E C Investment Holding Pte Ltd *v* Ridout Residence Pte Ltd and another (Orion Oil Limited and another, Interveners)
[2010] SGHC 270

Case Number : Originating Summons No 1357 of 2009

Decision Date : 15 September 2010

Tribunal/Court : High Court

Coram : Quentin Loh J

Counsel Name(s) : Lee Eng Beng, SC, Disa Sim and Jonathan Lee (Rajah & Tann) for the plaintiff; Tan Cheng Han, SC and P Balachandran (Robert Wang & Woo LLC) for the first defendant; Phua Siow Choon (Michael B B Ong & Co) for the second defendant; Kelvin Tan Teck San (Drew & Napier) for first intervener; Alvin Yeo, SC and Melvin Lum (WongPartnership LLP) for second intervener; Kabir Singh (Clifford Chance) for instructing solicitors.

Parties : E C Investment Holding Pte Ltd — Ridout Residence Pte Ltd and another (Orion Oil Limited and another, Interveners)

Land

15 September 2010 Judgment reserved.

Quentin Loh J:

Background

1 39A Ridout Road, Singapore, (the "Property"), is a rectangular plot of land comprising some 40,600 square feet, or 3779 square metres, in a good class bungalow area. A two-storey house together with a swimming pool and tennis court sits on this elevated plot with good frontage of about 170 feet, (52 metres), along Ridout Road and a generous depth of 240 feet, (73 metres).

2 The 1st Defendant, a company incorporated in Singapore, is the registered proprietor of the Property. Mr Agus Anwar, ("AA"), is its only director and shareholder. The 2nd Defendant, Hong Leong Finance Ltd, ("HLF"), is a mortgagee having provided credit facilities of $30 million to AA to finance the purchase of the Property and for AA's share trades. HLF registered its mortgage over the Property on 18 September 2006. Mr Phua Siow Choon, for HLF, informed me that as of 16 July 2010, the sum outstanding to the 2nd Defendant was $20,346,252.42 and interest was accumulating at about $5,408 a day.

3 Two parties are claiming specific performance of the sale of the Property to them:

(a) the Plaintiff, EC Investment Holding Pte Ltd, claims specific performance of the sale of the Property to it under an Option dated 5 June 2009, (the "1st Option"), for a purchase price of $20 million; and

(b) the 2nd Intervener, Mr Thomas Chan Ho Lam, ("TC"), also asks for specific performance of the sale of the Property to him under an Option dated 7 October 2009, (the "2nd Option"), but at a purchase price of $37 million.

4 The 1st Intervener, Orion Oil Ltd, a BVI company, ("Orion"), claims an interest in the proceedings by virtue of its charge registered against the 1st Defendant pursuant to a Deed of Charge dated 24 September 2008 over the proceeds of sale of the Property. Orion says it made a loan of $10 million to AA pursuant to a loan agreement dated 22 September 2008 and it is secured by the Deed of Charge given by the 1st Defendant.

Mr Agus Anwar's Financial Woes

5 From his affidavit dated 23 December 2009, (set out in 2.AB pp 400-461), in separate proceedings, (OSB No 58/2009/V), AA appears to have been a man of some means. He was originally an Indonesian citizen and businessman, holding a Masters in Mechanical Engineering from Fachhochschule Dusseldorf, Germany. At one time he was a significant shareholder in two Indonesian banks, PT Bank Kredit Asia and PT Bank Pelita, but in the 1997 financial meltdown, there was a run on "his" banks and they were taken over by an Indonesian Government agency known as IBRA in 1998. AA came to Singapore in 2000 to start on a clean slate. In 2004 he became a Singapore citizen. Having worked in the financial sector for most of his working life, AA became an investor in several companies. This included acquiring a 28% stake in the Singapore Petroleum Company in 2003 through his own company, Kapital Asia Co. Ltd, ("Kapital Asia"), and a substantial stake in Keppel Telecommunications and Transportation Ltd as well as coal mines in Indonesia.

6 AA purchased the Property in September 2006 for $28 million. He put up $11 million and the stamp duty of over $744,000 from his own funds and took the balance $17 million from a facility of $30 million extended to him by HLF earlier in June 2006. As noted above, HLF registered its mortgage over the Property in September 2006.

7 On 16 May 2008, HLF recalled the loan and terminated their facility. Payment was not forthcoming and HLF eventually commenced OS No. 1458 of 2008/A, obtaining an Order of Court on 2 February 2009 for the 1st Defendant to deliver vacant possession of the Property and for AA to pay the $20,742,627.50 that was due as of 12 November 2008 under the mortgage. AA was coming under increasing financial pressure. His investments were then badly hit by the global financial crisis sparked off by the collapse of Lehman Brothers in September 2008. AA made partial payment of $505,847 in March 2009 and $1.35 million over April and May 2009. In May 2009, HLF was pressing AA to reduce his outstanding loan of $19.638 million to $18 million.

8 It was within this context that AA came to give the 1st Option to the Plaintiff. This will be dealt with in greater detail below.

9 HLF filed a Writ of Possession on 22 September 2009 and vacant possession of the Property was delivered to HLF on 22 October 2009. There were a number of abortive attempts to auction off the Property but I was told by counsel during the interlocutory stages that the auction, after the grant of the 1st Option, was put off because there were certain assurances from the Plaintiff to HLF that the Plaintiff will make good any shortfall from the 1st Defendant for the outstanding loan. I was told by counsel during the hearing that this assurance is no longer there, presumably because this matter went into full blown litigation with rival claims being made. In any case, HLF have their security and no purchaser can get unencumbered title unless HLF's mortgage is discharged.

Mr Anwar's Section 45 Bankruptcy Act Individual Voluntary Arrangement

10 It is necessary to deal with an intervening development. At an interlocutory hearing on 18 May

2010, I was told by counsel for the 1st Defendant, Prof Tan Cheng Han SC, that a Court Order had just been made under section 45 of the Bankruptcy Act (Cap 20, 2009 Rev Ed) (the "Bankruptcy Act"), ordering all matters against AA to be stayed for 42 days. Prof. Tan SC had been shown a copy of a trust deed stating that the 1st Defendant was holding the Property on trust for AA. Mr Alvin Yeo SC, counsel for TC and who was applying for an interim injunction, took the position that the facts surrounding the trust deed should certainly be investigated and he for one wanted to inspect the same. I ordered, *inter alia*, that the 1st Defendant's team secure copies of this trust deed and circulate copies to all counsel to take instructions.

11 AA filed OSB No. 58 of 2009/V on 23 December 2009 and obtained an order under section 45(3) of the Bankruptcy Act (the "section 45(3) IVA Order") from Choo J on 17 May 2010. AA had to submit his proposal by the end of June 2010.

12 On the first day of the hearing of this OS, 5 July 2010, Mr David Chan from Messrs Shook Lin & Bok LLP appeared stating that he was acting for AA's nominees under AA's Individual Voluntary Arrangement, ("IVA") and asked for the proceedings to be stayed pending the decision of the Creditors' Meeting scheduled for 23 July 2010. Mr Chan said the IVA proposal had been submitted to the nominees on 25 June 2010. The notices had "been done", (which I take to mean had been drafted and finalised), and they would be sent to all creditors shortly.

13 Mr Chan submitted that I should not be making any orders for specific performance because the Property was part of AA's assets. The Property was listed as belonging to him personally in his affidavit setting out his assets. Any disposal of the Property by me in these proceedings was therefore caught by the section 45(3) IVA Order and would be disposing off an asset of AA's insolvent estate. Mr Chan said the Property was worth much more than $37 million today but accepted that he had no valuation to back that statement from the bar. Mr Chan's oral application was opposed by all counsel present on various grounds.

14 Mr Lee Eng Beng SC, counsel for the Plaintiff, (who had just taken over the matter from their previous lawyers), took objection not only to the lateness of the application and lack of notice but also to the legal basis of Mr Chan's application that the Property should fall into AA's insolvent estate. Mr Lee SC said the application must falter on the well-known principle that if a party entered into a contract to purchase property, the beneficial ownership shifts to the buyer and if there is a supervening bankruptcy, the bankruptcy takes subject to the buyer's interest. Mr Yeo SC agreed and submitted on a more basic point, and I agreed with him – that there was no proper application supported by an affidavit before me. Mr Yeo SC reminded me that when I first learned of the section 45(3) IVA Order at the PTC on 18 May 2010, I asked Prof Tan SC and his instructing solicitor, Mr P Balachandran, to invite Messrs Shook Lin & Bok LLP to attend the next PTC and update all concerned on those proceedings. They did not. Nor did they write to any of the parties.

15 I therefore informed Mr Chan that we were proceeding with the taking of the evidence for the rest of that week and oral submissions were going to be made the following week on 15 and 16 July 2010. That would give him the time, if his clients wished, to intervene and take out a proper application supported by an affidavit. In the event, no such application took place. It will also be noticed that AA was giving evidence in these proceedings and had filed four affidavits, (6 January, 9 April, 25 June and 1 July 2010).

The Plaintiff's Case

16 The Plaintiff contends that its case is very simple and straightforward. The terms of the deal

between the Plaintiff and the 1st Defendant are very clearly and unambiguously set out in the 1st Option and the Deed of Settlement dated 8 June 2009 (the "Deed of Settlement"). In exchange for a $1.5 million option fee, the Plaintiff was granted an option by the 1st Defendant to purchase the Property for $20 million. That option could be cancelled by the 1st Defendant within 60 days of the execution of the Deed of Settlement by payment of a cancellation fee of $180,000 and refund of the option fee of $1.5 million. If the 1stOption was not cancelled, the Plaintiff would be entitled to exercise the 1st Option to purchase the Property at $20 million.

17 The 1st Defendant failed to cancel the 1st Option by failing to make repayment of the $1.5 million option fee and "compensation" of $180,000 within the 60 days and the Plaintiff therefore claimed specific performance.

18 All the technical issues raised by the 1st Defendant, the 1st and 2nd Interveners were raised to obfuscate the simple and unarguable fact of the Plaintiff's prior, valid and enforceable right to purchase the Property. This attempt to detract from the Plaintiff's undisputable legal position was no doubt due to the dramatic rise in the value of the Property since June 2009.

The 1st Defendant's Case

19 The 1st Defendant contends that it holds the Property on trust for AA. The whole transaction was intended as a loan from the Plaintiff to AA and/or the 1st Defendant, of which AA was the sole shareholder and director. The 1st Defendant, acting through AA, never intended to sell the Property. Because it was truly a loan, the loss of the Property upon default amounted to a penalty. Further, the 1st Option and Deed of Settlement was in effect an illegal moneylending transaction under sections 2, 3 and 14 of the Moneylenders Act (Cap 188, 2010 Rev Ed) (the "Moneylenders Act") and was therefore void and unenforceable. The 1st Option and Deed of Settlement was a cloak to disguise a loan made at a monthly interest of 6% per month or 72% per annum. Also, in the circumstances the 1st Option and Deed of Settlement were vitiated by reason of illegality, fraud, duress and/or misrepresentation.

20 The 1st Defendant also alleged that the Plaintiff was estopped from enforcing its rights under the 1st Option and Deed of Settlement. The 1st Defendant was always ready and willing to repay the sum. The 1st Defendant alleged an agreement to vary the terms of the Deed of Settlement and that it duly attempted to repay the sum by a cheque for $1.68 million on 7 August 2009 which was rejected by the Plaintiff. The 1st Defendant also contended that there was a valid compromise agreement between the parties that the transaction be cancelled for an agreed sum. There is some dispute as to when this compromise was reached and whether the compromise payment was $3.5 million or $5 million, (inclusive of the $1.5 million). The 1st Defendant also claimed an entitlement to recover damages from the Plaintiff for all additional interest payable to HLF by reason of the 1st Defendant's inability to sell the Property due to the Plaintiff's action and all damages which the 1st Defendant may have to pay the 2nd Intervener.

HLF's Case

21 Before the hearing, all the agreed issues between the Plaintiff and HLF were, by agreement of

the parties, withdrawn. HLF therefore took no active part in these proceedings except to resist an application for an injunction made earlier by the Plaintiff to halt their public auction of the Property. Mr Phua very sensibly did not want to raise the level of costs and was content with the protection to his client as a registered mortgagee.

The 1st Intervener's Case

22 The 1st Intervener alleges it made a loan of $10 million to AA pursuant to a loan agreement dated 22 September 2008 and a supplemental loan agreement dated 24 September 2008. The 1st Defendant agreed to grant a charge over the balance of proceeds of sale of the Property and this is evidenced by the Deed of Charge over Proceeds dated 24 September 2008, which was duly registered against the 1st Defendant.

23 The issues between the Plaintiff and the 1st Intervener are:

(a) Whether the Plaintiff wrongfully rejected the 1st Defendant's cancellation of the 1st Option under the Deed of Settlement;

(b) Whether the purported sale of the Property to the Plaintiff was at an undervalue and was in contravention of section 340 of the Companies Act (Cap 50, 2006 Rev Ed); and

(c) Whether the Plaintiff induced the 1st Defendant to act in breach of its contractual obligations to the 1st Intervener.

The 2nd Intervener's Case

24 TC contends that there is a binding contract of sale for the Property and seeks specific performance. He argues that he obtained the 2nd Option from the 1st Defendant acting through its only shareholder and director, AA, to purchase the Property at $37 million. He paid the option fee of $1 million to the 1st Defendant on 8 October 2009 and properly exercised his option on 6 November 2009 and paid a further $850,000 to the 1st Defendant to do so. The $1.85 million amounted to 5% of the purchase price. TC also paid the stamp duty of $1.1 million around 20 November 2009 on the 2nd Option. TC contends that there is no challenge by the 1st Defendant or any other party to the validity of the 2nd Option or to its exercise to constitute a binding contract for the sale of the Property. TC also points out that his purchase price is more than sufficient to discharge HLF's claims with a surplus available to AA (or his creditors).

