MacarthurCook Property Investment Pte Ltd and Another v Khai Wah Development Pte Ltd [2007] SGHC 93

Case Number : OS 239/2007

Decision Date : 15 June 2007

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Chelva Rajah, SC, (instructed), Tan Chuan Thye and Gitta Satryani Juwita (Wong & Leow LLC) for the Applicants; Michael Hwang, SC, for the Respondent

Parties : MacarthurCook Property Investment Pte Ltd; Macarthurcook Limited — Khai Wah Development Pte Ltd

15 June 2007 Judgment reserved.

Judith Prakash J:

1 This is a summons taken out by MacarthurCook Property Investment Pte Ltd and MaccarthurCook Limited (collectively referred to as the "applicants") under s 4 of the Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed) with respect to a Put and Call Option Agreement dated 5 December 2006 ("the Option") with Khai Wah Development Pte Ltd ("the respondent"). The Option relates to the sale and leaseback of the property known as 51 Benoi Road, Singapore 629908 ("the property"). The dispute arises over the true interpretation of the Option and also as to whether the respondent was justified in terminating it.

2 The applicants are seeking, *inter alia*, the following reliefs in these proceedings:

(a) a declaration that, upon the true interpretation of cl 4 of the Option read with cl 2 of the same, the Option cannot be terminated, whether by the respondent or otherwise, unless the conditions set out in cl 2 read with schedule 5 of the Option are first satisfied;

(b) a declaration that the letter dated 2 February 2007 from the respondent's solicitors to the applicants' solicitors does not constitute a valid notice of termination under the provisions of the Option; and

(c) a declaration that the Option is still subsisting and remains valid and binding on the parties thereto.

3 By summons entered no. 1225 of 2007 the applicants also seek an order that HSBC Institutional Trust Services (Singapore) Limited ("the trustee") in its capacity as the new trustee of the MacarthurCook Industrial REIT under the Deed of Appointment and Retirement of Trustee dated 8 March 2007 be made a party to the proceedings herein and a further order that these proceedings be carried on by the trustee as if it had been substituted for the first applicant.

Factual background

4 The second applicant is a company incorporated under the laws of the Commonwealth of Australia. It is the parent company of the first applicant and is a specialist manager of direct property, real estate securities and mortgages. The second applicant is engaged in the investment in, and development and management of, properties; including those which are wholly or partly used for

industrial purposes in Australia and elsewhere in Asia.

5 Through its wholly owned subsidiary, MacarthurCook Investment Managers (Asia) Limited (a company incorporated in Singapore), the second applicant has sought to establish a real estate investment trust in Singapore to be known as MacarthurCook Industrial REIT ("the REIT"). To this end, the second applicant entered into various memoranda of understanding with owners of certain industrial properties in Singapore, including the respondent, expressing its interest in entering into sale and leaseback arrangements with these owners in respect of their properties for the purpose of the REIT.

6 The respondent is a company incorporated in Singapore. It is the owner of a leasehold interest in the whole of the property including the building(s) erected thereon. Jurong Town Corporation ("JTC") is the owner of the reversionary interest in the property. It is to be noted that the arrangement contemplated between the parties is a sale and leaseback transaction, *i.e.*, the property was intended to be sold to the first applicant (or its nominee, the trustee) in its capacity as trustee for the REIT and thereafter leased back to the respondent.

Structure of the Option

7 In order to understand the arguments, it might be helpful for me to set out a brief summary of the clauses of the Option. The recitals state that the first applicant is the trustee of the REIT and that pursuant to a memorandum of understanding dated 13 June 2006 ("the MOU") issued by the second applicant and accepted by the respondent, the parties had signified their intention for the respondent to sell, and for the second applicant's nominee to purchase, the property on the terms and conditions stated therein. The parties acknowledged that the first applicant may be replaced as trustee of the REIT at any time before completion.

8 The first clause contained various definitions and provisions relating to the interpretation of the Option. The word "Conditions" was defined as meaning the conditions set out in Schedule 5 of the Option and "Condition 1" meant the condition set out in item 1 of Schedule 5 whilst "Condition 2" meant the condition set out in condition 2 of Schedule 5. The term "Satisfaction Period" was stated to mean the period from the date of the Option until 31 January 2007 and as being the period in which the conditions were to be satisfied. Sub-clause 1.5 provided that the clause and paragraph headings were inserted for ease of reference only and should not affect construction.

9 By cl 2, application to JTC was to be made for certain consents and confirmations detailed in Schedule 5. These consents and confirmations were to be obtained by the expiry of the Satisfaction Period.

10 By cl 3, the respondent granted a call option ("the Call Option") to the first applicant or the trustee to require the respondent to enter into a sale and purchase agreement in respect of the property with the first applicant or the trustee. The Call Option was to be exercised by 30 April 2007, three months after the end of the Satisfaction Period.

11 Clause 4 dealt with various matters. First it provided for payment of the Call Option fee (a sum of $30,000 equivalent to less than 0.1% of the intended purchase price of $32,500,000) on execution of the Option. Then, cl 4.2 dealt with circumstances in which there could be an automatic termination of the Option. The true meaning of this clause has been hotly disputed by the parties. The other sub-clauses of cl 4 dealt mainly with the consequences of termination of the Option for any reason.

12 By cl 5, a corresponding put option ("the Put Option") was granted to the respondent to require the first applicant or the trustee to enter into the contract of sale in the event that the Call Option was not exercised by the Call Option Expiry Date, *i.e.*, 30 April 2007 or such other date as the parties might agree to. The Put Option was to be exercised by 5pm on the date that was one business day after the Call Option Expiry Date. The contract of sale to be signed by the parties was to be in the form provided and attached to the Option as Schedule 2.

13 The parties also agreed that subsequent to the execution of the contract of sale, they would execute a leaseback agreement in the form provided and attached to the contract of sale as appendix 1 thereof. Under the leaseback arrangement, the purchaser under the contract of sale was to lease the property to the respondent for a term of seven years (subject to JTC's consent) from the completion of the contract of sale.

14 Clause 16 of the Option provided for steps to be taken by the applicants and the respondent in relation to the implementation of the Option. For example, the respondent had to apply for what was described as "the Condition 1 Approvals" at its own cost promptly upon execution of the Option. Copies of applications made by the respondent had to be provided to the first applicant and the respondent was not to submit any applications to JTC unless drafts of the same had been given to the first applicant and the latter had consented to the form and substance of such applications. Further, parties were required to agree by the end of the Satisfaction Period on the amount of service charge to be paid by the respondent under the lease agreement.

15 Under the terms of its lease with JTC, the respondent was required to obtain JTC's approval before disposing of any interest in the property including by way of sale and leaseback. Such approval was the context in which cl 2, cl 4 and Schedule 5 of the Option were drafted:

(a) cl 2 made the approvals (to the sale and leaseback) of the relevant authorities (*i.e.*, JTC), a condition to the exercise of either of the Options;

(b) cll 2.2 and 2.5 set out the parties' obligations in respect of the procurement of such approvals within the Satisfaction Period;

(c) under cll 2.4 and 2.7, either party had the right to terminate the Option in accordance with the terms set out therein if, by the expiry of the Satisfaction Period:

(i) JTC refused to approve the proposed sale and/or leaseback; or

(ii) JTC's approval of the proposed sale and/or leaseback was given on any condition that was considered unsatisfactory by either party.

(d) under cl 4.2 (a), if the Conditions were either not satisfied or waived by the end of the Satisfaction Period, the Option was to terminate immediately upon expiry of the Satisfaction Period and the Option was to cease to have any further effect except for certain specified clauses which would remain in force.

Other relevant facts

16 All events recounted here took place in 2007 unless otherwise indicated. By a letter dated 8 January, the respondent wrote to JTC seeking its consent to the assignment of the property to the trustee and the leaseback by the trustee of the property to the respondent. On 2 February, JTC wrote to the parties granting its approval of the sale and leaseback with certain terms and conditions

attached thereto. This letter was sent by fax to both parties on the same day but for some reason only 11 out of the 12 pages of the letter were so transmitted. The original and complete copy of the letter of approval was sent out by post.

17 One of the conditions imposed by JTC was that its approval of the assignment of the property to the trustee was conditional on the REIT being listed.

