and in this e-mail, OCBC stated "[if] the terms are acceptable, please sign the attached term sheet for us to proceed for urgent approval in view of completion by mid March 2007"; and

(d) under cl 5(a) of the agreement, vacant possession of the property was to be given by the defendants no later than six months after the date of completion and the plaintiff had on 12 January 2007 informed its architects that the likely time for the property to be vacant was in September 2007 which meant it contemplated that completion would take place in March 2007.

46 As far as the defendants themselves were concerned, they too had proceeded on the basis that completion would take place on 12 March 2007 and this was shown by the following:

(a) on 26 February 2007, WO&P sent CCLC the completion accounts for the property and each completion account was clearly stated to be as of 12 March 2007; and

(b) on 7 March 2007, WO&P provided CCLC with the management committee confirmation of the share units in the property and also informed CCLC that it had in its possession the minute books, common seal and other books and accounts of the management committee as of 12 March 2007.

The defendants also said that they did not receive any objections from the plaintiff and/or CCLC to the completion accounts and were only informed on 6 March 2007 that the plaintiff would not be able to complete on 12 March 2007.

47 As regards the third requirement, the defendants asserted that it was unjust to allow the plaintiff to resile from its earlier position because the defendants had proceeded on the basis that completion would take place on 12 March 2007 and had done everything required of them to enable completion on that date:

(a) all documents that CCLC required for completion were provided by the defendants before 12 March 2007; and

(b) the Transfers prepared by CCLC were signed by the defendants on 21 February 2007.

Further, several of the defendants, namely the first defendant, the second and third defendants, the tenth defendant, the eleventh defendant and the twelfth defendant and the thirteenth defendant, had, in the belief that completion would take place on 12 March 2007, entered into agreements to buy replacement properties and had suffered loss in the process.

48 On this issue, the plaintiff submitted that its actions in providing Transfers dated 12 March 2007 and receiving, without protest, the defendants' completion accounts and total discharge of mortgage documents stating 12 March 2007 as the value date, were consistent with the parties using best endeavours to complete the transaction at the earliest possible date. There was no evidence, unlike in the *Candid Water Cooler* case, of the plaintiffs stating that they would complete only on 12 March 2007. Further, neither the plaintiff nor its lawyers said at any time that the plaintiff would waive its right to rely on cl 3.2 which provided for completion to take place on the later of the two specified dates. What had happened was that Mr Oh of WO&P had proceeded on the basis of his own assumption that the issuance of the banker's guarantee and QC were fairly routine matters and therefore that the completion date would be 12 March 2007. The individual defendants were not informed by the plaintiff that completion would take place on 12 March 2007. Their own lawyer had advised them of the completion date and they had relied on their own lawyer's advice. No representation was made to them by the plaintiff.

49 It seems to me that the question here is really whether there was a course of conduct that could have founded the estoppel. In this connection, the facts and decision of the *Candid Water Cooler* case are relevant. In that case, the plaintiff (Candid) exercised an option to purchase a property from the defendant (UOB). The purchase was subject to the written approval of the Jurong Town Corporation ("JTC") and cl 2 of the option stipulated that the date for completion was either 12 weeks from the exercise of the option (26 April) or three weeks from the date of JTC's written approval, whichever was the later. On 18 May, JTC wrote to UOB stating it had no objection in principle to the sale subject to various conditions being complied with. Candid's solicitors then asked UOB's solicitors to confirm that the completion was therefore scheduled to take place on 19 July (*i.e.*, 12 weeks from the exercise of the option). On 9 July, this completion date was confirmed by UOB's solicitors. Completion only took place on 5 October, however, and the issue before the court was whether the contractual completion date was 19 July. It was held that since Candid's solicitors had asked UOB's solicitors to confirm that the completion date was 19 July and such confirmation was given, Candid was estopped from asserting otherwise. It should be noted here that Candid had taken the view that the letter of 18 May from JTC was not the approval letter since the condition specified therein by JTC had not been complied with on that date. Instead, Candid had said that the approval had come in a subsequent letter, on 15 September 2005, and that the contractual completion date would therefore be 6 October, being three weeks after 15 September. The court declined to decide whether the letter of 18 May was the approval letter since it took the view that the parties had agreed that 19 July 2005 was the completion date. It was irrelevant in the court's view that the parties may have been mistaken in their original interpretation of the effect of the 18 May letter. Later in his judgment, the judge said (at para 44) that the parties' agreement on the contractual completion date was binding on both sides and it was not open to one side to resile from what it had agreed to.

50 Looking at the *Candid Water Cooler* case, it appears to me that the essence of that decision was the query by one party whether completion had been set for a particular date and the response

by the other that it had. This exchange of correspondence could be looked at in two ways. The judge did both. He regarded it as being either an agreed variation of the original contract by the substitution of a specified completion date or as an estoppel which arose when one party asked the other to confirm the date and the other party gave such confirmation.

51 I think that in this case there was no question of a contractual agreement on the completion date as there was in *Candid Water Cooler*. Indeed, the defendants did not pitch their case at that level. But was there a similar estoppel here? In my view, the relevant facts here are that CCLC dated the Transfer forms with the date 12 March 2007 and sent these forms to WO&P for execution by the defendants; that the defendants duly executed the forms without changing that date and their solicitors prepared and forwarded to the plaintiff on 27 February the completion accounts as of 12 March 2007 without receiving any objection thereto upon receipt. It was not till some seven days later that the plaintiff informed the defendants that completion could not take place on 12 March 2007. It is also relevant that the knowledge of whether the QC had been issued by 26 January 2007 when the Transfers were sent out was wholly in the possession of the plaintiff. The defendants' solicitor seeing the completion date on the Transfers would have been justified in assuming that, although he had not been formally notified thereof, the QC had either been issued before 26 January 2007 or was expected to be issued by 29 January 2007. Nothing occurred after 26 January and before 6 March 2007 to change such an assumption which was why the defendants took the various actions that they did in relation to an expected completion on 12 March 2007.

52 During the hearing, I had some doubt on this issue because it seemed to me too weighty to label the simple action of sending out a dated transfer form as an estoppel. Whilst the plaintiff might also have told third parties that the expected completion date was 12 March 2007, I did not think that its conduct *vis-à-vis* others who had nothing at all to do with the defendants but were the plaintiff's own agents and potential bankers could support the estoppel argument since the defendants were ignorant of such conduct. That being the case, the only facts which could cause the estoppel to arise were the dating of the Transfers and the plaintiff's omission to inform the defendants shortly after 29 January 2007 that the QC had not yet been issued. Having had time for further consideration, however, in the particular circumstances of this case where it was the plaintiff who needed the approval to proceed with the purchase and who was the only party corresponding with SLA, I have come to the conclusion that because of these factors which also caused the defendants to believe 12 March2007 was the completion date, an estoppel did arise if not on 26 January 2007 then very shortly after 29 January 2007. Accordingly, I would decide this point in favour of the defendants as well.

53 As regards the third requirement, this seems to have been watered down somewhat by the *Candid Water Cooler* case. In any event, there was sufficient evidence of the damage caused to a number of the defendants by the non-completion on 12 March 2007 to make it, in my opinion, unconscionable for the plaintiff to be allowed to go back on that completion date.

54 Accordingly, I would decide this point in favour of the defendants as well.