25 TC adopts the issues as between the Plaintiff and the 1st Defendant challenging the Plaintiff's claim that the 1st Option is a valid and binding right to purchase the Property. TC's main contentions are:

(a) the Plaintiff has not come to court with "clean hands" as is required of a party seeking equitable relief;

(b) Clause (B)(b) of the Deed of Settlement which provides for the exercise of the 1st Option in the event the Defendant fails to pay the loan in accordance with the Deed of Settlement is unenforceable as a penalty;

(c) the Plaintiff's purported loan and security are unenforceable for being in contravention of the Moneylenders Act;

(d) even if the Plaintiff's claim is valid, which is denied, the Plaintiff is estopped from claiming specific performance as it had agreed with the 1st Defendant to waive its right to complete in exchange for payment of a sum of money and/or its recent application in Summons No. 2585 of 2010/G (an application for, inter alia, leave to discontinue its action against HLF, that the proceeds for any mortgagees sale of the Property be paid into court, that the proprietary interests of the Plaintiff, the 1st Defendant and 1st and 2nd Interveners shall subsist in the monies so paid into court, leave be given to the 2nd Defendant to withdraw Summons No. 1724 of 2010/A, with costs to be paid by the Plaintiff to the 2nd Defendant);

(e) in any event the Plaintiff is not entitled to specific performance as (i) it would cause hardship on the 1st Defendant, (ii) the transaction is unfair to the 1st Defendant, and (iii) the conduct of the Plaintiff does not entitle it to an equitable remedy.

Findings of Fact

26 Save for [28] – [31], [36]-[38] and what happened after 11 August 2009, which I shall deal with in detail later, the following facts are not really in contention. Insofar as they are disputed, then the following are my findings.

27 In May 2009, AA was being pressed by HLF to reduce his loan to $18 million or face foreclosure. AA was quite desperate for funding and put the word out in the market that he was looking for a loan.

28 One of the persons through whom AA put the word out was Mr Lim Kheng Lim Ivan, ("Ivan Lim"), the Managing Director of Global Exotic Cars Pte Ltd. Ivan Lim, who was subpoenaed by AA, had dealings with AA since 2000. Ivan Lim's evidence was not very clear. He had difficulty remembering details and I therefore find his evidence of peripheral utility. What he could say with some degree of certainty, and I so find, was that:

(a) AA was looking for lenders for short term finance in May 2009;

(b) Ivan Lim spoke to about 5 people and none were interested; one of the persons he spoke to was Lim Swee Hoe, ("LSH"), who initially was not interested;

(c) However there were "...a few friends who were quite interested..." to purchase the Property, not to lend AA money;

(d) Ivan Lim told AA that no one was prepared to lend money but there were persons interested to purchase the Property; and

(e) AA's secretary gave Ivan Lim a Valuation Report from Colliers International dated 15 April 2009, (the "Colliers Valuation").

(See Notes of Evidence, 9 July 2010, pp 145-147)

Ivan Lim then gave LSH a copy of the Colliers Valuation to see if there were any persons "...interested or not ... [t]o do the deal..." (See Notes of Evidence, 9 July 2010, p 140) and subsequently LSH found someone and they all met up at the lawyer's office in the CPF Building. LSH's evidence on whether AA was prepared to sell rather than to just borrow money and whether the

Plaintiff was only interested to buy the Property was vague and even contradictory. I therefore could not place much reliance on his evidence on this score.

29 LSH is a director of LSH Realty Pte Ltd, the real estate agents who acted for the Plaintiff in this matter. LSH had acted for the Plaintiff in 2 or 3 transactions prior to this. He confirms Ivan Lim spoke to him about AA wanting a loan but LSH knew of no one who was prepared to lend money. LSH alleges that he spoke to Mr Tan Koo Chuan ("KC Tan"), a director of the Plaintiff, but he was not interested; KC Tan allegedly said in reply that they were property developers and not money lenders. LSH met Ivan Lim at the latter's office at some later date and Ivan Lim showed LSH the Colliers Valuation. LSH recalled that the Colliers Valuation had two figures, $29 million and $23-point-something million (See Notes of Evidence, 7 July 2010, p 100); this was in fact a reference to the Colliers Valuation of the Property in mid-April 2009 at $29 million and a forced sale value of $23.2 million. LSH showed this to KC Tan and his reaction was that he was only prepared to buy at the lowest possible price. According to LSH, KC Tan also knew AA was in urgent need of funds (see Notes of Evidence, 7 July 2010, p 102 lines 19-21). A meeting was subsequently set up with the lawyers. I find LSH's evidence not the most reliable. He was not clear on details and understandably took the side of the Plaintiff in giving some of his answers. However his evidence was not pivotal. Two points of some interest emerge from his evidence:

(a) First, he confirmed that AA telephoned him on 6 August 2009 saying that the $1.68 million would be paid on 7 August 2009. LSH's AEIC states that his response to AA was: "...please talk to the lawyers...". During cross examination he admitted he had informed KC Tan about this telephone conversation and request. This was not in his AEIC.

(b) Secondly, although LSH was asked why, if as he says he was acting for the Plaintiff and not the 1st Defendant, he sent a lawyer's letter to the 1st Defendant demanding payment of a commission for the sale of the Property. That letter of demand was sent on 11 November 2009 by Messrs Tan Lee & Partners, ("TLP"), the same lawyers acting for the Plaintiff. LSH was obviously caught off guard by these questions and gave the most unconvincing answers as to why such a demand was made. He claims that it was to make a claim on behalf of Ivan Lim since Ivan Lim did not have a real estate agent's licence and he and Ivan Lim had agreed to split the commission, but this was never put to Ivan Lim (see Notes of Evidence, 7 July 2010, pp 105-106); the Plaintiff's lawyer, Mr Lee Chow Soon ("CS Lee") of TLP, also gave a very unconvincing explanation as to why his firm sent out this letter. To a direct question whether he understood LSH was acting for the Plaintiff, CS Lee claimed, not that he did or did not know, but that, "I cannot confirm that." I unfortunately find that very evasive and difficult to accept as true. CS Lee was a conveyancing lawyer with many years of experience in that field. His first answer, (at Notes of Evidence, 8 July 2010, pp 45-48), was very garbled:

No, this letter is written in relation to the agreement by exchange of letters referred to in -- the party negotiated and -- you remember, the party negotiated and it was agreed that --

I find that CS Lee wrote that letter, knowing that LSH was not the Plaintiff's agent, but like sharks circling around bleeding prey, opportunistically made a claim when there was no basis to do so. This is all the more so when one considers what was going on at that point in time, this is something I will come to later. Despite CS Lee's central role in this matter, the only excuse he could muster was that LSH instructed him to make the claim and he just did so.

30 I find that as at end May or early June 2009, AA had been unsuccessful in raising short term finance to meet HLF's demand that he reduce his indebtedness to them. AA then contemplated using the Property as a means of raising money. For reasons which I shall elaborate on later, he did not

contemplate selling the Property, but to use it as security or collateral. On the Plaintiff's side, I find that they sensed an opportunity to make money. If they could drive a hard bargain, they had nothing to lose. If AA managed to pay off the $1.5 million, they would reap a profit of $180,000 for their 60-day loan. If AA did not manage to pay off the $1.5 million, they had the option to purchase the Property at $3.2 million below the forced sale valuation of $23.2 million.

31 I find that the Plaintiff discussed this with CS Lee who structured this as an "Option" for the sale and purchase of property and a "Deed of Settlement" which gave the vendor an opportunity to cancel the option upon repaying the loan with "compensation" – no doubt an euphemism for interest.

32 AA's evidence on this early period leading to the meeting on 5 June 2009 was contradictory and hopelessly tangled. Nonetheless I find that there is some truth in Prof Tan SC's submission that AA was a "big picture" man who did not pay attention to details. AA struck me as someone who has been struggling with insolvency for some time. During cross-examination he said whatever was expedient to him at that moment, whether it contradicted his affidavits or not. Some of his answers, for example, that he never authorised Ivan Lim to seek financing using the Property and was unsure how Ivan Lim came to possess a copy of the Colliers Valuation, (see Notes of Evidence, 8 July 2010, pp 177 and 185), just did not make any sense when viewed against the objective and documentary evidence and could not be believed. AA's lawyer, Mr Low Yew Shen, ("YS Low"), from Ng Chong & Hue LLC, ("NCH LLC"), whose evidence I accept, said in his AEIC that AA told him that the 1st Defendant had negotiated "...a plan to raise money by using the property known as 39A Ridout Road..." (See Notes of Evidence, 8 July 2010, pp 61-63).

33 Through LSH and Ivan Lim, the respective lawyers for the parties and their contact information was exchanged. Consequently, on 2 June 2009, YS Low sent an email to TLP's CS Lee referring to their request for and attaching HLF's Statement showing the outstanding sum of $19,638,690.19 as of 31 May 2009. On 3 June 2009, CS Lee sent YS Low a draft Option and draft Deed of Settlement for his perusal and comments:

(a) The draft Option had the appearance of a standard option, subject to the Singapore Law Society's Conditions of Sale 1999, with a purchase price of $20 million. However, some unusual features were that the option money or fee was $2 million (10% of the purchase price) with no further sum to be paid on exercise of the Option. Also, there was a long option period of almost 4 months (up to 30 September 2009). The sale and purchase was to be completed within 16 weeks from the date of acceptance or exercise of the Option. The $2 million option fee was to be treated as payment towards the purchase price upon exercise of the Option but if not, it "...shall be forfeited by the Vendor".

(b) The draft Deed of Settlement recited that an Option had been granted by the Plaintiff to the 1st Defendant for the sale of the Property for the option fee of $2 million and the "...Vendor and the Purchaser have since negotiated and it is now agreed..." *inter alia*, that (i) the Vendor has the option to cancel the Option within 60 days "...from today..." and subject to (ii) the Vendor refunding the Purchaser the option fee of $2 million, (iii) paying a lump sum compensation of $250,000, failing which the Purchaser "...may..." proceed to exercise the Option within the option validity period and complete the sale and purchase according to the terms of the Option. If the Vendor chose to cancel the Option, it had to give notice forthwith in writing and forward, together with such notice, a Cashier's Order for the sum of $2,250,000 made in favour of the Purchaser (see 1.AB pp 157A-157I).

YS Low said in his AEIC that he explained the documents to AA although AA took the view that this was a financing arrangement. NCH LLC returned the drafts with some comments by email on 4 June

2009, two of which were that the purchase price should be $22 million, not $20 million and that the Option should only be open for acceptance up to 31 August 2009 (See 1.AB pp 158-159).

34 A meeting was convened for 5 June 2009 at TLP's office. The persons present at this meeting were as follows: on the Plaintiff's side, Mr Melvin Poh, ("Melvin"), another director, KC Tan and CS Lee; on the 1st Defendant's side, AA, Mr Panthradil ("Panthradil"), the CFO of AA's Kapital Asia (now re-named InvestoAsia) and YS Low. YS Low arrived at the meeting late but his legal assistant, Mr Mario Tjiong, was there earlier. LSH and Ivan Lim were also present. AA, Melvin and KC Tan were meeting each other for the first time.

35 The finer details as to what occurred at this meeting are strongly disputed. Each side put forward evidence supporting its theory of the transaction, *viz*., the Plaintiff was only interested if it was a sale of the Property, the 1st Defendant and AA never intended to sell the Property and was forced in his desperation for immediate funding to agree to their terms, which included forcing the "loan" down to $1.5 million. I find the detailed evidence on these main themes from all the witnesses unreliable. Each side and their witnesses were stating what was favourable to their respective cases. At the end of that meeting there was an Option and a Deed of Settlement that were signed by the parties. Those are the terms that bind the parties.

36 I find that the following relevant facts did take place during this meeting on 5 June 2009:

(a) CS Lee produced a search on AA which showed numerous actions against AA. CS Lee, KC Tan and Melvin said there was therefore a significant credit risk for the Plaintiff in going forward with the deal. At a separate break-out meeting, when there were only 3 of them, KC Tan and Melvin told AA in no uncertain terms that they were only willing to go up to $1.5 million for the upfront option fee and that the "price" had to be reduced from $22 million to $20 million.

(b) AA agreed to this $1.5 million option fee under the circumstances then prevailing. KC Tan, Melvin and AA then rejoined the meeting. By that time YS Low was present. More than one witness said that they heard YS Low say to AA: "Pak ... are you sure? ... its $20 million – are you sure ..." and AA's reply: "... don't worry, I don't need 2 months, I can settle this in one month...". AA entered into the deal confident that he could get funds within one month which would enable him to cancel the 1st Option. He knew the default position was that the Plaintiff could proceed to purchase the Property (however see my findings below on events after 11 August 2009).

(c) The deal that was finalised was the 1st Option and Deed of Settlement with the essential terms set out above except that (i) the Option provided for a purchase price of $20 million and an option fee of $1.5 million, (ii) the Option period was up to 4 pm on 31 August 2009, (iii) completion was to be within 12 weeks from the date of acceptance of the Option, (iv) that the Vendor had the option "... within 60 days from today..." to cancel the Option by notice in writing, subject to (v) refunding the option fee of $1.5 million and paying compensation of $180,000 to the Purchaser. The other terms of note, which were also in the earlier draft, were (vi) payment for cancellation of the Option was to be by Cashier's Order to be forwarded together with the written notice of cancellation whereupon the Option was to be null and void and neither party was to have any claim against the other for damages, loss, cost or otherwise, (vii) if the Vendor did not cancel the Option as provided in (iv) above, then the Purchaser or its nominee may proceed to exercise the Option and complete the sale and purchase according to the terms of the Option, (viii) time was of the essence and (ix) subject to the terms of the Deed of Settlement, the Purchaser shall be entitled to enforce all their rights against the Vendor in any

manner howsoever including institution of legal proceedings and seeking judgment and enforcement on the basis of the admission herein by the Vendor of the payments herein stated.

(d) The purchase price on the 1st Option was below the Colliers' forced sale valuation of $23.2 million.

(e) Although the 1st Option and the Deed of Settlement were both signed at the meeting of 5 June 2009, the 1st Option was dated 5 June 2009 and the Deed of Settlement was left blank and subsequently dated 8 June 2009. There is some uncertainty as to who dated the Deed of Settlement. YS Low's recollection was that TLP dated it and LSH's recollection was that YS Low or someone in his office dated it when it was brought back after the meeting to NCH LLP to affix the common seal of the 1st Defendant. YS Low said and I accept his evidence, that it was clear to all, including the lawyers, that the Deed of Settlement was to be dated a later date than the 1st Option because CS Lee felt it would be "strange" if the 1st Option and Deed of Settlement were dated the same day, (see Notes of Evidence, 8 July 2010, p 96). I find that CS Lee, on behalf of the Plaintiff insisted on this and everyone agreed or at the very least acquiesced.