18 On the same day, 2 February, the respondent's solicitors wrote to the applicants' solicitors to state that, as the Satisfaction Period had expired on 31 January without satisfaction of the Conditions, the respondent had instructed them that, pursuant to cll 4.2(a) and (c) of the Option, the Option had been terminated. The applicants rejected this position four days later.

19 Then, on 8 February, the respondent's solicitors wrote a further letter to the applicants' solicitors. First, the respondent's position regarding the automatic termination of the Option was reiterated. The solicitors went on to state that the respondent had only on 7 February received the complete copy of the JTC's approval letter of 2 February and that the condition imposed by JTC that the assignment was subject to the successful listing of the REIT was not satisfactory to the respondent as the proposed sale and purchase between the parties was not subject to this listing. Pursuant to cl 2.4(b) of the Option therefore, the respondent was terminating the Option without prejudice to its position on the automatic termination that had already taken place.

The issues

20 The parties are, in substance, in agreement that the main issues that I have to resolve are as follows:

(a) whether the Option was terminated by operation of cl 4.2; and

(b) whether the respondent was entitled to terminate the Option pursuant to cl 2.4(b).

First issue: whether the Option was terminated by operation of cl 4.2?

21 This first issue involves three sub-issues. The first is whether cl 4.2 operated so as to bring the Option to an end immediately on the expiration of the Satisfaction Period if the Conditions had not been fulfilled by then and notwithstanding that JTC had not refused to consent or imposed unreasonable conditions for its consent by the end of that period. The second issue is, assuming that cl 4.2 operated in the way contended for by the respondent, whether the respondent had waived its operation. The third issue is whether, in trying to rely on the non-fulfilment of the Conditions within the Satisfaction Period, the respondent is trying to rely on its own wrong in that the respondent had not used its best endeavours to procure the satisfaction of the Conditions within the Satisfaction Period as required by the Option.

Construction of cl 4.2

22 Clause 4.2 reads as follows:

4.2 If:

(a) the Conditions are not either satisfied or waived by the end of the Satisfaction Period; or

(b) the Call Option is not exercised prior to the expiry of the Call Option Exercise Period and

the Put Option is not exercised during the subsistence of the Put Option Exercise Period,

this Agreement shall terminate immediately:

(c) in the case of paragraph (a), upon expiry of the Satisfaction Period; and

(d) in the case of paragraph (b), upon expiry of the Put Option Exercise Period,

in which case (as appropriate) this Agreement will cease to have any further effect, except for Clauses 7, 10, 11, 12, 13 and 14 which will remain in force.

23 In the light of the arguments made by the applicants, it would also be useful to see the material portions of cl 2. These are:

2.2 Without prejudice to Clause 6, the [respondent] must use its best endeavours to procure the satisfaction of Condition 1 in Schedule 5 by the end of the Satisfaction Period. To this end, the [respondent] must:

(a) within 30 days of execution of this Agreement, make written application to the Relevant Authorities for all approvals required under Condition 1 ("the Condition 1 Approvals");

(b) pay all fees and charges in connection with the Condition 1 Approvals;

(c) keep the [first applicant] informed at all times on the progress of the satisfaction of Condition 1;

(d) provide written notice to the [first applicant] within 2 Business Days of the satisfaction of Condition 1 Approvals, together with evidence from the Relevant Authorities confirming that satisfaction.

…

2.4 If the Relevant Authorities:

(a) refuse to give the Condition 1 Approvals; or

(b) give the Condition 1 Approvals on terms and conditions that either Party (acting reasonably) consider *(sic)* unsatisfactory,

by the end of the Satisfaction Period, then either Party may terminate this Agreement at the end of the Satisfaction Period by giving written notice to the other Party, which notice must be supported by evidence from the Relevant Authority:

(c) that the Condition 1 Approvals have been refused; or

(d) in the case of paragraph (b) above, which sets out the terms and conditions on which the Condition 1 Approvals were granted, together with evidence from the Party giving notice as to why those terms and conditions are considered unsatisfactory …

24 In essence, the respondent's position was that as by 31 January 2007, the Conditions had

not been satisfied in that JTC had not given its approval for the sale and leaseback, cll 4.2(a) and (c) came into effect and the Option terminated automatically. Accordingly, it was entitled to repay the Call Option fee to the applicants and consider itself as free from any further liability under the Option.

25 The applicants argued that the respondent's interpretation of cl 4.2 was unjustified when the Option was taken as a whole and in relation to the relevant facts of the case. According to the applicants, the respondent's position was that cl 4.2 was to be read independently from the other provisions of the Option. In the applicants' submission, however, cl 4 could not be looked at on its own but had to be considered in the light of the other provisions of the Option.

26 In this connection, the applicants submitted that it was important to have regard to the structure of the Option. Clause 2 of the Option dealt with the Conditions referred to in cl 4.2 and how they were to be satisfied. The Conditions were listed in Schedule 5 and separated as Condition 1 and Condition 2. There were two aspects to the Conditions. The first concerned consents or approvals from JTC and required that the consents be sought and received. The second aspect, as was clear from Schedule 5, involved the respondent fulfilling certain requirements. The requirements comprised matters existing prior to the consents being received from JTC as well as compliance with the terms of any consent granted by JTC. Condition 1 was governed by cll 2.2 to 2.4 of the Option and cl 2.2 put the obligation to satisfy that condition on the respondent. Condition 2 on the other hand was governed by cll 2.5 to 2.7 of the Option and the obligation to satisfy Condition 2 lay on the first applicant. Clauses 2.5 to 2.7 were essentially identical to cll 2.2 to 2.4 except that they applied to the first applicant and Condition 2.

27 The applicants said that given that the Conditions had two aspects and one of the aspects involved steps that were not known at the time of the Option, and which steps might have to be taken after the end of the Satisfaction Period, cl 4.2 could not be given the interpretation that the respondent had given it for two reasons. The first reason was that this interpretation would lead to an absurd result since it meant that as long as any one of the terms which formed part of the Conditions had not been satisfied by the end of the Satisfaction Period, then the Option would terminate automatically. The applicants considered that this interpretation was absurd because it would mean that the respondent would be able to back out of the transaction without incurring any liability simply by failing to satisfy any of the conditions forming part of Condition 1 within the prescribed time. In such a case, the respondent would need only to wait until the expiry of the Satisfaction Period in order to bring its obligations under the Option to an end. This could not have been the intention of the parties. Instead, the proper interpretation of cl 4.2 required that it was not to be treated as the operative clause for the termination of the Option. Rather, cl 4.2 had to be read as being subject to cl 2 and Schedule 5. This would mean that the Option could only be terminated in one of the two circumstances set out in cll 2.4 and 2.7. Under these clauses, the right to termination would arise only if consents were refused or given on terms considered unsatisfactory.

28 The applicants said that it was logical that the Option should provide for termination only in a situation where the Condition Approvals were refused or given on terms that were unsatisfactory. Given that without the approval of JTC the transaction could not take place, it must have been the intention of the parties that termination could occur only in those limited circumstances. The Option had to be interpreted on the assumption that it was a contract that both the respondent and the first applicant were happy with and which they desired to be fully performed. The rules of interpretation required that cl 4 be considered in the light of the other provisions and in addition, the court when faced with competing interpretations, would prefer the one which led to a sensible result to the one that led to an absurd result.

29 During oral arguments, Mr Rajah, counsel for the applicants made an alternative argument

that the phrase "or a reasonable time thereafter" should be added to cl 4.2(c) after the words "in the case of paragraph (a), upon expiry of the Satisfaction Period".