37 The Deed of Settlement provided that AA could exercise his right to cancel the 1st Option "… within 60 days *from today*..." (emphasis added). The use of the word "today" raises two possible dates – was the 60 days to run from 5 June 2009, *ie*, when the Deed of Settlement was signed, or 8 June 2009, *ie*, the date appearing on the Deed of Settlement? If it was purely governed by the terms appearing on the Deed of Settlement, then it would probably be the latter because it was expressed to be made on 8 June 2009; under the second recital, the parties "...have since [the 1st Option] negotiated..." and "... it was now agreed...etc"; the parties "... set their hands and seals on this 8th day of June 2009…". However, all parties accepted that the Deed of Settlement was signed and executed on 5 June 2009. The relevant phrase used was not the usual "...within 60 days *from the date hereof*..." but "...from *today*..." [emphasis added] and in the context must be taken to mean the day the parties executed the Deed of Settlement, *viz*, 5 June 2009. It must have been due to this ambiguity, and I so find, that the lawyers, CS Lee and YS Low, discussed what the last day for the cancellation of the 1st Option was. YS Low then sent a fax on 5 August 2009 to TLP referring to a telephone conversation between YS Low and CS Lee on 4 August 2009, confirming that AA had until 6 August 2009 to cancel the 1st Option.

38 As noted above, AA alleged that he telephoned LSH on 6 August 2009 and asked him if he could pay the $1.68 million (the $1.5 million option fee and the $180,000 compensation fee) by cheque on 7 August 2009 and LSH, on behalf of the Plaintiff, agreed asking AA to send his cheque to the lawyers. LSH denies agreeing at all and says his response to AA was to ask him to talk to the lawyers. LSH admitted in cross-examination that he informed KC Tan of this request. LSH also said he told KC Tan that he asked AA to speak to the lawyers but denied the suggestion that KC Tan agreed to the request. I find that LSH did not agree to AA's request or say that the Plaintiff agreed to his request. He did not have the authority to do so. There is no evidence that KC Tan agreed to this request, on the contrary, I find it more probable than not that KC Tan realised AA was having trouble making payment and cancelling in time and waited to have AA over a barrel. In his usual haphazard way, AA did make the request and assumed it was forthcoming or agreed to when it was not.

39 On 7 August 2009, NCH sent a letter to TLP enclosing AA's cheque for $1.68 million but there was no reference to this alleged agreement from LSH. This would be strange given that just 2 days before this, YS Low had written to CS Lee to confirm their discussion and agreement that the last day

to cancel the 1st Option was 6 August 2009. Furthermore, payment must be by way of a Cashier's Order under the terms of the Deed of Settlement. YS Low said in his AEIC that AA telephoned on 6 August 2009 to inform him that he had agreed with LSH to pay the $1.68 million by cheque on 7 August 2009. But YS Low could not give any convincing explanation why he did not refer to the agreement in his letter of 7 August 2009. I find that inexplicable as was his first reason given under cross-examination that he did not do so because there were no details given to him about the agreement and subsequent retraction and then the proffering of the excuse that he did not because AA told him CS Lee knew about it. I do not find YS Low to be dishonest, but more someone who could not recall exactly what happened and put forward a version that was more favourable to his former client. Given that the lawyers agreed only 2 days earlier that the last day for cancelling the 1st Option was 6 August 2009, and payment was to be by way of Cashier's Order with time being of the essence under the Deed of Settlement, anyone would have expected the 7 August 2009 letter to refer to an agreement varying these two important terms. But it did not.

40 It is therefore not surprising that on 11 August 2009 (7 August 2009 being a Friday and 10 August 2009 being a public holiday), TLP wrote to NCH LLP rejecting the cancellation of the 1st Option as being out of time and for non-compliance with the mode of payment and returning the cheque. Strangely, this letter did not say anything about proceeding to complete the sale and purchase of the Property. It should also be noted that under cross-examination, AA admitted that he did not have $1.68 million in his Maybank account to meet that cheque if it was presented for payment (see Notes of Evidence, 9 July 2010, pp 35 and 36). I do not accept his later attempt to explain that he could have found the funds from friends if necessary. He clearly had no more friends who could lend him money, otherwise he would not have been in that predicament in the first place.

41 It will be convenient to state my further findings of fact in relation to the specific issues raised by the parties later and I first turn to deal with AA's defences of duress and unconscionability as vitiating the 1st Option. AA has also raised misrepresentation. This was not pursued in cross-examination or Closing Submissions and rightly so. There is accordingly no need to deal with this issue, and in any case it does not arise at all on the facts of this case.

Duress

42 It has long been recognised that a party may be able to avoid a contract for duress where he entered it because of a wrongful or illegitimate threat or pressure by the other party, normally because the threat left him with no practical alternative: see *Chitty on Contracts, Vol.1, General Principles*, (Sweet & Maxwell, 13th Ed) at para 7-001. The traditional categories of illegitimate pressure or threats were those of violence to the victim's person or a threat to destroy or damage property or, (after some doubt), a threat to seize or detain goods wrongfully, (see *eg, Maskell v Horner* [1915] 3 KB 106; *Occidental Worldwide Investment Corp v Skibs A/S Avanti* [1976] 1 Lloyd's Rep 293 at 335; *The Evia Luck* [1992] 2 AC 152, overruling *Skeate v Beale* (1840) 11 Ad & E 983; *Chitty* at para 7-012). These traditional categories seldom trouble the courts today. The older analyses justifying duress as having one's will overborne, or acting involuntarily or not having a free choice, have since *Lynch v DPP of Northern Ireland* [1975] AC 653 given way to the more flexible and realistic concept of not having no choice at all, but leaving the party with a choice between two evils or choosing unwillingly in circumstances which prevents the law from accepting what has happened as a valid contract in law: *per* Lord Wilberforce at 680 or, in the words of Lord Simon at 695, it "… deflects without destroying the will of one of the contracting parties ... thereby making the contract voidable". This change inevitably led to the question whether economic duress was a possible vitiating factor in contracts.

43 One year later, Kerr J was able to state in *Occidental Worldwide Investment Corp v Skibs A/S Avanti* [1976] 1 Lloyd's Rep 293 at 333-334 that it could. The learned judge was of the view that duress was not necessarily limited to cases of threats to the person or in relation to goods but the true question was ultimately whether or not the agreement in question was to be regarded as having been concluded voluntarily. In that case a slump in charter rates occurred soon after charter parties were entered into. The charterers used strong coercive threats of allowing themselves to go bankrupt, as they had no substantial assets (which was untrue), if the owners did not re-negotiate charter hire. On the facts, Kerr J held at 336 that even though the owners were acting under great pressure when they entered into the re-negotiated terms, it was only commercial pressure and not under anything which could in law be regarded as a coercion of will so as to vitiate the consent. Kerr J took into account the fact that the owner made no protest in entering into the re-negotiated terms and had at all times treated the agreement then reached as binding. The plea of duress thus failed (although the defence of fraudulent misrepresentation succeeded). This decision, recognising economic duress as a ground to avoid a contract, was followed 3 years later in *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd and Another (The Atlantic Baron*) [1979] QB 705 at 718-719 where shipbuilders renegotiated a 10% increase in the price for construction of a vessel with a threat to break their contract when they had no basis to do so. The owners feared losing a lucrative charter if there was a delay in delivery of the vessel and reluctantly agreed, reserving all their rights. Mocatta J held at 719-720 that this amounted to economic duress entitling the owners to set aside the renegotiated rates, but on the facts, there had been a subsequent waiver of the right to avoid the re-negotiated contract. Accordingly the owners' claim failed.

44 In *Pao On v Lau Yiu Long* [1980] AC 614, the Privy Council, on appeal from the Court of Appeal of Hong Kong, considered the applicability of economic duress as a ground for rendering a contract entered into between commercial parties voidable. Lord Scarman, who delivered the judgment of the Privy Council, stated at 634:

> [J]ustice requires that men, who have negotiated at arm's length, be held to their bargains unless it can be shown that their consent was vitiated by fraud, mistake or duress. If a promise is induced by coercion of a man's will, the doctrine of duress suffices to do justice. The party coerced, if he chooses and acts in time, can avoid the contract. If there is no coercion, there can be no reason for avoiding the contract where there is shown to be a real consideration which is otherwise legal.

Lord Scarman stated at 635-636 that there is nothing contrary to principle in recognising economic duress as a factor which may render a contract voidable, provided always that the basis of such recognition is that it must amount to a coercion of will, which vitiates consent. Lord Scarman emphasised that commercial pressure is not sufficient and in determining whether there is a coercion of the will, it is material to consider the following factors:

(a) Whether the person alleged to have been coerced did or did not protest;

(b) Whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy;

(c) Whether he was independently advised; and

(d) Whether after entering the contract he took steps to avoid it.

45 In *Universe Tankship Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366, Lord Diplock stated at 384 the rationale for the doctrine of economic duress but declined to elaborate on what would amount to legitimate commercial pressure which did not give rise to duress:

> It is, however, in my view crucial to the decision of the instant appeal to identify the rationale of this development of the common law. It is not that the party seeking to avoid the contract which he has entered into with another party, or to recover money that he has paid to another party in response to a demand, did not know the nature or the precise terms of the contract at the time when he entered into it or did not understand the purpose for which the payment was demanded. *The rationale is that his apparent consent was induced by pressure exercised upon him by that other party which the law does not regard as legitimate, with the consequence that the consent is treated in law as revocable unless approbated either expressly or by implication after the illegitimate pressure has ceased to operate on his mind*. It is a rationale similar to that which underlies the avoidability of contracts entered into and the recovery of money exacted under colour of office, or under undue influence or in consequence of threats of physical duress.
>
> Commercial pressure, in some degree, exists, wherever one party to a commercial transaction is in a stronger bargaining position than the other party. It is not, however, in my view, necessary, nor would it be appropriate in the instant appeal, to enter into the general question of the kinds of circumstances, if any, in which, commercial pressure, even though it amounts to a coercion of the will of a party in the weaker bargaining position, may be treated as legitimate and, accordingly, as not giving rise to any legal right of duress...
>
> (emphasis added)

46 Economic duress as a vitiating factor in contracts has also been adopted in Singapore. In *Third World Development Ltd v Atang Latief and another* [1990] 1 SLR(R) 96, the Court of Appeal was able to say at [17]: "Assuming that there was some pressure – commercial pressure – exerted on the appellant at the time of his execution of the undertaking, such pressure does not constitute economic duress unless it amounts to a coercion of his will which vitiates consent..." referring to the *Pao On* decision. Some 11 years later, in *Sharon Global Solutions Pte Ltd v LG (International) Singapore Pte Ltd* [2001] 2 SLR(R) 233, Kan J noted at [30] that economic duress as a ground for avoiding contractual obligations is still in its formative stage of development and the acts that constitute economic duress and the effect they must have on the receiving party have not been defined with certainty or finality. Kan J was of the opinion that in determining whether a case of economic duress has been made out, it is necessary to consider all the circumstances of the case, including the state of mind of the parties.

47 In *Wu Yang Construction Group Ltd v Zhejiang Jinyi Group Co Ltd* [2006] 4 SLR(R) 451, a case on the tort of conspiracy and use of unlawful means, Phang J (as he then was), rejected the older analysis of the overborne will theory and adopted, *obiter*, at [78], Prof Atiyah's view of "coercion" or "vitiation of consent" from the "... perspective of pressure that so distorts the voluntariness of the consent of the party that is the alleged victim of economic duress that the law regards such pressure as illegitimate. And what the law regards as illegitimate becomes, from that particular perspective, situations where there has in effect been no consent at all." The learned Judge then referred to the Court of Appeal decision noted above, *Third World Development Ltd v Atang Latief*, which cites with approval the *Occidental Worldwide Investment Corp* and *Pao On* cases, and states that the concept of vitiation of consent should now be read in light of the Commonwealth precedents; this includes the

New South Wales Court of Appeal decision in *Crescendo Management Pty Ltd v Westpac Banking Corp* (1988) 19 NSWLR 40, another Privy Council case on appeal from New Zealand, *R v Her Majesty's Attorney-General for England and Wales* [2003] UKPC 22 and *Dimskal Shipping Co SA v International Transport Workers Federation* [1992] 2 AC 152. The learned Judge also said at [77] that there is a close analogy with the tort of conspiracy with its two-fold formulation of an unlawful act and "lawful act duress". Where acts are lawful in themselves, it would be "extremely difficult" to prove economic duress simply because the doctrine of economic duress generally requires proof of illegitimate pressure, as opposed to mere commercial pressure. This is something that was taken up in a more recent case.

48 In *Tam Tak Chuen v Khairul bin Abdul Rahman* [2009] 2 SLR(R) 240, Prakash J cited at [22] *Universe Tankships Inc of Monrovia* where Lord Scarman stated that there are two elements in the wrong of duress:

(a) pressure amounting to compulsion of the will of the victim; and

(b) the illegitimacy of the pressure exerted.

With regards to the second element, *ie*, what constitutes an illegitimate pressure or threat, Prakash J cited Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (Sweet & Maxwell, 2006) ("*Enonchong*") at para 3-031:

> terms secured as a result of the threat of lawful action are so "manifestly disadvantageous" to the complainant as to make it unconscionable for the defendant to retain the benefit of them.

Prakash J further considered at [50] the categories listed in *Enonchong* of circumstances which indicate when a threat of lawful action is illegitimate:

> 50 ... *Enonchong* ([22] *supra*) classifies the circumstances which, according to the authorities, indicate that when a threat of lawful action that is not unlawful is illegitimate. These categories are:
>
> (a) where the threat is an abuse of legal process;
>
> (b) where the demand is not made *bona fide*;
>
> (c) where the demand is unreasonable; and
>
> (d) where the threat is considered unconscionable in the light of all the circumstances.
>
> After listing the categories, *Enonchong* goes on to warn (at para 3-022):
>
> > It should be noted that the general approach of the courts in this context is one of caution. Bearing in mind the need for certainty in the commercial bargaining process, the English courts will not lightly find that a threat of lawful action in the commercial context is unacceptable and therefore illegitimate so that the transaction is voidable for duress. *As Steyn LJ warned in the CTN Cash and Carry case, the law should not "set its sights too highly when the critical inquiry is not whether the conduct is lawful but whether it is morally or socially acceptable." Therefore cases where a threat of lawful action that is not unlawful in itself will be regarded as illegitimate so as to constitute duress will be "relatively rare"*.
>
> (emphasis added)

Prakash J held at [62] that once the plaintiff had proved that illegitimate pressure had been exercised on him, it was up to the defendant to prove that the pressure had not contributed to the plaintiff's decision to execute the agreement. With respect, I adopt these principles espoused by Kan J, Phang J (as he then was) and Prakash J as correct statements of the law of contract in Singapore in relation to duress, with one caveat.

49 I do not think *Enonchong*'s basis at para 3-031 cited above should be adopted without a great degree of caution. The proposition that if the threat comprises lawful action, but the terms secured "...are so 'manifestly disadvantageous' as to make it *unconscionable* for the defendant to retain the benefit of it..." [emphasis added], if accepted, would open the door to uncertainty. It comes too close to re-writing disadvantageous contracts. We should not regress to those days where equity is measured by the length of the Lord Chancellor's foot. Whilst I accept that doctrines like unjust enrichment are useful tools in equity's armoury to prevent injustice, unconscionability has not been accepted in Singapore as a separate ground for vitiating a contract. Unconscionability should remain in equity and discretionary remedies, including calls on performance guarantees or bonds. It is worth repeating the warning of *Enonchong* that courts must approach the issue of duress with caution because of the need for certainty in commercial contracts and the bargaining process. It has been said time and again that our courts are always mindful of the need for contractual certainty and predictability, especially in commercial contracts, see *eg*, *Zurich Insurance (Singapore) Pte Lte v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [111] and *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR(R) 927 at [26]. We are not yet in Utopia and so there remains a distinct and discernible difference between what is "illegitimate" and what is "unconscionable" and it is worth remembering that what is unconscionable is not necessarily illegitimate.

50 I therefore cannot accept Prof Tan SC's suggestion that the *Wu Yang Construction Group Ltd* case should be read to suggest a wider concept of duress than cases like that of *Universe Tankships Inc of Monrovia*. Consider the facts of *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, where a main contractor, refurbishing a block of flats, entered into a subcontract for the carpentry work with a subcontractor for £20,000. As is not uncommon, the subcontractor got into financial difficulty after carrying out some of the work, partly due to the fact that he underpriced for the work and partly because of his inability to properly supervise his labour workforce. There was little doubt that the subcontractor would be delayed in completing his subcontract works. The main contractor knew that if the subcontractor delayed him, he would suffer hefty liquidated damages under his main contract with the owner of the block of flats. The main contractor called for a meeting with the subcontractor and agreed to pay the subcontractor an extra £10,300 at the rate of £575 extra per flat to ensure the main contractor's completion date is not delayed. After the subcontractor completed 8 more flats, the main contractor only paid a further £1,500. The subcontractor sued the main contractor who argued that the subcontractor furnished no consideration for the promise of extra payment. Equally this could be said to be duress vitiating the agreement to make the additional payment. The English Court of Appeal held that the main contractor had obtained a *practical benefit* as a result of the subcontractor's promise to complete on time and that was sufficient consideration. But would it be different if it was the subcontractor who called the main contractor for the meeting? Why should it depend on who called the meeting if the message passed was the same – "if you do not pay me more, I will be in delay or may not be able to complete my work at all". How different then would this be from the threat in *Occidental Worldwide Investment Corp* or *North Ocean Shipping Co Ltd*? These kinds of situations arise all the time in construction contracts.

51 There should therefore be two elements kept firmly in mind for actionable duress. As held by Prakash J in the *Tim Tak Chuen* case, first, pressure amounting to compulsion of the will of the victim,

and secondly, the illegitimacy of the pressure exerted. I do not say that lawful pressure can never amount to duress, for that would be constraining the doctrine unjustifiably bearing in mind why it was developed in the first place, but it certainly will be a very rare case indeed for a contract to be set aside for duress when only lawful means or pressure was used.

52 Thirdly, lawful commercial pressure must never be mistaken for "duress" capable of avoiding a contract. The learned author in Treitel, *The Law of Contract* (Sweet & Maxwell, 12th Ed, 2007) at para 10-005 sets out some helpful comments in distinguishing between "commercial pressure" and "unfair exploitation":

> *The aim of the courts is to distinguish between agreements which are the result of mere "commercial pressure", and those which are the consequence of unfair exploitation*. This is not an easy distinction to apply in practice and it is, perhaps, for this reason that the passage from Lord Goff has been said to "leave room for flexibility in the characterisation of illegitimate pressure and of the relevant causal link". Thus, some cases in which duress has not been established may be best explained on the basis that the threat to break the original contract was not illegitimate in the circumstances, while in others the illegitimate pressure created by the threat may not have amounted to "a significant cause" of the decision to enter into the further contract. Indeed, the two factors may also be said to be interdependent in the sense that the more illegitimate the pressure the lower the causal threshold. This may explain why, for duress of the person, it need only be proved that the threat was one reason why the contract was entered into, whereas *for economic duress the minimum requirement before it can be said that the threat was a significant cause is to satisfy the "but for" test, i.e. that the agreement would not have been made at all or on the terms it was made*.
>
> (emphasis added)

Lastly, the question then of whether a transaction was entered into as a result of duress is a question of fact, taking into account all the circumstances of the case. It is apt to remember the approach espoused by Dyson J in *DSDN Subsea Ltd v Petroleum Geo-Services ASA* [2000] BLR 530, at 545:

> In determining whether there has been illegitimate pressure, the court takes into account a range of factors. These include whether there has been an actual or threatened breach of contract; whether the person allegedly exerting the pressure has acted in good or bad faith; whether the victim had any realistic practical alternative but to submit to the pressure; whether the victim protested at the time; and whether he affirmed and sought to rely on the contract. These are all relevant factors. Illegitimate pressure must be distinguished from the rough and tumble of the pressures of normal commercial bargaining.

53 Turning to the present case, in all the circumstances of the case, did the pressure amount to compulsion of AA's will and was that pressure illegitimate such that AA's consent was vitiated? Since AA is the only shareholder and director of the 1st Defendant, I treat AA as being synonymous with the 1st Defendant and where appropriate, references to AA will include the 1st Defendant.

54 The following paragraphs also contain my further findings of fact if not already been made above.

55 If the Plaintiff had agreed to lend AA $2 million with the Property as security, delayed matters to the last minute and when AA turned up to pick up his cheque he was then presented with a loan agreement, a smaller sum of $1.5 million and an option to sell the Property to the Plaintiff for $20

million (instead of $22 million) which was even below the forced sale value, and it was by then too late for AA to refuse and look for other sources of funds, then applying the above authorities, there may have been sufficient illegitimate pressure and coercion of AA's will to set aside the option to purchase the Property at $20 million. I emphasize the word "may".

56 The fact is that AA had been unsuccessful in raising a loan and was coming under increasing pressure to reduce his loan with HLF. I have made my findings on how the Colliers Valuation ended up in LSH and the Plaintiff's hands. On AA's own lawyer's evidence, AA had told him that he had negotiated a plan to raise money using the Property (see [32] above). CS Lee structured the deal with his draft Option and Deed of Settlement and this was sent to YS Low two days before the 5 June 2009 meeting. YS Low said, and I accept his evidence, that he discussed these documents, and I find that this includes the structure of the deal, with AA. YS Low also confirmed that AA understood his advice (see Notes of Evidence, 8 July 2010, p 79). AA says he passed the drafts to Panthradil and in the car on the way to the meeting on 5 June 2009, Panthradil explained to him the effect of the documents. Under cross-examination Panthradil said that he received the draft Option and draft Deed of Settlement on or after 3 June 2009 and upon reading them, said to AA: "Hey, Pak, this looks like you're selling the property." Panthradil said AA's response was: "No, I will clear it before that. Its just the structure to enable the borrowing", (see Notes of Evidence, 9 July 2010, p 130 lines 14 to 18). I accept Panthradil's evidence over AA's version. Panthradil said when he saw the cancellation and the factoring in of the interest he saw the documents as a secured loan structure. Panthradil said they were desperate for funds because no one was going to lend AA $2 million "clean". I therefore find that AA intended to use the Property as security for the loan.

57 As for the 5 June 2009 meeting, Panthradil says the figure was $22 million (for the 1st Option) and to borrow $2 million. That was what YS Low also said in response to the drafts sent to him on 3 June 2009. However, it should be nonetheless noted that the drafts first sent by CS Lee to YS Low stated $2 million for the "option" and $20 million as the purchase price under the option and there was no subsequent agreement between the lawyers to revise those figures. There was therefore no agreement on these figures prior to the meeting on 5 June 2009.

58 AA is a seasoned businessman who has been through much in his business career. The figures were not final when the meeting commenced on 5 June 2009. There was no promise or agreement. A deal had been proposed, the drafts had been with AA's lawyer and his CFO. I find that they were there to negotiate. During the course of the meeting, searches had been made and the actions against AA were tabled. Based on the information on the searches, CS Lee stepped out of the meeting room to discuss this with his clients, KC Tan and Melvin. Subsequently, AA did negotiate with KC Tan and Melvin alone in a break-out meeting, but when he returned to the main meeting, he had his CFO and his lawyer with him. A number of witnesses heard them ask him if he was sure of what he was doing and he was confident he could settle the "loan" in one, or at the maximum, 2 months and therefore cancel the 1st Option given to the Plaintiff. There was certainly no protest or suggestion of illegitimate pressure from AA or his advisers or that some understanding had been breached.

59 The fact that AA was very desperate for funds and that fact was known to the Plaintiff only meant that they had the upper hand in the negotiations. That was a legitimate commercial advantage and not pressure because the Plaintiff was not obliged to lend AA money: see *CTN Cash and Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714, where a threat by a supplier, who enjoyed a monopoly in the distribution of certain goods, not to provide the buyer with urgently needed credit facilities in future transactions if certain payment, which it genuinely believed was owing to them, was not paid was held not to constitute duress. Holding otherwise would mean that many hard pressed debtors would be able to avoid contractual obligations on this ground. That fact alone cannot amount to unlawful

exploitation or illegitimate pressure. The truth is, and I so find, that AA entered into this transaction and signed the 1st Option and Deed of Settlement because he was confident he could repay that sum within one or two months. AA had the benefit of advice from his lawyer and his CFO, both of whom were also with him at the 5 June 2009 meeting. He understood what he was signing. I therefore cannot see how there is any duress in this case that could vitiate the contract or that there is any illegitimate coercion which vitiated the will.

60 At this stage, it suffices for me to hold that what was entered into was a secured loan with a twist, the security could be enforced at a price that had no relation to and was below the then forced sale value indicated on the Colliers Valuation. I will deal with this in detail later but this brings us to whether this agreement is "unconscionable" and if so, can it be set aside as a matter of contract law.

Unconscionability

61 The facts relied upon by the defendant in seeking to establish the defence of unconscionability largely overlaps with those relied upon for the defence of duress. If the doctrine of economic duress is still in its formative stage of development, then it will be all the more so for the doctrine of unconscionability: see *Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 at [112] and [114].

62 Prof Tan SC bravely submitted that this was an appropriate time to cautiously recognise and apply this doctrine. There exists a broad doctrine of unconscionability in Commonwealth jurisdictions like Canada, Australia, New Zealand, and as well in the USA, where unconscionability is used to set aside contracts in a far broader range of situations than under English law. In Canada, unconscionability is found when there is "...proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger...": see *Morrison v Coast Finances Ltd* (1965) 55 DLR (2d) 710 at 713 (BCCA), or when "…the transaction, seen as a whole is sufficiently divergent from community standards of commercial morality that it should be rescinded…": see *Harry v Kreutziger* (1978) 95 DLR (3d) 231 (BCCA). In Australia, the doctrine of unconscionability is broader in two respects than in Canada in that it is not always necessary for the weaker party to have suffered detriment from the bargain and the Canadian grounds of ignorance, need or distress are replaced by a longer and open ended list: see *Blomley v Ryan* (1956) 99 CLR 362. However Australian law requires the stronger party to know the weaker party's disadvantage and to take advantage of it, see *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447. The doctrine in New Zealand is closer to the Australian position: see *Hart v O'Connor* [1985] 2 All ER 880. In the USA, the doctrine is enshrined in Section 2-302 of the Uniform Commercial Code and it is often treated as part of their common law if the Code is inapplicable.

63 The starting point for the doctrine of unconscionability in contract law is *Cresswell v Potter* [1978] 1 WLR 255 where Megarry J stated at 257 that three requirements had to be met in order to set aside a contract on the ground of unconscionability:

(a) whether the plaintiff was poor and ignorant;

(b) whether the sale was at a considerable undervalue; and

(c) whether the vendor had independent advice.

Few would quarrel with the above formulation of the doctrine. However, Megarry J stated that the euphemisms of the 20th century may require the word "poor" to be replaced by "a member of the

lower income group" or the like, and the word "ignorant" by "less highly educated" and he added that the three requirements were not the only circumstances which would suffice but that there may be circumstances of oppression or abuse of confidence which would invoke the aid of equity.