30 Mr Hwang, counsel for the respondent, did not agree that interpreting cll 4.2(a) and (c) in accordance with their ordinary meaning would lead to an absurd consequence such that those clauses should be totally ignored. He pointed out that the main thrust of the absurd consequences argument was that it would be absurd to expect the parties to satisfy all the Conditions before the Satisfaction Period expired on 31 January 2007. Hence, this argument would have to draw its force from the allegation that satisfaction of the Conditions would require a much longer time than envisaged under the Option (*i.e.* from 5 December 2006 to 31 January 2007). There had, however, been no material facts advanced in any of the applicants' supporting affidavits to justify their contention that it would be unreasonable to expect the various Conditions to be satisfied within the Satisfaction Period. Consequently, the relevant evidence to support the applicants' contention that it would be unreasonable to expect the Conditions to be satisfied within the Satisfaction Period was not before the court. In addition, there was no evidence of any apprehension or complaint by either party that the Conditions could not have been satisfied by the end of the Satisfaction Period. In this case, both parties to the Option were experienced businessmen who had the benefit of legal advice from their respective solicitors. There was no reason why the Option which had been well negotiated and drafted with input from both parties should be considered absurd. In these circumstances, the respondent's submission was that the ordinary meaning (as derived from a literal interpretation) of cll 4.2(a) and (c) should be adopted. In any case, cll 4.2(a) and (c) made perfect commercial sense and should not be disregarded.

31 As the respondent submitted, the starting point of the analysis is to determine whether there was any sensible purpose in fixing a Satisfaction Period. The respondent took the view that the Satisfaction Period was the time provided in the contract for the arrangement and fulfilment of the contingent conditions so that at the end of the Satisfaction Period, the parties would be able to determine whether the sale and leaseback transaction would in fact proceed. Michael Tan, a director of the respondent, said in his first affidavit that:

> 15. Additionally, I should highlight that the present structure of the Agreement was to allow the parties to have a very clear time-frame for the relevant events.
>
> 16. The Agreement was structured so that the parties would be able to ascertain early whether the sale was going to go through. The effect of "Conditions" 1 and 2 of the Agreement and indeed the Satisfaction Period of up till 31 January 2007 (within which to comply), was to set a deadline such that the Applicants would be able to include the property for the prospective listing of the REIT. This makes it certain for both parties by 31 January 2007 whether the property would be sold, so that each could make alternative plans.
>
> 17. The need for certainty was to facilitate the Applicants' ability to meet the deadlines, details of which I am not aware, for their REIT to be listed on the SGX-ST although I understand that these may be subject to change. On our part, it was to allow us to seek out other prospective buyers of the property if needed.

32 I accept the above evidence and the argument that the rationale behind cll 4.2(a) and (c) was to set down a date by which the parties would have a significant degree of certainty about whether the contingent requirements had been satisfied before they proceeded to expend resources to facilitate further progress of the sale and leaseback transaction. The expiry of the Satisfaction Period allowed the parties a chance to reconsider. Matters could stop there or, if they still wished to proceed with the transaction despite the non-satisfaction of the Conditions at that time, then they

could either extend time for satisfaction or waive certain of the Conditions, as cl 4.2(a) itself envisioned.

33 The nature of the Option is also relevant in this connection. Whilst the applicants argued that that document was practically a sale and purchase contract, I do not agree. Although the Option envisaged that a sale and purchase could result from it, the document also contemplated a situation where for one reason or another, parties could not go forward into that succeeding transaction. It was carefully crafted so as to provide for various contingencies since the parties recognised that the approval of the JTC was absolutely essential for the sale and leaseback to take place and also recognised that the JTC might, as it was entitled to do, withhold its consent. In this connection, the factual context was that when the respondent purchased the property in January 2006, the JTC gave its consent to the acquisition on condition that the respondent would be prohibited for a period of three years from further assigning the property. Thus, it was always on the cards that JTC might hold the respondent strictly to that term. In the light of all the circumstances, I agree with the respondents that there was a valid commercial reason for inserting cl 4.2 and that accordingly the clause must be given its full effect and not disregarded.

34 It is also relevant in determining the contractual intentions of the parties in relation to cll 4.2(a) and (c), that the Call Option Fee of $30,000 was very low in relation to the intended purchase price of the property which was $32.5million. The fee was less than 0.1% of the price and this was unusual in that in normal conveyancing transactions the option fee is 1%. Taking this factor into account, I accept the respondent's argument that it is unlikely that it would have intended to bind itself to a commercial transaction which restricted its freedom of disposition of the property for an indeterminate period of time from the time of expiry of the Satisfaction Period till the expiry of the Call Option Exercise Period (i.e. 30 April 2007) for such a low fee. This fact therefore supports the respondent's interpretation of cl 4.2 as a "drop dead" clause which envisages the return of the Call Option Fee to the applicants if automatic termination occurred on the expiry of the Satisfaction Period as a result of cl 4.2. In other words, the applicants would suffer no loss if the Option was automatically terminated as a result of cl 4.2, unless the respondent had breached its obligations under cl 2.2 to use its best endeavours to procure the satisfaction of Condition 1. On the other hand, if the applicants' interpretation of cl 4.2 is correct, the consequence would be that the Option would prevent the sale of the property from 5 December 2006 for an indeterminate period of time after the expiry of the Satisfaction Period until 30 April 2007. While the low amount of the Call Option Fee in itself cannot determine the proper interpretation of cl 4.2, it is a relevant background factor to be considered in assessing the reasonableness of the competing interpretations of cl 4.2.

35 The applicants contended that from a reading of cll 4.2, 4.5 and 2.4 together, the right to terminate the Option only arose under cl 2.4. The respondent's reply was that cll 4.2 and 2.4 gave rise to alternative rights of termination and may be interpreted in a manner so that they would be consistent with one another. In this regard, I find the respondent's arguments to be compelling in the light of the contractual provisions. There was in my view no clash between cl 4.2 and 2.4 and they each played their own part in the structure of the Option and were required for it to work reasonably for the benefit of both parties.

36 First, cl 2.4 related only to situations where there had been unfavourable responses from the relevant authorities to whom applications for approval had been made. When that happened, cl 2.4 gave the parties the choice to either: (i) continue negotiations by making further representations to the authorities or by making the appropriate waivers or variations to the Option, or (ii) terminate the Option upon the expiry of the Satisfaction Period. Clause 2.4 did not cover the situation where there had been no response from the relevant authorities. This is quite clear from the fact that the clause called for a notice of termination to be supported by evidence from the relevant authority since it is

not possible for relevant evidence to be provided in the event of a non-response.

37 Clause 4.2 made reference to possible variations and waiver of the Conditions and the immediate termination of the Option if the Conditions were not varied or waived by the end of the Satisfaction Period. If cl 4.2 were read as covering situations where there had been no response from the relevant authorities or where there had been non-satisfaction of the Conditions in cases which did not require approval from any authority, then cl 4.2 would be consistent with cl 2.4. In fact this must be the way to read cl 4.2 as one of the principle tenets of construction is that a contractual document must be read as a whole and in such manner as to, as far as possible, harmonise the provisions of the document with one another.

38 There is nothing in cl 4 itself to indicate that the only right of termination arises under cl 2. The applicants argued that cl 4.5 contemplated termination of the Option only pursuant to cl 2 and did not contemplate automatic termination. This is a misreading of cl 4.5 which stated:

> 4.5 Save as that provided in this Clause 4, neither Party will be liable to the other for compensation, reimbursement or damages of any kind or character whatsoever as a result of or in connection with the termination of this Agreement pursuant to Clause 2 of this Agreement.

From the above wording, it is plain that cl 4.5 did not say that the only right of termination under the Option arose under cl 2. The purpose of cl 4.5 was to provide that compensation for losses occasioned by a termination by either party under cl 2 would be exhaustively provided for within cl 4. There would have been no reason to have a reference to cl 4.2 within cl 4.5 since the purpose of cl 4.2 was to release each party from further liability at the end of the Satisfaction Period.