64 In *Rajabali Jumabhoy and others v Ameerali R Jumabhoy and others* [1997] 2 SLR(R) 296, Prakash J was concerned with whether an option to purchase shares in a company granted to its director was liable to be set aside on the ground of, *inter alia*, unconscionability. Prakash J cited Megarry J and rejected the defendants' submission on this issue at [197] to [198]:

> 197 The first and third defendants, realising that the description "poor and ignorant" even though updated in modern terms to "less well-off and less highly educated" could not by any stretch of imagination be applied to Yusuf and Mustafa, have urged upon me that I should follow the Australian jurisprudence and discard them altogether and instead have regard to whether these men were under a "special disability". This term was used by Deane J of the High Court of Australia in the case of *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 in the following passage appearing at 474 of his judgment:
>
> > The equitable principles relating to relief against unconscionable dealing and the principles relating to undue influence are closely related. The two doctrines are, however, distinct. Undue influence, like common law duress, looks to the quality of the consent or assent of the weaker party ... Unconscionable dealing looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so. The adverse circumstances which may constitute a special disability for the purposes of the principles relating to relief may take a wide variety of forms and are not susceptible to being comprehensively catalogued. In *Blomley v Ryan*, Fullagar J listed some examples of such disability: 'poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary.' As Fullagar J remarked, the common characteristic of such adverse circumstances 'seems to be that they have the effect of placing one party at a serious disadvantage *vis-a-vis* the other'.
>
> 198 Whilst I accept the force of the criticism that continuing to apply the first criterion in Megarry J's test would allow the doctrine of unconscionability to be invoked by only a small minority of people in modern Singapore and thus deprive the courts of what can be a useful jurisprudential tool, I have some difficulty with adopting the Australian position. The common law is clear: inequality of bargaining power as between the parties to a contract is not in itself sufficient to have the contract subsequently set aside. The problem with phrases like "special disability" and "special disadvantage" (used by Mason J in *Amadio*'s case) is that they are so wide (as the illustrations given by Fullagar J themselves indicate) that that common law principle can be quite easily undermined by their application. I think that whilst it would be too limiting in the modern world to always insist on plaintiffs making a claim of unconscionability qualifying as poor and ignorant, one cannot, in the absence of these disadvantages, proceed on unconscionability unless, as Megarry J also pointed out, there are such circumstances of oppression or abuse of confidence present as would cry out for the intervention of a court of equity.

65 Prakash J was concerned that the uncertain concept of "special disability" recognised by the Australian courts would undermine contractual certainty, which forms the bedrock of all commercial contracts in Singapore. I respectfully agree. The common law ensures that parties are not allowed to simply rely upon their inferior bargaining power to subsequently set aside disadvantageous agreements freely entered into when things go awry. I also respectfully agree with what the learned Judge said at

[195]:

> This does not mean that the court will set aside a contract merely because one party, in a somewhat stronger bargaining position than the other, has driven a hard bargain. The court will not rewrite an improvident contract where there is no disability on either side. See *White and Carter (Councils) Ltd v McGregor* [1962] AC 413.

66 I do not think unconscionability as a vitiating factor in contract forms any part of Singapore law, in spite of the rather tentative comments, undoubtedly *dicta*, of the Court of Appeal in *Gay Choon Ing*, at least not until the time comes for an abandonment of the doctrine of consideration in favour of doctrines like economic duress, undue influence and unconscionability. We already have the doctrines of undue influence, constructive fraud in equity and even *non est factum* in contract for the protection of the weak, the elderly, the very young and the ignorant. To do more and put forward a fledgling doctrine of unconscionability, without some considered, comprehensive and rational basis, and which the Court of Appeal itself recognises is not without its own specific difficulties (at [114]), would be in my respectful view to inject unacceptable uncertainty in commercial contracts and in the expectations of men of commerce. Where this is needed it is best left to Parliament. Hence we have the Unfair Contracts Terms Act and no doubt in time to come, we will have specific consumer legislation, as in other Commonwealth countries.

67 AA cannot by any standard be said to be "poor and ignorant". He entered into the agreement with the Plaintiff having had the benefit of legal advice. He had his CFO on hand. In any case, AA fails to meet two of Megarry J's three criteria. Even though he was facing severe financial difficulties, a fact which the Plaintiff was clearly aware of, this would not entitle him to the defence of unconscionability as set out in *Creswell v Potter*.

The True Nature of the Transaction Entered into on 5 June 2009

68 The 1st Option and Deed of Settlement entered into by AA with the Plaintiff are therefore not susceptible to being set aside for duress or, even if there was such a ground, unconscionability. This brings us to the question: what exactly was the transaction that the Plaintiff and 1st Defendant entered into. Both parties, perhaps understandably, overstated their case. The Plaintiff's KC Tan and Melvin insisted that they were only out to buy the Property, and they built in a handsome compensation if AA chose to cancel the 1st Option. AA on the other hand insisted that he only entered into a loan transaction.

69 The true analysis in law must be this: if A only wanted a loan and made that clear, and B only wanted to buy A's property and made that clear and B openly and to the knowledge of A, agreed to lend money on terms, then short of applicable vitiating factors, they willingly enter into an agreement on terms that are clear, then A and B are bound by their agreement.

70 However that is not the true analysis of these two documents. Apart from its unusual terms, it was not an option *simpliciter*. There was a contemporaneous Deed of Settlement that was meant to work in tandem with the 1st Option and both were executed at the same time. I find that the idea originated from the Plaintiff and between KC Tan, Melvin and their lawyer, they structured the deal and documentation accordingly. CS Lee agreed in cross-examination that he gave his "input" to his clients and their instructions. The idea of calling the second document a "Deed of Settlement" was his and I find that the idea to date this later than the 1st Option was also, despite his denial, at CS Lee's insistence (see Notes of Evidence, 8 July 2010, p 34). CS Lee was evasive and combative in cross-examination but it was more in the spirit of putting forward the best case for his client and defending

his part in the structuring of the deal. Whilst at times he came close to it, CS Lee did not cross the line. But it did damage the credibility of his version of the facts. The 1st Option, as noted earlier, has a number of very unusual features. More than that, it was accompanied by a rather misleading Deed of Settlement, which was signed at the same time as the 1st Option, but the language contained there was, as CS Lee himself admitted, apt to "mislead" an uninformed party of the true situation. CS Lee admitted in cross-examination this was an "unusual transaction" and despite his efforts in trying to equate this to a granting of an option and a genuine *subsequent* agreement to cancel the option, the effect of his evidence was that he had not done this kind of deal before.

71 Despite the claims of the Plaintiff otherwise, I find that on the evidence of the parties and the documents, the true nature of the 1st Option and the Deed of Settlement was to disguise a loan with security, the security being the Property. There are many objective factors that point to this in addition to the unusual terms and the need for two documents as set out above.

72 First, I find it telling that in all the evidence of the 5 June 2009 meeting, no one really negotiated the purchase price, in the sense of bargaining over it, and this was despite the many statements of intention. I find that the focus of the meeting was on AA's ability to repay the $1.5 million and compensation. The Plaintiff's KC Tan and Melvin also admitted that the "purchase price" of $20 million had no relation to the value of the Property and it was referenced to the outstanding loan of the 1st Defendant to HLF (see Notes of Evidence, 5 July 2010, pp 37-38 and 7 July 2010, pp 7-8). The *only* valuation that was in existence then – the Colliers Valuation – had a forced sale value of $23.2 million. Even with *ex post facto* justification, the Plaintiff's valuation expert, Mr Daniel Ee, put the forced sale value at the relevant time as $21.6 million. It was totally illogical and highly unlikely that three experienced businessmen would "agree" upon a genuine purchase price that was significantly below that of the forced sale value. I cannot see how KC Tan and Melvin could believe AA would agree to such a proposal – to sell below the forced sale value just for an immediate loan of $1.5 million - when AA could just let HLF take over the Property and sell it for at least $23.2 million. AA would have cleared his loan with HLF and have a balance of some $2 to 3 million left over. The draft documents prior to the 5 June 2009 meeting showed no agreed price nor agreed "option fee". I do not accept the evidence of KC Tan and Melvin that they only wanted to purchase the Property at the "lowest" price and were not interested in giving any loan.

73 Secondly, there was another very telling fact. The evidence of the parties was, and I so find, that what was put on the table, "hot-off-press", was a search made on AA on 5 June 2009 itself and it showed many actions against AA. It is not in dispute that KC Tan and Melvin used this high "credit risk" to push the option fee down from $2 million to $1.5 million. CS Lee, who is a very senior and experienced conveyancer, had to admit that it is not disputed in law (a point that I shall deal with below), that AA's financial position would not affect the 1st Defendant's, as contradistinct to AA's, ability to give good title as registered proprietor in a conveyancing transaction. Both KC Tan and Melvin admitted that they knew and were advised that they could buy from a registered proprietor unaffected by the interest of a shareholder or beneficiary under a trust in relation to the company; in short, AA's personal financial status would not affect the purchase of the Property (see Notes of Evidence, 6 July 2010, pp 87-88; 8 July 2010, pp 19-20). If they were really only interested in the purchase of the Property, these actions against AA would not have affected any "credit risk" and they could proceed with the purchase unaffected by AA's personal financial position.

74 It is appropriate to say at this juncture that I find KC Tan's evidence very unreliable. He feigned ignorance on many things and kept up the simple mantra that he was only interested in property, smelt a good deal and went after it. He very unconvincingly tried to maintain that unless something was in writing, there was no contract. He ended up getting tangled in his own mind over the effect of

an oral agreement. His answers came quite close to AA's approach in saying what suited his purpose, irrespective of whether that made sense or not. I find that he is no simpleton, he is shrewd and street-smart. Although he chose to give his evidence in Chinese, he spent most of his time intently reading the live note before him instead of listening to the translator. He was very combative and a good example of his sparring with counsel and not answering the question appear at the Notes of Evidence, 7 July 2010, pp 43 to 53. Melvin fared better. He came across as a very intelligent, calm and collected witness. But under relentless cross-examination, his untenable positions came through and his lack of candour became evident. He maintained he was concerned over AA's financial position even after he admitted he was advised that it did not affect his right to buy from a registered proprietor (see Notes of Evidence, 6 July 2010, pp 81-82). There were also times when he clearly understood the question but played for time by pretending not to understand the question and asked for it to be repeated or simplified.

75 Thirdly, the picture that the Plaintiff presented to Court was not candid or forthright. This can clearly be seen by the first affidavit filed in these proceedings – they had an option, the vendor was in default and they prayed for specific performance. There was no mention of the second document, *ie*, the Deed of Settlement. Also, the litigation search on AA that featured so prominently in the 5 June 2009 meeting was only discovered by the Plaintiff in their Supplemental List of Documents on 1 July 2010, at the doorstep of trial. This was after the Opening Statements had been filed and the rather disingenuous statement at paragraph 5 of the Plaintiff's Joint Reply Affidavit filed on 1 July 2010 states:

> At paragraph 27 of Mr Anwar's AEIC he claims that our lawyer, Mr Lee Chow Soon ("Mr Lee"), said at the meeting of 5 June 2009 that he wanted to do a "search on litigation suits" against Mr Anwar, and that Mr Lee said that there were "many legal suits" and there was a "credit risk issue". At paragraph 8 of Mr Low's AEIC, Mr Low states that Mr Lee "made some adverse comments on some searches he had done on Mr Anwar and his company Kapital Asia Pte Ltd". This did not happen.

This lack of candour also showed up in their cross-examination, especially that of Melvin. Having the illogic of a purchase price of $20 million, he tried to say that as experienced property developers they had their "own sense of the value of the Property at that time". He was forced to acknowledge that $20 million was below even that of a forced sale value and his own expert witness gave a forced sale value of $21.6 million. He also accepted under cross-examination that AA never intended to sell the Property (see Notes of Evidence, 6 July 2010, pp 41-42).

76 Fourthly, during cross-examination CS Lee suddenly volunteered, without any prompting, that he had in mind the amended Moneylenders Act at the relevant time and that "...even if it is a loan, which it was not, would not be caught under the Moneylender's (*sic*) Act. So I have no reason why I should avoid this loan document ..." (see Notes of Evidence, 8 July 2010, pp 41-42). It is not disputed that AA was desperate for money, the Plaintiff knew this and that AA was looking for a short term loan. On the evidence I find it very clear that AA did not intend to sell the Property at $20 million and Melvin knew this (see Notes of Evidence, 6 July 2010, pp 41-42). In para 15 of the 15 January 2010 Joint Affidavit of KC Tan and Melvin, it is telling that they claim the Plaintiff took a risk because "...it was uncertain whether *[AA] or the 1st Defendant* would be able to *repay the money* by the deadline ..." (emphasis added). I also accept Mr Yeo SC's submission that if the Plaintiff had only wanted to purchase the Property and AA insisted on a cancellation right, the normal and usual reaction would have been to reject it and tell AA to come back when he was ready to sell. When asked, Melvin's garbled answer was:

> To have – this was a condition that he wanted to impose on the sale and purchase and we had

to agree in order to have a realistic chance of buying the property at 20 million, to at least have an attractive price.

(Notes of Evidence, 6 July 2010, pp 38-39)

77 It is clear law that the Court is entitled to go behind whatever labels that parties chose to put on their transactions, to ascertain their true nature and purport. It is a matter of substance over form and labels: see Kim Lewinson, *The Interpretation of Contracts* (Sweet & Maxwell, 3rd Ed, 2007) at para 9.07, cited with approval in *MCST No.1933 v Liang Huat Aluminium Ltd* [2001] 2 SLR(R) 91 at [46] and *Welsh Development Agency v Export Finance Co Ltd* (1992) BCLC 148. The true nature and purport of these two documents show a clear loan amount of $1.5 million (negotiated down from $2 million after AA, not the 1st Defendant, was said to be a credit risk due to the many actions against him) and called an "option fee", the loan period was 60 days and there was a hefty interest of $180,000 labelled as "compensation", which amounted to 6% per month or 72% per annum and it was secured on the Property. The unusual features of the 1st Option and the misleading wording and date of the Deed of Settlement have already been addressed above. This includes the non-payment of any further sum upon exercise of the 1st Option – the obvious reason being the counter-intuitive need to pay the 1st Defendant any additional sum upon its default to repay the loan and compensation. If the Plaintiff only wanted to purchase the Property, and since AA was a "credit risk" and his ability to repay the large option fee was questionable, all the Plaintiff had to do was to wait out the option period and proceed with all speed once the 60 day period had passed. One also asks, why did CS Lee in his first draft Option build in such a long option period of some 3 months and in his draft Deed of Settlement provide in Clause B(f) that in the event of "default" of the 1st Defendant, of any of its obligations "herein", *ie*, the Deed of Settlement and Clause B, which related to the cancellation mechanism and repayments, the Plaintiff "... shall be entitled to enforce their rights *under this Agreement* against the [1st Defendant] in any manner howsoever including instituting legal proceedings and *seeking judgement* and enforcement *on the basis of the admission herein* by [the 1st Defendant] *of the payments herein stated*..." (emphasis added). If there was a failure to cancel the 1st Option, the Plaintiff could proceed with the purchase and completion. It certainly could not sue the 1st Defendant *also* for the $2 million option fee or the $250,000 compensation.