39 As I have noted above, the applicants submitted that one of the reasons why the interpretation propounded by the respondent was commercially absurd was that it would allow the respondent to withdraw from the transaction without occurring any liability by simply refusing to satisfy any of the Conditions. This submission however ignored the provisions of cl 2.2. This clause laid an obligation of best endeavours on the respondent to ensure that Condition 1 was satisfied within the Satisfaction Period, while cl 2.5 imposed a parallel obligation on the applicants to use their best endeavours to ensure that Condition 2 was satisfied within the Satisfaction Period. If either party did not use its best endeavours and by reason thereof the Option terminated because the Conditions were not fulfilled within the Satisfaction Period, then the party in breach of its obligation would be liable in damages to the other. The Option would not survive the Satisfaction Period because satisfaction of the Conditions before the Satisfaction Period was the condition precedent to the exercise of the Call Option but the party in default would not escape without liability. This position comes across clearly from para 2-151 of *Chitty on Contracts Vol 1* (29th Ed, London, Sweet & Maxwell 2004) which reads:

> **Principal and subsidiary obligations.** It will be seen that in cases falling within the categories discussed in paras 2-147 to 2-150 above, a distinction must be drawn between two types of obligation: the principal obligation of each party (*e.g.* to buy and sell) and a subsidiary obligation, *i.e.* one not to withdraw, not to prevent occurrence of the condition, or to make reasonable efforts to bring it about. One view is that the party who fails to perform the subsidiary obligation is to be treated as if the condition had occurred; and that he is then liable on the principal obligation. Thus in *Mackay v Dick* the buyer was held liable *for the price*; but there was no discussion as to the remedy. In principle it seems wrong to hold him so liable, for such a result ignores the possibility that the machine might have failed to come up to the standard required by the contract, even if proper facilities for trial had been provided. It is submitted that the correct result in cases of this kind is to award *damages* for breach of the subsidiary obligation: in

assessing such damages, the court can take into account the possibility that the condition might not have occurred, even if there had been no such breach. To hold the party in breach liable for the full performance promised by him, on the fiction that the condition had occurred, seems to introduce into this branch of the law a punitive element that is inappropriate to a contractual action. The most recent authority rightly holds that such a doctrine of "fictional fulfilment" of a condition does not form part of English law.

[emphasis in original; footnote omitted]

Thus, notwithstanding that cl 4.2 would bring the Option to an automatic end if the Conditions were not satisfied by the end of the Satisfaction Period, if the non-satisfaction of the Conditions was in fact due to the respondent's failure to exercise its best endeavours to procure the satisfaction of Condition 1, then the respondent would be liable in damages to the applicants. It could not, therefore, take the easy way out of the transaction by simply sitting back after executing the Option and waiting for the expiry of the Satisfaction Period.

40 A further difficulty in the way of adopting the applicants' interpretation is that to do so would render the language of cl 4.2 redundant. This is something that the courts are loathe to do as indicated in paragraph 7.03 of *The Interpretation of Contracts* by Lewison (London, Sweet & Maxwell 2004) which states:

7.03 In construing a contract all parts of it must be given effect where possible, and no part of it should be treated as inoperative or surplus.

The construction of a document as a whole necessarily involves giving effect to each part of it in relation to all other parts of it. Accordingly, as a corollary of the principle that a document must be construed as a whole, effect must be given to each part of the document. This in turn means that in general each part of the document is taken to have been deliberately inserted, having regard to all the other parts of the document, with the result that there is a presumption against redundant words (usually called "surplusage").

In Re Strand Music Hall Co Ltd, Lord Romilly M.R. said:

> "The proper mode of construing any written instrument is, to give effect to every part of it, if this is possible, and not to strike out or nullify one clause in a deed, unless it is impossible to reconcile it with another and more express clause in the same deed."

41 Clause 2 itself highlighted the importance of the Satisfaction Period. Under cl 2.1, the Call Option could not be exercised by the applicants unless and until the Conditions had been satisfied by the end of the Satisfaction Period. The definition of "Satisfaction Period" indicated the importance of the need for the Conditions to be satisfied before the expiry of the Satisfaction Period because this period had been defined as "being the period in which the Conditions are to be satisfied". Once that period had passed, there could be no fulfilment of the Conditions as provided for in the definition. As the respondent submitted, the fulfilment of the Conditions by the end of the Satisfaction Period was a condition precedent to the further operation of the Option. By the Option, the parties had entered into a contractual arrangement whereby they agreed for termination of the arrangement without liability to any party if some or all of the conditions precedent to the agreement were not satisfied. That type of contractual arrangement is well known and often used in Singapore. In this case, cll 4.2 (a) and (c) provided the escape mechanism. There was no evidence that this type of contractual arrangement was not intended by the parties here. In entering into an agreement that contained conditions precedent, they accepted the risk that some or all of these precedents would not be

satisfied within the specified time period and that the agreement would then terminate automatically.

42 The applicants also argued that cl 4.2 had to be construed in such manner that did not make time of the essence otherwise, again, absurd consequences would follow. They demonstrated their argument by taking the terms of the approval from JTC as an example. Assuming that the approval had come in on 30 January 2007, the parties would still have had to comply with its terms. One of these was para 2.3(a) of the approval which made the approval subject to the successful listing of the REIT. The applicants pointed out that on its terms, para 2.3(a) could not have been complied with by 31 January 2007. It could not, they said, have been the parties' intention that an approval received on 30 January 2007 would nonetheless result in the automatic termination of the Option on 1 February 2007 because the approval contained a term that could only be complied with after 31 January 2007. I do not think that the example given by the applicants supports their case. This is because once the JTC's approval had been received within the Satisfaction Period, then cl 4.2 would cease to apply and the transaction would proceed unless either party invoked its right under cl 2.4(b) to terminate the Option because it considered the terms and conditions of the approval or any of them to be unsatisfactory. In this regard therefore, cl 4.2 did not have the unsatisfactory consequence posited by the applicants.

43 This issue, however, as to whether the Satisfaction Period would expire on the named date, *i.e.*, 31 January 2007, or whether the Option should be construed so as to provide that the Satisfaction Period was to expire within a reasonable period from 31 January 2007 must still be considered as, if the applicants' argument is correct, then there would be strong grounds for holding that the JTC's approval which arrived on 2 February 2007 was received within the Satisfaction Period.

44 The applicants argued that time was not of the essence in relation to cl 4.2 because cl 8 of the Option which dealt with this issue only provided that time was to be of the essence in respect of two specific instances: (i) in relation to the delivery of documents and (ii) in relation to the giving of notices. Since cl 8 could not be relied on to assert that time was of the essence in relation to the satisfaction of the Conditions, one had to look at the Option as a whole in the circumstances of the case to determine whether time was intended to be of the essence. They argued that the structure of the Option indicated that that was not the case. There was a difference of three months between the expiry of the Satisfaction Period and the expiry of the Call Option Exercise Period. Parties had therefore provided a sufficient "buffer" period to carry out their outstanding obligations under the Option before execution of the contract of sale and the lease agreement. Further, the term "Satisfaction Period" was used in instances unrelated to the Conditions and therefore it could be inferred that it carried no special significance except that it was a period within which parties were to use their best endeavours to achieve certain things. It did not mean that time was of the essence. The end of the Satisfaction Period was the date by which the parties were to know if the relevant authorities had rejected the application for approval or had given approval on unsatisfactory terms. It was not an absolute cut-off date in the simplistic sense suggested by the respondent.

45 The applicants recognised that the presence of the word "immediately" in cl 4.2 caused them some difficulty. They argued that the court should not give "immediately" its literal sense of urgency in order to give effect to the entirety of cl 4.2 and thereby uphold the scheme contemplated by the parties under cl 2. They cited precedents which had held that "immediately" could be construed as "allowing a reasonable time for doing it" and stated that these precedents emphasised the need to construe the word with the object of the contract and the circumstances of the case.

46 The respondent's reply was that the argument that time was not of the essence was a mere reiteration of the applicants' earlier argument that there would be absurd consequences from giving effect to cl 4.2, as the thrust of the time was not of the essence argument was that it was absurd to

expect the Conditions to be satisfied by the end of the Satisfaction Period. That no such absurdity existed had already been demonstrated. In any case, it was a non-sequitur to argue that just because cl 8 specified certain matters in which time was of the essence, it necessarily followed that the time was of the essence rule did not apply to other matters under the Option. Further, if cl 4.2 was interpreted in the manner suggested by the respondent, there was no need to invoke that rule. Second, it was not necessary to specify that time was of the essence in cl 4.2 because it expressly provided for an automatic termination of the Option if the time stipulation had not been met. Such an automatic termination provision was in form and substance, a direct translation of the legal term of art "time is of the essence". The parties were entitled to express the idea of time being of the essence by using any words they liked and were not restricted to using that exact phrase as long as the language used reflected the same intention. This had clearly been done in this case.

47 I agree with the respondent. I consider that in the context of the Option, the word "immediately" has to be given its ordinary meaning and the circumstances here, as discussed above in relation to the absurd consequences argument, fortify rather than weaken the court's natural tendency to give effect to the plain meaning of language in a contract. The applicants themselves accepted that the exercise of construction had to be carried out in the light of all the circumstances. Unfortunately for them, my view of the matter is that the Option looked at as a whole must be construed in the way the respondent contends. I cannot give the word "immediately" the strained interpretation of "within a reasonable time".

48 I was also impressed by the analysis of agreements such as the Option that appears in paragraph 14.16 of *The Interpretation of Contracts* ([40] *supra*). This reads:

> 16. OPTIONS AND UNILATERAL CONTRACTS
>
> **A time stipulation in an option or unilateral contract is of the essence of the contract.**
>
> Both in the Court of Chancery and in the courts of common law the rules that were developed about particular stipulations not being of the essence of the contract (or not being conditions of the contract) applied only to synallagmatic contracts (that is, contracts of reciprocal obligations). They did not apply to unilateral or "if contracts". Under contracts which are only unilateral one party (the promisor) undertakes to do or refrain from doing something on his part if another party (the promisee) does or refrains from doing something, but the promisee does not himself undertake to do or to refrain from doing that thing. The commonest contracts of this kind are options granted for good consideration to buy or to sell land or other property or to grant or to take a lease, competitions for prizes and the like.
>
> In such cases time is of the essence of any time limits with which the promisee is to comply. Two possible theoretical reasons may be advanced for this rule. First, the grant of an option constitutes the making of an irrevocable offer, and an offer must be accepted in exact compliance with its terms. Secondly, the question whether an option has been complied with simply involves asking what have the parties agreed to do, rather than what are the consequences of their having failed to do what they have agreed to do. However, as Lord Diplock explained in *United Scientific Holdings Ltd v Burnley Borough Council*:
>
> > "A more practical business explanation why a stipulation as to the time by which an option to acquire an interest in property should be exercised by the grantee must be punctually observed is that the grantor, so long as the option remains open, thereby submits to being disabled from disposing of his proprietary interest to anyone other than the grantee, and this without any guarantee that it will be disposed of to the grantee. In accepting such a fetter

on his powers of disposition of his property, the grantor needs to know with certainty the moment when it has come to an end."

Illustration

An agreement for the sale of shares contained an option to re-purchase. It was held that time was of the essence for the exercise of the option. *Hare v Nicoll.*

[footnotes omitted]

49 As I have stated above, I do not accept the applicants' contention that the Option was practically a sale and purchase contract. Looking at the document as a whole, in my view, it is a unilateral contract rather than a synallagmatic contract notwithstanding that it contained not simply the Call Option given to the applicants but also the Put Option given to the respondent by cl 5. Whilst this feature distinguishes the Option from the classic type of unilateral contract where it is only one party (commonly the vendor granting the option) who undertakes to refrain from selling his property if the other party (commonly the prospective purchaser) provides consideration in the form of an option fee, and the other party does not undertake to exercise the option, it does not change the essential nature of the Option. In fact, the Option consisted of two unilateral contracts. Accordingly, I reject the applicants' contention that time was not of the essence in relation to the satisfaction of the Conditions under cl 4.2.

Was satisfaction of the Conditions waived?

50 The applicants submitted that, in any event, the parties had, by their conduct waived the requirement for strict adherence to the satisfaction of the Conditions by the end of the Satisfaction Period. In the face of these waivers, they argued, the respondent could not rely on cl 4.2 to terminate the Option. The conduct that the applicants relied on in this connection was the conduct of the parties' respective solicitors in January 2007.

51 Some factual background is necessary here. The context in which the relevant actions took place was the negotiations between the parties as to the quantum of service charge to be paid by the respondent when the leaseback took effect. Under cl 6.8 of the Option, the parties were under an obligation to agree on this charge by the end of the Satisfaction Period. As at 26 January, the parties had not agreed on the charge. On that day, the applicants' solicitors M/s Baker & McKenzie.Wong & Leow ("B&MWL") wrote to M/s Heng, Leong & Srinivasan ("HLS"), the respondent's solicitors, to ask for an extension of time in this connection. The relevant portion of their letter read:

Our clients are committed to working with your clients to determine and agree on the Service Charge and will be contacting your clients shortly to arrange a meeting with this objective in mind. To ensure that the Parties have sufficient time to engage in fruitful discussions, for and on behalf of our clients, we would like to request an extension of an additional 20 days (the "**Extension**") for the Parties to meet and agree on the Service Charge.

Consequently, if your clients are agreeable, Clause 6.8 shall therefore be hereby varied such that references to the phrase "by the end of the Satisfaction Period" and in particular, in each of line one of Clause 6.8 and Clause 6.8(a) shall be amended to read "by 20 February 2007" respectively (the "**Variation**")

52 HLS replied the next day by e-mail. This is an important piece of correspondence. It was brief and its full contents read as follows:

Hi

May I also suggest an extension of the satisfaction period, given that the conditions are yet to be satisfied?

Regards

53 On 30 January, B&MWL sent HLS an e-mail in the following terms:

Thank you for your e-mail.

We attach a scanned copy of our letter proposing an extension, on our client's behalf, of the Satisfaction Period (as defined in the Put & Call Option Agreement) till 16 February 2007 in view of the ongoing JTC application process. We would be grateful if you could arrange for your client to sign the corresponding acknowledgement and return the same, together with the signed acknowledgement in respect of our earlier letter dated 26 January 2007 pertaining to extension of the period for agreement on the Service Charge, to us by 4p.m. on Wednesday, 31 January 2007.

After a telephone conversation on 30 January between the respective lawyers handling the matter, the letter was further amended to provide for an extension for Condition 2 as well.

54 The amended formal letter from B&MWL which proposed the extension contained the following material paragraphs:

Pursuant to Clause 2.2 and 2.5 of the Agreement, the Vendor and the Purchaser are required to use their best endeavours to procure the satisfaction of Condition 1 and Condition 2 respectively in Schedule 5 by the end of the Satisfaction Period, being 31 January 2007.

In view of the fact that the Condition 1 and Condition 2 Approvals from the Relevant Authority (in particular JTC) are still pending, we propose that the Satisfaction Period in the Agreement be extended till 16 February 2007 (the "**Extension**"). This will allow the Vendor and the Purchaser sufficient time to obtain the necessary approvals.

If your clients are agreeable, the definition of "Satisfaction Period" in Clause 1.1 of the Agreement shall therefore be hereby varied and amended by deleting the words "31 January 2007" and substituting therefor the words "16 February 2007" (the "**Variation**").

55 The applicants submitted that it could be seen from the foregoing exchange that parties intended and did indeed waive the requirement for strict adherence to the Satisfaction Period. The only outstanding issue in the letters that had to be agreed upon was the date to which the Satisfaction Period should be deferred. In this respect, as evidenced by B&MWL's letters, the intention was to extend the Satisfaction Period up to 20 February 2007 for the purpose of cl 6.8 but only up to 16 February 2007 for the purposes of cll 2.2 and 2.5.

56 The respondent did not accept the applicants' interpretation of the facts as having resulted in a mutual waiver. It pointed out that cl 14.8 of the Option provided that all variations and waivers of the Option would only be effective if they were in writing and signed by the parties. In this case, it said, there was never any agreement in writing to waive or vary the Satisfaction Period which was signed by the parties. Hence, any such purported waiver or variation of the Satisfaction Period would in any event be ineffective, with the consequence that the Satisfaction Period expired on 31 January 2007.