78 Lastly, the Plaintiff's and AA's conduct after the signing of these documents confirms to me, beyond doubt, the above findings.

79 In so saying I have borne in mind that the *Liang Huat* case confirms that the relevant intention of the parties, objectively ascertained, is at the time they entered into the contract and not thereafter. I also note that in *Zurich Insurance* the Court of Appeal stated that where extrinsic and contextual evidence is admissible to construe a document, there should be no rigid prohibition against subsequent conduct although in the normal case it would probably be inadmissible. The Court of Appeal noted that subsequent conduct remains a controversial and evolving issue and will require more extensive scrutiny at a more appropriate time. However, I am not looking at subsequent conduct to construe the contracts. The terms of the contracts are clear enough. Where the Court is considering whether the labels applied to the contract or contracts are true and correct, the Court is entitled to look at, amongst other facts, subsequent conduct of the parties to see how they implemented or treated the contract or contracts; *a fortiori* when, as CS Lee admits, it is an unusual transaction (and in effect even accepted that he had not done this before). However, the fact remains that the conduct of the Plaintiff and their lawyer was quite at odds with this being a true sale and purchase of property; moreover, these facts will also be very relevant to the issues of waiver and estoppel which I shall come to later.

80 As noted above, AA tried to cancel the 1st Option by tendering a cheque for $1.68 million on 7 August 2009 and by a letter dated 11 August 2009, the Plaintiff rejected this attempt to cancel the 1st Option, as it was entitled to, for being out of time and not in compliance with the Deed of Settlement, which called for payment by a Cashier's Order. Nothing happened thereafter until 27 August 2009 when TLP wrote to NCH LLP exercising the 1st Option to purchase the Property. This 27 August 2009 letter asked for, *inter alia*, the title deeds, certified resolutions approving the sale, copy of the approved draft Total Discharge of Mortgage and a current copy of the property tax bill and evidence of payment. Under the 1st Option, the Plaintiff had until 4 pm on 31 August 2009 to exercise the 1st Option. It is not disputed that the completion date was 19 November 2009. Despite there being no response nor reaction from NCH LLP to the exercise of the 1st Option on 27 August 2009, the Plaintiff and TLP remained silent for about two months until 26 October 2009 when TLP wrote to NCH LLP stating that they needed the documents requested urgently to prepare for completion and if NCH LLP failed to do so, their client would be forced to apply for specific performance. It seemed almost as an afterthought that TLP sent a letter to NCH LLP 5 days later, on 30 October 2009, enclosing their draft Transfer for approval and asked for the title deeds and completion account; something that one would have expected at the very least to have been contained in the 26 October 2009 letter. NCH LLP replied on the same day, 30 October 2009 rather enigmatically, that they were taking their client's instructions and would revert as soon possible.

81 In the meanwhile, the Plaintiff did not offer any evidence of their taking any serious steps to obtain financing for the purchase. The paid-up capital of the Plaintiff was $2,000 and the 31 March 2009 Balance Sheet shows cash balances of only $21,161(see 1.AB at p 142). There is no other evidence apart from an offer from HLF to the Plaintiff dated 9 September 2009 to finance the purchase of the Property. But this was never accepted by the Plaintiff and it is worth noting that one of the conditions of the proposed HLF loan was that the paid-up capital of the Plaintiff had to be increased to $100,000. It should also be noted that the parties had reached their first "settlement" agreement on 3 September 2009, (see [85] below). The Plaintiff commenced this action and asked for specific performance on the basis that it was ready, willing and able to complete the purchase and this was challenged. There was no other evidence to show that the Plaintiff had the means to complete the purchase. In an attempt to plug this gap, KC Tan said with great bravado on the stand that he could put $30 million into the Plaintiff the next day if required. Unfortunately, the time to produce the evidence had long past and I am fully justified to ignore offers of this nature to produce evidence whilst under cross-examination, assuming I believe KC Tan, which I do not.

82 If the Plaintiff was truly only interested to purchase the Property at this very "attractive purchase price" of $20 million or $3.2 million below the forced sale value, I would have expected, and I so find, that they would have proceeded to exercise the 1st Option and move with all speed to complete the purchase after 11 August 2009. But nothing of this sort happened. The dates on the various legal requisitions betray the Plaintiff's avowed intention to purchase the Property. Despite the much shorter time for answers to return from the authorities nowadays, the sending of requisitions on 16 and 20 November 2009 for a completion on 19 November 2009 cannot by any stretch of imagination be seen as being timely. It is also noteworthy that the Plaintiff only stamped the 1st Option on 24 November 2009, one day before it commenced these proceedings and not within 14 days from the date which the 1st Option was exercised, *ie*, by 10 September 2009. In cross-examination Melvin agreed that the Plaintiff wanted to avoid paying stamp duty if it could receive a sum of money in exchange for the cancellation of the 1st Option (see Notes of Evidence, 6 July 2010, p 110), and that the only reason why stamp duty was paid was to be able to sue on it (see Notes of Evidence, 6

July 2010, p 114).

83 This brings me to the next glaring fact. There were, and I so find, subsequent agreements to allow AA to find another buyer provided AA paid the Plaintiff, at first $3.5 million, and later revised upward to $5 million, in exchange for relinquishing its rights under the 1st Option. There were undeniable exchanges of SMS messages between AA, KC Tan and Melvin referring to the securing of a second purchaser and it is no surprise that the prospective second purchasers were mentioning current market value purchase prices. Again there were absolutely no references to these negotiations in the earlier affidavits of the Plaintiff. I find that this evidence was suppressed until they had no choice because AA produced the evidence of subsequent settlement negotiations. Melvin was forced to concede through cross-examination, that the Plaintiff's witnesses had given misleading evidence when they claimed they were adamant about purchasing the Property (see Notes of Evidence, 6 July 2010, pp 157-160). It is clear there was never any hint from them that there were such negotiations. Melvin's evidence under cross-examination on this issue shows him being less than candid in his answers and I accordingly do not believe much of his evidence, especially when it comes to the Plaintiff's intentions. Melvin had to concede they concealed the settlement reached in November 2009 in no less than 5 earlier affidavits until their AEIC filed on 25 June 2010.

84 The evidence shows, and I so find, that even prior to the Plaintiff's exercise of the 1st Option, there were SMS exchanges between 24 to 27 August 2009 which clearly show that discussions on cancellation of the 1st Option had begun. Melvin was eventually forced to admit that the Plaintiff was trying to obtain more compensation in exchange for not exercising the 1st Option:

> Q: Anyway, you now agree that you had these discussions before you exercised the option; Mr Agus Anwar made proposals; you all made counterproposals. Okay so far?
>
> A: Yes.
>
> Q: In your counterproposals, you agree that the defendants [*sic*] were trying to see whether they could get additional compensation, that means over and above the 180,000, out of Mr Anwar; correct?
>
> A: Yes
>
> (see Notes of Evidence, 6 July 2010, p 97).

And in characteristically evasive answers, he then claims that he could not recall any details but conceded that "…it could have been in the millions" (see Notes of Evidence, 6 July 2010, p 97). These negotiations continued after the exercise of the 1st Option and it is the clear reason why CS Lee was not proceeding with all speed toward completion, as he would have if the Plaintiff was genuinely interested only in purchasing the Property.

85 I find that there was an agreement reached on 3 September 2009 between the Plaintiff and the 1st Defendant. The agreement was that AA could find another buyer and pay a greatly enhanced "compensation". This was confirmed in an SMS sent by Melvin to AA on 9 September 2009 at 20:13:35 where the former asked for a "...cashier's order for the full amount of S$3.5 million by this Friday..." and the SMS sent by Melvin to AA on 14 September 2009 where he referred to a "settlement" (see 1.AB pp 233 and 243). Melvin confirmed under cross-examination that the $3.5 million comprised the return of the $1.5 million option fee and $2 million being the "compensation" for

cancellation of the 1st Option:

Q: I just want to understand. And the 3.5 million was supposed to encompass the 1.5 million?

A: Yes.

Q: And it would encompass the 180,000?

A: Yes

Q: So it is basically 1.5 million plus compensation of 2 million?

A: Yes

Q: So, although in your minds, on 27 August, as you told us, you have already exercised your option to buy the property, you were still prepared to give it back if you got an extra $2 million; correct?

A: Yes

Q: Mr Poh, I would suggest to you that that itself indicates this was not a true sale, but you were just trying to get more compensation, as a good businessman, out of Mr Anwar. You can agree or not agree.

A: Agree.

(see Notes of Evidence, 6 July 2010, p 108).

Melvin tried to characterise this as an in-principle agreement, which I do not accept. The necessary essential terms had been agreed upon.

86 In the event, AA was unable to meet that deadline. But discussions along a similar vein continued through late September, October and into early November 2009 when another agreement was reached, except that this time, the compensation quantum was $5 million. This second agreement is set out in the exchange of correspondence dated 6, 10 and 11 November 2009 between JLC Advisers LLP ("JLC LLP") (the new lawyers acting for the 1st Defendant in place of NCH LLP) and TLP.

87 CS Lee admits that he knew, pre-November 2009, that there were discussions between his clients and AA on "settlement" (see Notes of Evidence, 8 July 2010, pp 25-26), and his clients kept him posted of developments. Yet to help pile on the pressure, TLP wrote to NCH LLP on 4 November 2009 stating that their searches showed that the 1st Defendant had granted an option to the 2nd Intervener and threatened to issue proceedings. On 6 November 2009, JLC LLP wrote to TLP, referring to an "agreement reached" between their respective clients and upon the 1st Defendant paying $5 million, the Plaintiff will "abort" the purchase of the Property and withdraw their two caveats. TLP's response on 10 November 2009 was that there was an agreement provided that payment was to be made by Cashier's Order by 16 November 2009 and asked for confirmation by the next day on this stipulation, failing which their "...client's agreement..." was null and void. On 11 November 2009, JLC LLP replied to TLP accepting the terms. On the same day, as noted above, TLP rather disingenuously, wrote to the 1st Defendant stating that they were acting for LSH and demanding payment of

$300,000 commission for securing the Plaintiff as buyer of the Property and, without having any basis, stated that "...completion of sale & purchase of the above property will take place on 19 November 2009". CS Lee was forced to accept under cross-examination that this last statement was untrue. On 13 November 2009, TLP wrote another letter to JLC LLP stating that they act for LSH, asking for the Cashier's Order of $5 million for the payment to the Plaintiff on "completion" on 16 November 2009 and $300,000 in favour of LSH. In the meanwhile, on 13 November 2009, TLP forwarded their draft withdrawal of caveats for JLC LLP's perusal.

88 I find that these agreements involved AA looking for other buyers at the market price so as to pay the Plaintiff back, (see Notes of Evidence, 6 July 2010, p 118). In an SMS sent on 28 September 2009 at 15:12:48 from AA to Melvin, the latter was informed that AA was "...waiting for the contract to be signed. Will revert asap". The contents speak for themselves and there was no protest from Melvin as I would have expected if their case was true. Again AA's SMS sent on 2 October 2009 at 15:09:55 read: "...now *waiting to sign an option*" (emphasis added). Again there was no protest or objection. Melvin's response SMS at 15:11:58, just some two minutes later, read: "... *our settlement* must be fully secured and everything must be settled by Monday..." to which AA replied at 15:13:08: "...will tell *buyer*" (emphasis added). The italicised words cannot be misunderstood. Indeed Melvin had no choice but to agree under cross-examination when confronted with these SMS messages that AA was in fact keeping him informed about finding another buyer and the Plaintiff did not stop him (see Notes of Evidence, 6 July 2010, pp 122 and 124).

89 I find it telling that in the Plaintiff's Joint Affidavit filed on 15 January 2010, the Plaintiff stated quite untruthfully at paragraph 35 that between 16 September 2009 and 3 November 2009 "...there was only silence from the 1st Defendant". I also find it telling that the Plaintiff concealed the settlement reached in November 2009 in no less than 5 earlier affidavits and it was only in their AEIC filed on 25 June 2010 that Melvin attempts to explain that they did not disclose the settlement earlier because of the very lame excuse that they were privileged communications.

90 The agreement reached on 11 November 2009 was breached because AA needed more time to make payment. This was because the 2nd Intervener had lawyers on board by then and the problem was who would move first. The Plaintiff wanted to be paid first, before they released their caveats and privilege under the 1st Option, but AA could not get the money until the second buyer made a substantial downpayment and who was obviously not prepared to pay anything so long as the Plaintiff's caveats remained. I can now turn to the Plaintiff's claim for specific performance.

Specific Performance

91 I shall deal with the effect of the September and November 2009 "agreements" later and put them to one side for the time being. The Plaintiff's claim for specific performance lies in equity and is therefore a discretionary remedy: see Tang Hang Wu, Kelvin FK Low, *Tan Sook Yee's Principles of Singapore Land Law* (LexisNexis, 3rd Ed, 2009) ("*Tan Sook Yee*") at para 16.116. In *Ng Bok Eng Holdings Pte Ltd and another v Wong Ser Wan* [2005] 4 SLR(R) 561, the Court of Appeal stated at [54] thus:

> Under para 14 of the First Schedule to the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed), it is expressly provided that the High Court has the "[p]ower to grant all reliefs and remedies at law and in equity". Of course, this only sets out the general power of the High Court. It would be for the court in each case to decide whether a particular relief ought to be granted in the circumstances there prevailing. As we have noted above, Lord Hardwicke in *Higgins* did not give any reason as to why the relief by way of account should not be ordered in addition to the relief

of having the property, which was conveyed in breach of the Elizabethan Statute, restored. While it is true that an account of profits is the traditional remedy for breaches of equitable obligations, it did not mean that that remedy may not be granted by the court in other situations. *No rule should remain immutable in the eyes of equity. Ultimately, it is the justice of the case which will dictate what relief will be appropriate*.