57 The respondent also argued that the email query sent by its solicitor on 27 January 2007 was a mere query in response to the applicants' initial query to extend the period for the determination of the service charge, seeking to inquire whether the applicants wanted to make an offer to extend the Satisfaction Period. In relation to this it was noteworthy that the applicants had not been able to specify what the precise terms of the purported offer made on behalf of the respondent were. This argument was supported by reference to the affidavit given by Ms Amy Cheah, the solicitor in HLS who had sent out the e-mail. In her affidavit, Ms Cheah said:

> From the Applicants' letter, it was apparent that their intention was to propose an extension of the deadline to the Service Charge issue only and not an extension of the Satisfaction Period per se. On my own initiative, I thought it would also be sensible for them to propose an extension of the Satisfaction Period as well, before I sought my clients' instructions. Therefore, my email of 27 January 2007 … was merely a question to check if their proposal also applied to the Satisfaction Period as that would be more sensible and consistent with the Applicants' concerns. My intention was to obtain confirmation and clarify the scope of the Applicants' proposal so that I could then seek my clients' express instructions on this. That was the reason why I had phrased this short email as a question, with no other specifics …

58 I accept the above evidence. The e-mail that Ms Cheah sent out was brief and its wording reflected a query more than it reflected an offer since it did not contain any specific date to which the Satisfaction Period could be extended. If the respondent had indeed intended to offer to extend the Satisfaction Period, it would have specified the new date and not have left the matter indeterminate as this would have meant that its obligations under the Option would have had no precise end date before the end of the Call Option Period (*i.e.* 30 April 2007). That situation would not have been in accordance with the respondent's intentions in entering into the Option as shown by its care to include a satisfaction period in the first place. At the most, in the absence of a specific date, the e-mail of 27 January constituted an indication that the respondent was prepared to consider an extension but not that it had committed itself to one.

59 On the above basis therefore, the only offer to extend the Satisfaction Period was that made by the applicants in their letter of 30 January 2007. It is also clear from the same letter that the applicants were making a proposal and that they knew that no agreement had been yet obtained from the respondent. Both the covering e-mail and the letter itself specifically asked the respondent to indicate acceptance of the "Extension" and the "Variation" by signing the acknowledgement portion of the letter and returning it to B&MWL. The acknowledgement portion was never signed by the respondent. Thus, the offer made by the applicants was not accepted and there was no mutual waiver of the Satisfaction Period. In any case, without a written agreement, there could be no effective waiver or variation because of the operation of cl 14.8.

Best endeavours?

60 The applicants' next argument was that, even assuming that the respondent's interpretation of cl 4.2 was correct, the respondent had not used its best endeavours to procure the satisfaction of the Conditions within the Satisfaction Period as required under the Option. Consequently, the respondent should not be allowed to rely on its own default to insist on its strict legal rights. In this connection, the applicants relied on the provisions of cl 2.2(a) which placed the obligation to use best endeavours on the respondent.

61 The law on this issue is well settled. In *Justlogin Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2004] 1 SLR 118, Kan Ting Chiu J held that when a party is under a duty to use its best endeavours to procure a thing to be done, that party must show that he had done everything reasonable in good

faith with a view towards obtaining the required results within the time allowed. The learned judge accepted the formulation of Geoffrey Lane LJ in *IBM United Kingdom Ltd v Rockware Glass Ltd* [1980] FSR 335 to the effect that an obligation of best endeavours obliges the parties subject to it to take all reasonable steps which a prudent and determined man acting in his own interests and anxious to obtain the required result would have taken.

62 In the present case, the applicants submitted that the respondent had not taken all reasonable steps which a prudent and determined man would have taken to obtain the satisfaction of Condition 1 (which included procuring the Condition 1 Approvals from JTC) within the agreed time. At the first hearing, the applicants relied on the following facts in support of this submission:

(a) the first contact made by the respondent with JTC was by its letter dated 8 January 2007 applying for the Condition Approvals. This letter was four days past the contractual deadline of 4 January 2007 by which the application had to be made;

(b) on 9 January 2007, the JTC asked for further particulars of the transaction and a copy of the Option. On 10 January 2007, the applicants' solicitors consented, on behalf of the applicants, to the release of the Option to JTC; and

(c) on 12 January 2007, HLS provided JTC with the requested documents.

63 The applicants submitted that apart from the foregoing there was no evidence of other correspondence or communication between the respondent and JTC. The respondent had asked JTC to reply with its decision within 14 days of the application made on 8 January but when this period expired on 22 January, the respondent did nothing to follow up with JTC on the status of the application. As the expiry date of the Satisfaction Period drew nearer, the respondent made no enquiry with JTC as to the status of its application. It chose not to do anything and allowed the Satisfaction Period to lapse. A prudent and reasonable man in the respondent's position, knowing that the Condition Approvals were necessary to the transaction and knowing that he might not have sufficient time to satisfy Condition 1 without first receiving the Condition Approvals, would have taken active steps to enquire with JTC and/or seek the applicants' assistance. The respondent, however, did nothing.

64 When this argument about best endeavours was put up at the first hearing, the respondent objected. Mr Hwang argued that these arguments had not been raised at any time previously in the correspondence between the parties and none of the applicants' affidavits had relied on the respondent's alleged lack of best endeavours as a ground for rejecting the respondent's reliance on cll 4.2(a) and (c) to terminate the Option. I accepted that this argument had not been raised previously and I therefore gave the respondent leave to file a further affidavit to show what steps it had taken to fulfil its obligation of best endeavours. Thereafter, both parties filed further submissions on the issue.

65 In rebuttal, the respondent pointed out that whilst cll 2.2(a) to (d) listed the items which the respondent had to use its best endeavours to perform within the Satisfaction Period, the applicants had only asserted a failure to use best endeavours in respect of cl 2.2(a). No issue had been made in respect of any item listed in cll 2.2(b) to (d). Using the further evidence that it had disclosed in its affidavit, the respondent argued that the applicants' argument that it had failed to exercise its obligation of best endeavours because it had submitted the application for JTC approval four days late was a non-starter. As Michael Tan's third and fourth affidavits showed, the applicants had only provided the respondent with its preferred application form and comments after the deadline given by cll 2.2 and 2.5 of the Option (*i.e.*, 4 January) had already passed. Without the applicants' preferred

application form, the respondent was in no position to apply to JTC for approval. Further, as Mr Tan had testified, the respondent had notified JTC of the intended transaction and applied for the relevant approvals as early as 22 November 2006. Therefore, the applicants were the authors of their own misfortune.

66 The applicants had attempted to argue that the deadline under cll 2.2 and 2.5 to make the relevant applications for the Condition 1 and Condition 2 Approvals was 5 January 2007. This, the respondent said, was a misunderstanding as those clauses set the deadline as 30 days after the execution of the Option and that date was 4 January 2007. In any event, by the time HLS received the response from B&MWL on the applicants' preferred application form, it would have been impossible for the respondent to meet the deadline under cl 2.2 whether it was 4 January or 5 January 2007.

67 As for the applicants' argument that the respondent had failed to exercise best endeavours in chasing for a response from JTC to its application before the expiry of the Satisfaction Period, the respondent submitted that the principle "that no man may take advantage of his own wrong", was not applicable on the facts of this case as the applicants had also failed to chase JTC for response to its application for Condition 2 Approvals before the expiry of the Satisfaction Period. Alternatively, the applicants had failed to show that the breach of the best endeavours obligations under cl 2.2 by the respondent was the cause of the JTC's delayed response on 2 February 2007.

68 The further evidence relied on by the respondent came from Michael Tan's third affidavit. There he stated that the respondent had, directly and through its solicitors, been in contact with JTC since July 2006 to discuss issues relating to the title of the property and to seek "in-principle" approval of the arrangement in anticipation of the agreement to be signed with the applicants. Shortly after the signing of the MOU on 16 June 2006, the respondent had through HLS, commenced correspondence with JTC on various matters relating to the property in order to facilitate the proposed transaction. On 2 October 2006, HLS wrote to JTC to seek its approval to the sale and leaseback. JTC replied a few days later seeking the reasons for the assignment. HLS responded to JTC on 22 November 2006 explaining the respondent's reasons for the transaction *i.e.* that it wished to capitalise its investment for the purpose of raising funds for corporate use. In this letter also, HLS reiterated the respondent's request for JTC's consent to the transaction. Thus, from very early on the respondent had given its commercial rationale for the transaction to JTC.

69 As regards the format of the application form, Michael Tan stated that as early as 29 November 2006, the respondent had sought the applicants' confirmation on the preferred form of the application. This was in compliance with cl 6 of the Option which required that the application be submitted only in a form preferred and approved by the applicants. It was only on 21 December 2006 that HLS was informed by the applicants' solicitors in Australia that the pro forma approval letters would be available shortly. Whilst these were duly sent out to HLS the next day, the covering e-mail also requested that the respondent provide a completed application for the applicants' "final review".