(emphasis added)

92 In my view, the Plaintiff would fail to obtain specific performance on five separate grounds.

93 The first ground is the perceived principle that the Plaintiff is entitled to specific performance as a matter of right since this is a purchase of land or real property. It is generally accepted that a contract for the purchase of land, land being property with unique qualities, damages would not provide an adequate remedy for the innocent party and it has generally been accepted that specific performance, apart from equitable defences, is available as a matter of right. In R Meagher, D Heydon, M Leeming, *Meagher Gummow & Lehane's Equity Doctrines & Remedies* (Butterworths LexisNexis, 4th Ed, 2002), the learned editors state at para 20-035:

Contracts for the disposition of interests in land. Contracts for the dispositions of interests in land are, far more commonly than contracts of any other description, the subject of orders for specific performance. Damages are not an adequate remedy for failure by a vendor to complete a contract for the sale of land (*Adderley v Dixon* (1824) 1 Sim & St 607 at 610; 57 ER 239 at 240; *Dougan v Ley* (1946) 71 CLR 142 at 150 per Dixon J), even if the purchaser is acquiring the lands as, in effect, part of his stock-in-trade: for instance, for the purpose of subdivision and sale: *Pianta v National Finance & Trustees Ltd* (1964) 180 CLR 146 at 151; [1965] ALR 737 at 739-740 per Barwick CJ, but cf *Loan Investment Corp of Australasia v Bonner* [1970] NZLR 724 at 735. Similarly, in the case of an agreement to lease land damages are not an adequate remedy, although in some cases specific performance may be refused on the ground of futility

94 In *Excelsior Hotel Pte Ltd v Hiap Bee (Singapore) Pte Ltd, (OCBC Finance (Singapore) Ltd, intervener)* [1989] 2 SLR(R) 322, which concerned two shop units in the Excelsior Hotel and Shopping Centre, it was the converse situation where the vendor sought specific performance of a sale agreement against the purchaser. Chao Hick Tin JC (as he then was) ruled that under the common law, it was clear that a vendor of immovable property had as much a right to ask for specific performance of a contract of sale as a purchaser would have. Chao JC stated at [9]-[10]:

9 Under common law, it is clear that a vendor of immovable property has as much right to ask for specific performance of a contract of sale as a purchaser would have. Gareth Jones, William Goodhart, *Specific Performance* (Butterworths, 1986) states the following at p 91:

> As long ago as 1804 Sir William Grant MR said that a court of equity will always decree specific performance of a contract for land; it is "as much of course in this Court to decree a specific performance, as it is to give damages at Law". Damages are only deemed to be an adequate remedy if the defendant has an equitable defence to the plaintiff's claim. *Land is deemed to have a special and peculiar value for the purchaser, and no enquiry is made as to the value of the land or as to the possibility that a substantially similar piece of land may be obtained elsewhere*. The vendor can also sue for specific performance although the claim is merely to recover a sum of money. He can do so, "although as at the date of the writ the contract has been fully performed except for the payment of the purchase price or part thereof".

1 0 *Halsbury's Laws of England* vol 44 (Butterworths, 4th Ed, 1983) at para 414 states the following:

> Since land may have "a peculiar and special value" to a purchaser, a claim for specific performance of an agreement to sell or grant an interest in land will not be refused on the ground that damages would be an adequate remedy, even if the interest to be granted is a lease for a short term or a mere contractual licence to enter on land for a temporary purpose.

(emphasis added)

95 Two things should be noted. First, the learned Judge did not go so far as to say specific performance would always be given as of right. He merely ruled that the vendor had as much *right* as the purchaser *to ask* for the equitable remedy of specific performance. Secondly, I also doubt that Sir William Grant MR's pronouncement in 1804 (*Hall v Warren* (1804) 9 Ves 605 at 608, and also *Adderley v Dixon* (1824) 57 ER 239, per Sir John Leach VC), that land is "deemed to have a special and peculiar value for the purchaser" and "no enquiry is made" as to the value of the land, *ie*, for damages, or the possibility of a substantially similar piece of land elsewhere, holds good today and in all circumstances. If a vendor defaults in the sale of his shop unit which is along a corridor in a large shopping complex, why should the unit next door (assuming there are no negative factors that are not also affecting the unit in question), which is available, not be a perfectly good substitute and also a basis for damages if the purchaser cannot show that the unit next door is somehow not an equivalent?

96 In my respectful view, *Good Property Land Development Pte Ltd v Societe Generale* [1989] 1 SLR(R) 97, is to be preferred. There, Chan Sek Keong J (as he then was), in the context of an application by the mortgagor for an interim injunction against the mortgagee from exercising its power of sale of the mortgaged property, stated, albeit *obiter*:

> 25 It is not disputed that if damages were an adequate remedy to the plaintiffs, the defendants, being a large international commercial bank, would be able to meet any damages that result from any breach of duty by them. However, it is settled principle that damages would not be an adequate remedy to a party who has been or will be deprived of his enjoyment of or interest in land. The same principle is applicable to the converse case of a claim for specific performance of a contract of sale of land. Damages are inadequate because no two parcels of land can be identical and a piece of land may have a peculiar and special value in the eyes of the purchaser. Therefore, it might be said that damages would not be an adequate remedy for the plaintiffs here if the injunction were refused and if they were to ultimately succeed, only to find that the sale of the mortgaged property to HPL was no longer defeasible by virtue of s 38 of the Land Titles Act (Cap 157). This is an important point. I have, however, in my oral judgment, said that in this case damages would probably be an adequate remedy to the plaintiffs. It is necessary to explain what I meant.

2 6 *Land may be owned for personal enjoyment (eg for dwelling or as gardens etc) or they may be owned as investment, ie for profit. In circumstances where the main object of owning land is not the personal enjoyment thereof but the profit derivable therefrom, it would be unrealistic to believe that damages would not be an adequate remedy to the owner for the loss of the mortgaged property*. I am aware that there is high authority to the contrary: see in *Pianta v National Finance of Trustees Ltd* (1964) 38 ALJR 232 where Barwick CJ said, at 233:

> But in my opinion this proposition is without foundation in law, even if the respondent had had no other business than that of subdividing and selling land and had made a decision to

subdivide and sell the subject land.

but see the Canadian authorities referred to in *Sharpe on Injunctions and Specific Performance* (1983) para 617.

(emphasis added)

97 In *Pianta v National Finance of Trustees Ltd* (1964) 38 AJLR 232, cited in the above case as "high authority" against the proposition that damages may be an adequate remedy in some situations, Barwick CJ considered the proposition that since the purchaser was a land developer, damages would be an adequate remedy. He rejected this proposition as being without foundation in law, even if the purchaser has had no other business than that of subdividing and selling and had made a decision to subdivide and sell the subject land. However, the real issue in *Pianta* whether the sellers' solicitor had the authority to make an oral contract on behalf of his clients to sell the land to the purchaser. What was stated by Barwick CJ was thus strictly *obiter* and was not dealt with by the other members of the court.

9 8 *Good Property* was cited in *Cathay Theatres Pte Ltd v LKM Investment Holding Pte Ltd* [1999] SGHC 171 where Lee Seiu Kin JC (as he then was) noted at [103] that Chan J was not concerned directly with the question of specific performance. However, Lee JC, without deciding the issue, stated that the views expressed in *Sharpe* and in *Good Property* have "great merit".

99 In England, the position is that specific performance is granted in respect of a sale and purchase of land due to the perceived "uniqueness" of land unless there is some equitable defence. Robert Pearce and John Stevens, *The Law of Trusts and Equitable Obligations* (Oxford University Press, 4th Ed, 2006) states at p 34:

(a) Contracts concerning land

Land is always deemed to be unique as it is assumed that there is no identical market alternative. Therefore, as Lord Diplock observed in *Sudbrook Trading Estate Ltd v Eggleton*, damages would:

"… constitute a wholly inadequate and unjust remedy for the breach. That is why the normal remedy is by a decree of specific performance …".

Specific performance is therefore available in respect of a contract for the sale of land, for the grant of an interest in land or even for the grant of a licence to occupy the land. …

However, the learned authors considered the situations where a defence against specific performance would be available to a defendant and stated at p 42 that hardship is one such ground:

(d) Specific performance is a discretionary remedy, and the courts may refuse to grant it if it would cause great hardship to the defendant or a third party. In *Patel v Ali* Mr and Mrs Ali had entered into a contract to sell their house to Mr and Mrs Patel. Mr Ali was then adjudicated bankrupt and spent a year in prison. Mrs Ali was diagnosed as having bone cancer, had a leg amputated just before the birth of her second child, and then subsequently had a third child. In these circumstances Goulding J refused an order for specific performance on the grounds of the hardship to the plaintiffs. He stressed that:

'The important and true principle … is that *only in extraordinary and persuasive circumstances can hardship supply an excuse for resisting performance of a contract for*

the sale of immoveable property…".

(emphasis added)

100 Similarly in *Chitty*, in considering the situations which might make it appropriate for the equitable remedy of specific performance, the learned editor states at para 27-005 and para 27-007:

> ... "The standard question ... 'Are damages an adequate remedy?' might perhaps, in the light of the authorities in recent years, be rewritten: 'Is it just, in all the circumstances, that a plaintiff should be confined to his remedy in damages?'"
>
> ...
>
> **Land**. The law takes the view that the purchaser of a particular piece of land or of a particular house (however ordinary) cannot, on the vendor's breach, obtain a satisfactory substitute, so that specific performance is available to the purchaser. *It seems that this is so even though the purchaser had bought for resale*. ... (emphasis added)

However, various grounds for refusing specific performance are also set out by the learned editor:

> 27-031 **Severe hardship to defendant**. Specific performance may be refused on the ground that the order will cause severe hardship to the defendant... On the other hand, "mere pecuniary difficulties" would "afford no excuse."...
>
> ...
>
> 27-033 **Inadequacy of consideration**. The authorities on inadequacy of consideration as a ground for refusing specific performance are not easy to reconcile. On the one hand it is settled that *mere* inadequacy of consideration is not a grant for refusing to grant the remedy. On the other hand, the statement that inadequacy of consideration is not a ground for refusing specific performance unless it is "such as shocks the conscience and amounts in itself to conclusive and decisive evidence of fraud" is probably too narrow, even when allowance is made for the possibility that fraud may have had a wider meaning in equity that at law. *The best view seems to be that specific performance may be refused where inadequacy of consideration is coupled with some other factor not necessarily amounting to fraud or other invalidating cause at law – for example, surprise, or unfair advantage taken by the claimant of his superior knowledge or bargaining position, even though such other circumstances do not justify rescission of the contract*. ...
>
> (emphasis added)

101 In contrast, in Canada, even though the position used to be that specific performance was granted as a matter of course for sale and purchase of land, there appears to be a recent change in the approach taken by the courts where specific performance may not be granted if the purchaser's interest in the land is purely commercial: see Robert J Sharpe, *Injunctions and Specific Performance* (Canada Law Book, 2009 loose leaf edition) ("*Sharpe*") at para 8.10.

102 In *Semelhago v Paramadevan* (1996) 136 DLR (4th) 1 ("*Semelhago*"), the Supreme Court of Canada was concerned with the question of whether a purchaser of a residential property, who had elected for damages in lieu of specific performance, was entitled to the increase in the value of the property which arose after the date fixed for closing the transaction. In the course of her judgment,

Sopinka J stated at [21]-[22]:

> 21 It is no longer appropriate … to maintain a distinction in the approach to specific performance as between realty and personalty. It cannot be assumed that damages for breach of contract for the purchase and sale of real estate will be an inadequate remedy in all cases.
>
> 22 Courts have tended, however, to simply treat all real estate as being unique and to decree specific performance unless there are some other reason for refusing equitable relief. ... Some courts, however, have begun to question the assumption that damage will afford an inadequate remedy for breach of contract for the purchase of land. In *Chaulk v Fairview Construction Ltd* (1977) 14 Nfld. & P.E.I.R 13, the Newfoundland Court of Appeal (*per* Gushue J.A.) ... stated, at p 21:
>
> > The question here is, whether damages would have afforded Chaulk an adequate remedy, and I have no doubt that they could, and would, have. There was nothing whatever unique or irreplaceable about the houses and lots bargained for. They were merely subdivision lots with houses, all of the same general design, built on them, which the respondent was purchasing for investment or re-sale purposes only. He had sold the first two almost immediately at a profit, and intended to do the same with the remainder. It would be quite different if we were dealing with a house or houses which were of a particular architectural design, or were situated in a particularly desirable location, but this was certainly not the case.
>
> Specific performance should, therefore, not be granted as a matter of course absent evidence that the property is unique to the extent that its substitute would not be readily available.

103 In *Sharpe*, the author cited *Semelhago* and stated at paras 8.60-8.70:

> ... the effect of *Semelhago*, is not to replace the presumption of uniqueness with the presumption of replaceability, but as explained by Low J, "*to open the door to a critical inquiry as to the nature and function of the property in relation to the prospective purchaser". Where the purchaser's interest is investment or resale, the proposition that a substitute could not be found and that therefore damages are inadequate is dubious and specific performance will be refused*. …
>
> Similar considerations arise where the purchaser is a speculator acquiring the property for profit on a resale. Land is a fungible good to such a purchaser and the arguments which have been considered elsewhere in this book as to the relative advantages and disadvantages of specific performance and damages apply. Again, it may be argued that since land is so especially difficult to value objectively, a purchaser should not be forced to accept the assessment of others. On the other hand, granting specific performance will often allow such a purchaser, at the expense of the vendor, a risk-free period of speculation between the date of the breach and the date of the trial. There seems to be no reason why a speculator in real estate should not be subject to the same principle of mitigation as the speculator in any other commodity.
>
> (emphasis added)

The learned author concluded at para 8.90:

> One disadvantage of assessing the adequacy of damages according to the circumstances of each particular case is that an element of uncertainty is introduced. The rule which prevailed, until

recently, was to presume the inadequacy of damages in the case of land and, while this presumption may seem inappropriate in particular cases, it may perhaps be justified on the ground that it is usually apt and that it provides a more or less clear and definite rule. It may be felt that it is important for both parties to know what form of remedy is available, not only to avoid the cost of litigation, but also to enable the purchaser to know whether to buy a substitute, and to enable the vendor to know whether to resell. *On the other hand, the equitable origin of specific performance has meant that discretion has been its hallmark. Certainty is not the only legal value worth pursuing in the remedial context and perhaps the courts are appropriately confident that identifiable principles of sufficient clarity underlie recent decisions which question the traditional presumption*. As Adams J observed after reviewing the significant number of cases in which specific enforcement in favour of a vendor has been refused:

> There is no suggestion in the cases reviewed above of remedial anarchy. Rather, there is a conscious effort to explore the real inadequacy of monetary relief in relation to land agreements as well as any failure to mitigate because of the contribution of these twin principles to self-ordering and contract policy.