70 The draft template provided by the applicants included an application for approval of sub-lease (*i.e.*, Condition 2 under cl 2.5 of the Option). Although satisfaction of Condition 2 was the applicants' responsibility, Michael Tan said that the respondent accommodated this point in its draft letter due to time constraints and because it was linked to the approval for the sale that was being sought from JTC. The respondent duly completed the letter and application form and forwarded the same by e-mail to B&MWL on the evening of 3 January 2007 (the first working day of the New Year) for their review. B&MWL reverted on 5 January 2007 (at 4.06pm, Friday evening) with their comments on the draft letter and application form. Mr Tan said that by the time this reply was received, it was not possible to make the required changes and submit the application online as well as make the printed application. Therefore, after the comments were collated and the necessary amendments

made, the letter and application were sent off on the next working day which was Monday, 8 January 2007.

71 Michael Tan continued that as JTC was already aware of the intended sale and leaseback arrangement, they wrote to the respondent on 9 January seeking details of the financing proposal and of the business plan relating to the operation of the property. JTC also sought a copy of the signed Option. When the applicants' consent to release the Option to JTC was received on 12 January 2007, the document was immediately forwarded as requested. Then, on 17 January 2007, Michael Tan wrote to JTC to explain the background and intent of the transaction from the respondent's perspective and also in relation to the existing occupant, Lian Huat Aluminium Limited. Michael Tan took some time with this letter because some details had to be checked with the accountants and also because he had reservist training until 12 January 2007. Mr Tan recalled having two telephone discussions with a JTC officer who indicated that JTC was only prepared to consider lifting the existing three year restriction against assignment of the JTC lease if the new assignment was part of a sale and leaseback arrangement. Mr Tan took the view that the respondent had submitted all documents and information that were required by JTC and had duly complied with its duties under the Option. There was nothing further it could have done in this respect to assist JTC in its decision process. Whilst waiting for JTC's decision, the respondent continued to work on other aspects of the transaction.

72 Having considered the facts, I take the view that up to 17 January 2007 the respondent was not in breach of its obligation to use best endeavours. It could not have put in the formal application for approval any earlier since the applicants' approval of the form was required before it was submitted and this only came late on 5 January. The respondent also responded as promptly as was necessary when JTC had further queries. The respondent had in fact acted from the beginning as a prudent man who was concerned to bring matters to a favourable conclusion since it had been corresponding with JTC from July 2006 and had tried, even before the Option was signed, to get in-principle approval of the transaction from JTC. The question is whether the respondent in failing to chase JTC for its reply before 31 January was in breach of its obligation. This is a delicate question since a man who is anxious to bring about a certain state of affairs that depends on the approval of a third party will often be a nuisance in that he continually pesters that third party for a positive response. This, however, does not mean that his more laid back brother who has provided the third party with all necessary material for the decision making process and then waits for the outcome of that process without prodding the third party is necessarily not exercising his best endeavours. On balance, however, since this was a case where there was a rapidly approaching deadline and expiry of the Satisfaction Period without satisfaction of the Conditions would lead to the end of the Option, I think that the prudent man who wanted to bring about a favourable outcome would, at the least, have telephoned the JTC once during the period between 17 and 31 January and informed the relevant officer that it was vital that a decision be forthcoming by 31 January. Whilst the respondent had in its letter of 8 January asked for a response within 14 days, it had not brought to the JTC's attention that if an answer was given after 31 January, then even if that answer was favourable, the transaction might very well not go through because of the operation of cl 4.2. JTC was therefore not aware of the vital importance of providing an answer, whether favourable or unfavourable, before that date. In all the circumstances therefore, I think that the respondent did not exercise its best endeavours because it did not impress on the JTC either orally or in writing the need for a reply before 31 January 2007.

73 The respondent argued, however, that even if it had failed to exercise best endeavours, the applicants could not take advantage of this failure because the principle "no man may take advantage of his own wrong" only applied where the alleged wrongdoer was seeking to take advantage of his own wrong against a *blameless* contracting party. This principle had no application where both parties were equally in breach of their contractual obligations. In the present case, the JTC application made

on 8 January was a joint application made on behalf of both the respondent and the applicants for the Condition 1 and Condition 2 Approvals respectively. If the respondent was in breach of its obligation to use best endeavours under cl 2.2 for not chasing JTC for a response to its application for Condition 1 Approvals before the Satisfaction Period expired, then, argued the respondent, it must follow that the applicants were also in breach of their obligation to use best endeavours under cl 2.5 for failing to chase JTC for response to their application for Condition 2 Approvals before the end of the same period. If the applicants' contention that the respondent could not rely on its breach of cl 2.2 were upheld, then it would follow that the applicants would be taking advantage of their own wrong in failing to use their best endeavours by preventing the respondent from relying on the automatic termination of the Option under cl 4.2.

74 There is, in my view, much force in this argument made by the respondent. It can be seen from the speech of Lord Atkinson in *New Zealand Shipping Company Limited v Socit Des Ateliers Et Chantiers De France* [1919] AC 1 that there is a need for the contracting party who seeks to rely on the principle that "no man will take advantage of his own wrong" to be blameless of any kind of contractual default. His lordship said:

> It is undoubtedly competent for the two parties to a contract to stipulate by a clause in it that the contract shall be void upon the happening of an event over which neither of the parties shall have any control, cannot bring about, prevent or retard. For instance, they may stipulate that if rain should fall on the 30th day after the date of the contract, the contract should be void. Then if rain did fall on that date the contract would be put an end to by this event, whether the parties so desire or not. Of course, they might during the currency of the contract rescind it and enter into a new one, or on its avoidance immediately enter into a new contract. But if the stipulation be that the contract shall be void on the happening of an event which one or either of them can by his own act or omission bring about, then the party, who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself, *or to compel the other party, who is blameless, to insist upon it,* because to permit the blameable party to do either would be to permit him to take advantage of his own wrong, in the one case directly, and in the other case indirectly in a round-about way, but in either way putting an end to the contract.
>
> The application to contracts such as these of the principle that a man shall not be permitted to take advantage of his own wrong *thus necessarily leaves to the blameless party an option whether he will or will not insist on the stipulation that the contract shall be void on the happening of the named event*. To deprive him of that option would be but to effectuate the purpose of the blameable party. When this option is left to the blameless party, it is said that the contract is voidable, but that is only another way of saying that the blameable party cannot himself have the contract made void, cannot force the other party to do so, and cannot deprive the latter of his right to do so …
>
> [emphasis added]

75 In this case, the applicants although obliged by cl 2.5 to use their best endeavours to procure the satisfaction of Condition 2 in Schedule 5 by the end of the Satisfaction Period, did not see fit to press their case before JTC and ask for an answer to their application for approval of the sub-lease before 31 January 2007. Their failure operates, in my judgment, to negate the consequences of the respondent's similar failure. There are two ways of looking at this. The first is that each party was, as the respondent submitted, in breach of its best endeavours obligation and therefore neither party could seek to rely on the wrong of the other so as to prevent the other from relying on the operation of cl 4.2. The second is that, in fact, neither party thought that the

requirement of best endeavours obliged it to send JTC a reminder or inform JTC that 31 January 2007 was a vital date before which the answer to the applications should be provided. In either case, the result is that the respondent remained entitled to rely on cl 4.2 notwithstanding its failure to chivvy JTC.

Conclusion on this issue

76 I am therefore satisfied that in all the circumstances, the Option terminated automatically on 31 January 2007 since the Conditions were not satisfied on that date.

Second issue: was the respondent entitled to terminate the Option under cl 2.4(b)?

77 In view of the conclusion that I have come to in respect of the first issue, it is not, strictly, necessary for me to consider the second issue. I will do so, however, for the sake of completeness.

78 It would be recalled (see [23] above) that cl 2.4 provided that if the relevant authorities gave the Condition 1 Approvals on terms and conditions that either party (acting reasonably) considered unsatisfactory, then that party was entitled to terminate the Option at the end of the Satisfaction Period by giving written notice to the other party. The approval letter issued by JTC on 2 February contained the following condition:

> 2 Conditions to be complied with
>
> We have in principle, no objection to the Assignment subject to the following conditions being complied with:
>
> …
>
> 2.3 Assignor and Assignee
>
> That both you and the Assignee shall (and you shall procure the Assignee to) agree with and comply with the following:
>
> (a) This assignment shall be subject to the successful listing of MacarthurCook Industrial REIT and shall in any case be legally completed within 3 months from the date of this letter, failing which our consent to this Assignment shall automatically lapse without notice to you …

The respondent found the Condition contained in para 2.3(a) of the JTC letter (the "JTC Condition") to be unsatisfactory and served a notice on the applicants on 8 February that it was terminating the Option for that reason.

79 In affidavits filed on its behalf by Michael Tan, the respondent explained why it considered that the JTC Condition was unsatisfactory and would subject it to a significant commercial risk that it was not prepared to take. These reasons can be summarised as follows:

> (a) the sale and purchase agreement did not contain any clause which made the sale and leaseback transaction conditional upon the successful listing of the REIT. If the applicants had exercised the Call Option and the respondent had entered into the sale and purchase agreement, the respondent might be in breach of the sale and purchase agreement in the event that the listing of the REIT was not successful by 2 May 2007 (*i.e.* three months after the date of the JTC letter);

(b) the JTC Condition would make it difficult for the respondent to exercise its Put Option under the Option, as it would not be able to pass its leasehold interest under the sale and purchase agreement to the applicants if the listing of the REIT was not successful by 2 May 2007;

(c) the listing of the REIT was a matter entirely beyond the respondent's control; and

(d) in the time period between 31 January 2007 (expiry of the Satisfaction Period) till 2 May 2007 (deadline when JTC in-principle approval would lapse), the respondent assumed a significant commercial risk of a fall in the price of the property and that time and costs would have been wasted by the respondent in carrying out its obligations under the sale and purchase agreement.

80 The applicants submitted that the respondent was not entitled to terminate the Option under cl 2.4(b) for the following reasons:

(a) the respondent could not ignore the backdrop against which the sale and leaseback transaction was concluded and therefore in order for the respondent to have acted reasonably in this situation, the respondent should have taken into account the applicants' interest in the listing of the property as part of the portfolio of the REIT;

(b) the respondent had failed to show good reasons why the JTC Condition would impose a commercial risk on the respondent which it would find unsatisfactory if it was acting reasonably; and

(c) the imposition of the JTC Condition did not prevent the respondent from exercising its rights under the Option.

81 Whilst all parties knew that the applicants wanted to acquire the property as part of their portfolio of the REIT, I agree that this fact did not translate into any contractual obligation on the part of the respondent to take the listing of the REIT into account. There was no clause in the Option which made the exercise of the Call Option conditional upon listing. As far as the Option was concerned, there was no contractual effect arising from the listing or non-listing of the REIT. The way that the document was structured, once the Call Option had been exercised by the applicants, the respondent would have known that whatever happened to the REIT, the property would be acquired by the first applicant or by the trustee and would then be leased back to it. It would have been certain, therefore, on the exercise of the Call Option, or failing that, by the exercise of the Put Option, that the transaction would go ahead. The JTC Condition therefore introduced an element of uncertainty that had not previously been present.

82 As far as the commercial risk to the respondent was concerned, this element of uncertainty was unwelcome. The respondent's letter to JTC of 17 January 2007 indicated that the respondent's holding company, Ho Lee Group Pte Ltd, was anxious to arrange the financing as it was under financial strain and the sale and leaseback arrangement would have removed this financial strain. As a result it was not surprising that the respondent did not wish to wait for three more months (*i.e.*, up to 30 April 2007) to find out whether the REIT would be listed so that the Call Option could be exercised and the transaction completed on 2 May 2007 as required by the JTC. In any case, the transaction had already taken some time from the initial signing of the MOU in June 2006. It had then been envisaged that the sale and purchase agreement would be executed by 15 August 2006 and the sale completed by end December 2006 but, in the event, the Option was only executed in December 2006 itself and then the respondent had to wait a further six weeks up to 31 January 2007 to discover whether or not the Call Option could even be exercised.

83 The respondent submitted that it had been locked into the deal with the applicants for almost ten months with no certainty of outcome in sight. As of the date of the hearing, the respondent said it still did not know whether a sale and purchase agreement for the property would (or even could be) entered into, let alone any idea whether a sale and purchase agreement could be completed. This was long after the initial date of 15 August 2006 and the initially contemplated completion date of 31 December 2006. This was why the directors of the respondent found the JTC Condition to be unsatisfactory and why it exercised its right of termination under cl 2.4(b). The respondent was no longer interested in indulging the applicants by allowing the completion of the sale and purchase agreement to be linked to the successful listing of the REIT and thus, as a backup alternative to automatic termination, terminated the Option pursuant to cl 2.4(b).

84 The respondent also submitted that any doubt to the reasonableness of the commercial decision taken by the respondent should be resolved in the respondent's favour, unless the court found that no reasonable director in the respondent's position would have terminated the Option. This submission was derived from the adoption by the Court of Appeal in *Intraco v Multipak Singapore Pte Ltd* [1995] 1 SLR 313 of the following passage from the speech of Lord Wilberforce in *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 at 832:

> Their lordships accept that such a matter as the raising of finance is one of management, within the responsibility of the directors: they accept that it would be wrong for the court to substitute its opinion for that of the management, or indeed to question the correctness of the management decision on such a question, if bona fide arrived at. There is no appeal on merits from management decisions to courts of law: nor will courts assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at.

85 I accept the above submission. It is not for the court to second guess the commercial decisions made by management as long as those decisions were honestly arrived at. In the present case, there is no evidence that casts any doubt on the *bona fides* of the directors of the respondent in making the decision to terminate the Option.

86 In the course of oral arguments, I enquired as to what the legal risks of the respondent would be if the REIT were not listed by the deadline set by JTC (*i.e.*, 2 May 2007) before its in-principle approval lapsed. The respondent's counsel submitted that, assuming that:

> (a) the applicants exercised their Call Option or the respondent exercised its Put Option; and
>
> (b) the sale and purchase agreement was completed but the REIT was not listed by 2 May 2007,

then the respondent would be in breach of s 45(b) of the Jurong Town Corporation Act (Cap 150, 1998 Rev Ed), which would give JTC the right to determine the respondent's lease of the property. This section reads:

> **Determination of lease of flat, house or building**
>
> **45.** The Corporation may, where a flat, house or building has been sold by the Corporation under the provisions of this Act –
>
> …

(b) if the owner has committed any breach of a condition against assigning, underletting or parting with possession of the flat, house or other building or any part thereof or has committed any other condition the breach of which is not capable of remedy and the Corporation has sent a notice in writing by registered post addressed to the owner or purchaser at the flat, house or other building (whether the notice has been received or not);

…

in every such case re-enter upon the flat, house or building or a part thereof in the name of the whole and thereupon the lease shall determine; but such determination shall be without prejudice to any right of action or remedy of the Corporation in respect of any such breach or any other breach of the conditions contained in the lease.

87 Counsel also submitted that alternatively the respondent would face a legal risk if it entered into a sale and purchase agreement with the applicants after the Call or Put Option was exercised, as there was no provision making the sale of the leasehold interest in the property conditional upon the successful listing of the REIT. The respondent would then be exposed to a possible claim for breach of contract for being unable to convey title under the sale and purchase agreement to the applicants since contractual liability is strict.

88 The imposition of the JTC Condition put it, the respondent averred, in a difficult situation. If the REIT failed to be listed and the respondent tried to complete the sale and purchase agreement, it would risk being sued by JTC. If the REIT failed to be listed and the respondent declined to complete the sale and purchase agreement, it would risk being sued by the applicants. The respondent contended that however small the legal or factual risk it faced, it could not be said to be acting unreasonably if it wished to avoid that risk.

89 Having considered the relevant facts and submissions, I hold that the respondent was entitled to terminate the Option under cl 2.4(b).

Conclusion

90 In view of the findings that I have made, I dismiss the applicants' application with costs and, as requested by the respondent, grant the following declarations:

(a) that the Option terminated automatically on 31 January 2007 upon expiry of the Satisfaction Period; and

(b) further, that the respondent's letter dated 8 February 2007 to the applicants constituted a valid notice to terminate the Option.

91 In the light of the outcome of the main proceedings there is no need for me to deal with summons 1225 of 2007 and I, accordingly, make no order on the same.