(emphasis added)

104 New Zealand follows the Canadian position. In *Landco Albany Ltd v Fu Hao Construction Ltd* [2006] 2 NZLR 174, the Court of Appeal stated at [43] that since the purchaser's interest in the land was plainly commercial rather than private or sentimental and the purchaser must have entered into the transaction in order to make a profit, damages would in those circumstances be an adequate remedy.

105 From these Commonwealth authorities, there appears to be two different positions taken. In New Zealand and Canada, specific performance is not granted as a matter of course in respect of purchase of land especially if the purchaser bought the land purely for commercial purposes, *ie*, profits. On the other hand, in Australia and England, the position remains that damages are considered inadequate in respect of land due to its perceived uniqueness although specific performance, being a discretionary remedy, may be refused on grounds such as exceptional hardship or inadequacy of consideration as a result of one party taking unfair advantage of his superior bargaining position.

106 I am of the view that the law in Singapore should follow the New Zealand and Canadian cases and has found expression, albeit *obiter*, in the *Good Property Land Development* and *Cathay Theatres* cases referred to above. Just because the contract involves the purchase of land, specific performance does not follow as a matter of right. The court needs to look at all the facts and circumstances. As *Sharpe* correctly puts it, land in the hands of a speculator, is a fungible good. If all that matters is the profit that the purchaser can make upon a re-sale, then damages must be an adequate remedy. This is so even if the object is unique, be it a piece of land, a piece of art or shares in a private limited company. The traditional bases of personal enjoyment and that no two pieces of land are identical, do not necessarily hold true for all purchasers and in all cases. I do not think the Court should only look at whether the object of the purchase is unique or only at the reason for the purchase. The Court should look at all the facts and circumstances of the case, including importantly, the nature and function of the property in relation to the purchaser in question. Insofar as English and Australian law confer (subject of course to equitable defences) specific performance as a matter of right in a contract for the purchase of land or real property, they should not, with respect, be followed in Singapore.

107 I must clarify two points at this juncture. First, the above should also apply to leases of real

property. Secondly, with respect, I have doubts about the view expressed in the italicised passage in *Chitty* at para 27-033 noted above at [100], that perhaps the best view of the inadequacy of consideration authorities is that specific performance may be refused where inadequacy of consideration is coupled with some other factor like surprise, unfair advantage taken by the claimant of his superior knowledge or bargaining position. Further the inadequacy of the consideration must be by a significant margin or clear in the circumstances of the case. My views on unconscionability also apply to such a formulation which gives rise to uncertainty in the ambit and application of such an imprecise and vague rule. I prefer to restrict the "exceptions" to the equitable defences, such as "coming to equity to clean hands" which are well established and adequate to deal with particular instances of injustice.

108 Applying these principles to our case, the Plaintiff prides itself in being a property developer. There is no element of personal enjoyment in the ownership in the transaction with the 1st Defendant. The Plaintiff proudly recounts in its affidavits and oral evidence the many developments they have and that: "... [t]his transaction was, to us, merely an acquisition of an attractive plot of land at a good price, like the other transactions that we have done over the years". KC Tan and Melvin also emphasize their many years, between them, in the property and property development business. In their Joint Affidavit filed on 15 January 2010, KC Tan is said to be a property developer of some 20 years standing with 50 projects to his credit and at paragraph 10, they state that in October 2006, they bought a property along River Valley Road at $65 million and sold it some 6 months later at $133 million. I have found that on the evidence, it is clear the Plaintiff was happy not to proceed with completion and was trying to seek some kind of quick turnaround and large payout. I therefore find and hold that the Plaintiff is not entitled to the remedy of specific performance. In the words of Chan J (as he then was) in *Good Property Land*, the Plaintiff is not holding the land for personal enjoyment but the profit derivable therefrom, "...it would be unrealistic to believe that damages will not be an adequate remedy".

109 This brings me to the second ground why the Plaintiff's claim for specific performance fails, which is connected to the first, where damages are an adequate remedy specific performance may be refused see *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR(R) 537 at [53]. On the facts of this case, damages would clearly be an adequate remedy.

110 Mr Lee SC however forcefully argues that a fundamental distinguishing feature here is that even if damages are an adequate remedy, the 1st Defendant is in no position to pay any damages to the Plaintiff. That would mean leaving the Plaintiff without any substantial relief. Mr Lee SC's point is unfortunately robbed of much of its force in this particular case because the Plaintiff *knew* of AA's financial position, sought security for its loan, used the fact that there were many actions taken out against AA as a credit risk and took the risk to lend money to AA, albeit through the 1st Defendant, for a handsome reward in the first instance and a windfall in the second and third "agreements". It chose to take the risk of allowing the 1st Defendant to look for a second buyer to enable it to reap those windfalls and having so chosen, it now must face the consequences of the risk materialising.

111 I now come to the third ground upon which the Plaintiff's claim for specific performance must fail. Specific performance is an equitable remedy and it is well settled that those who want to avail themselves of this equitable remedy must come to equity with "clean hands".

112 In *Keppel Tatlee Bank Ltd v Teck Koon Investment Pte Ltd* [2000] 1 SLR(R) 355 Lai Siu Chiu J said at [29]: "It is well established that a person seeking equitable relief must come to a court of equity with 'clean hands'; in other words, he must not have behaved unconscionably himself" (citing *Dering v Earl of Winchelsea* (1787) 1 Cox 319 and *Duchess of Argull v Duke of Argyll* [1967] Ch 302).

In that case, a solicitor, by acting for the mortgagor, the nominal purchasers, himself (and another individual) as the true purchasers and as well as for the mortgagee, acted improperly when he failed to inform the mortgagee of this obvious conflict of interests. The learned Judge stated that the solicitor violated the Legal Professional (Professional Conduct) Rules, that his conduct was reprehensible and therefore even if he could establish an equity in his favour, he should be denied any relief because he did not come to court with clean hands (see [34] to [36]).

113 In *The Law of Trusts and Equitable Obligations*, the learned authors noted at p 19 that the maxim does not apply to conduct in general, but only to illegal or inequitable conduct which has "an immediate and necessary relation to the equity sued for". This requirement has been accepted in *Hong Leong Singapore Finance Ltd v United Overseas Bank* [2007] 1 SLR(R) 292 at [224] to [226], where Menon JC (as he then was) said:

> [224] The argument raises two distinct issues which I consider separately. The first is the principle that he who comes to equity must come with clean hands.
>
> [225] It is true that a plaintiff in equity must approach the court with clean hands but this does not mean he must be blameless in all ways. Firstly, the undesirable behaviour in question must involve more than general depravity. "[I]t must have an immediate and necessary relation to the equity sued for; it must be a depravity in a legal as well as in a moral sense": see *Dering v Earl of Winchelsea* [1775-1802] All ER Rep 140. This principle was similarly followed in *Moody v Cox* [1917] 2 Ch 71 where it was held by Warrington LJ at 85:
>
> > In order to prevent a man coming for relief in connection with a transaction so tainted it must be shown that the taint has a necessary and essential relation to the contract which is sued upon, and it is not enough to say in general that the man is not coming with clean hands when the relief he seeks is not based on the contract which was obtained by fraud, but is to have the contract annulled on a ground which exists quite independently of the fact that a bribe has been given and received.
>
> [226] Moreover, the principle has lost some of its vitality over time. The position is set out thus in *Halsbury's Laws of Singapore* vol 9(2) (LexisNexis, 2003) at para 110.016:
>
> > The maxim has been relaxed over time and is no longer strictly enforced. The question is whether in all the circumstances it would be a travesty of justice to assist the plaintiff given his blameworthy participation or role in the transaction. The whole circumstances must be taken into account having regard to the relief sought, for the relative blameworthiness only emerges after a complete and exhaustive scrutiny and relief which is less drastic and need not be defeated by conduct that is less opprobrious. It has been said that the "the conduct complained of must have an immediate and necessary relation to the equity sued for" and "it must be a depravity in the legal as well as moral sense".

Whilst I agree with the foregoing, I must say, with the greatest of respect to the learned Judicial Commissioner and the editors of *Halsbury's Laws of Singapore*, that I do not quite agree that this equitable principle has either lost its vitality over time or that it "... is no longer strictly enforced...".

114 Did the Plaintiff come to this Court to seek specific performance with clean hands? In my judgment, I think not. The Plaintiff did not in both the respects referred to above. It was certainly not a matter of just a little general dirt under the fingernails:

(a) First the Plaintiff's conduct related immediately, directly and necessarily to the equity sued

for. The transaction entered into would clearly, if carried through, be at an undervalue and responsibility for that undervalue lies squarely on the Plaintiff. The Plaintiff comes asking for specific performance for the purchase of this Property at a price that had no relation to its then market value. It was fixed, not really negotiated, with respect to the outstanding mortgage and was considerably below the forced sale value, which at that time was the only valuation available. This "price" was pressed down on the credit risk of the 1st Defendant's sole shareholder, not that of the 1st Defendant. Then the Plaintiff attempted to maximise its profit by not completing but agreeing to be bought out and reap a windfall. I have no doubt in my mind that if a second sale had been achieved on the terms envisaged by the Plaintiff and AA, the Plaintiff would have gone away with its $3.5 million or $5 million and they would not be here today asking for specific performance. The truth, as I have found, is that they never intended to purchase the Property when they signed the 1st Option and Deed of Settlement. They manoeuvred thereafter to maximise their profit from the security. Having failed to get a quick windfall, they are now before this court because the property values rose sharply thereafter and they see the potential for an even higher payout by asking for specific performance.

(b) Secondly, they launched their proceedings with a simple claim and a misleading affidavit, which did not mention the full facts nor, more importantly, the Deed of Settlement which accompanied the 1st Option. The structuring of the deal and documents was meant to mislead. As noted above, thereafter, they were still not forthcoming in the subsequent affidavits with the full story and further only gave incremental discovery of evidence that was unfavourable to them. This has been dealt with above. In so saying I must emphasize I do not criticise Mr Lee SC or his team in any way; they took over the matter only a couple of weeks before it was first scheduled for hearing. Further, before me, both Melvin and KC Tan continued with their untrue claim that right from the beginning, they were only interested to purchase the Property.

(c) Thirdly, applying Lord Parker's formulation in *Stickney v Keeble* [1915] AC 386 at 419 that equity will only grant specific performance if, under all the circumstances, it is just and equitable so to do, in all the circumstances here it would cause severe hardship to the 1st Defendant and the conduct of the Plaintiff demonstrates it does not deserve the remedy.

In my judgment, the Plaintiff could not satisfy the adage: he who seeks equity must do equity: see *Beckkett Pte Ltd v Deutsche Bank AG and another and another appeal* [2009] 3 SLR(R) 452 at [119].

115 The fourth ground upon which the Plaintiff's application for specific performance must fail is that there were two subsequent agreements reached between the Plaintiff and AA to allow AA to seek another purchaser for the Property and to pay the Plaintiff a very largely enhanced "compensation". I have already dealt with the facts in relation to this above. The evidence shows that these agreements, reached in early September and on 11 November 2009, were subsequently scuttled because the Plaintiff wanted to be paid before removing their caveats against the Property and AA was in no position to make payment unless the second purchaser paid the purchase price, thereby allowing AA to make payment therefrom. Insofar as it is necessary, I also find that sometime after 16 November 2009, after AA was unable to make payment of the $5 million and needed a little extra time to do so, the Plaintiff changed its mind because of the significant rise in property prices and decided to go for a bigger payout, by claiming the Property itself. There was the proof staring them in the eye with the 2nd Intervener's purchase price.

116 The fifth ground upon which the Plaintiff's claim for specific performance must fail is estoppel by acquiescence. Estoppel by acquiescence is a defence against specific performance: see *Meagher*

Gummow & Lehane's Equity Doctrines and Remedies at para 20-170. In K R Handley, *Estoppel by Conduct and Election* (Sweet & Maxwell, 2006) at para 12-007, the learned author states:

> Acquiescence after the event is an equitable defence when inaction, delay or other facts make it inequitable for the claimant to enforce his rights. This defence and an estoppel by representation overlap when the claimant by his conduct represents to the defendant that he has abandoned his rights or does not intend to enforce them. In such a case there could be an estoppel if the defendant was thereby induced to change his position. As Cotton LJ said in *Allcard v Skinner*:
>
> > "Mere delay in enforcing a right is not a defence. It is very different from raising no objection to an act while it is being done, which may be treated as assent to the act, and therefore as being acquiesced in [so] as to be an equitable defence."

117 In *Yongnam Development Pte v Somerset Development Pte Ltd* [2004] SGCA 35, Chao Hick Tin JA considered the application of the doctrine of estoppel by acquiescence and stated at [48]:

> Estoppel by acquiescence, sometimes referred to as proprietary estoppel, was described by Lord Cranworth LC in *Ramsden v Dyson* (1866) LR 1 HL 129 at 140-141 and explained by Robert Goff J in *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] 1 QB 84 at 103 as a doctrine "precluding a person, who stands by and allows another to incur expenditure or otherwise act on the basis of a mistaken belief as to his rights, from thereafter asserting rights inconsistent with that mistaken belief."

118 In *Nasaka Industries (S) Pte Ltd v Aspac Aircargo Services Pte Ltd* [1999] 2 SLR(R) 817, Prakash J cited *Halsbury's Laws of England* and stated that generally, five circumstances must be present in order that the estoppel may be raised against the party estopped: B must be mistaken as to his own legal rights, B must expend money or do some act on the faith of his mistaken belief, A must know of his own rights, A must know B's mistaken belief and A must encourage B in his expenditure of money or some other act, either directly or by abstaining from asserting his legal rights.

119 Similarly, in *Keppel Tatlee Bank* (see above), Lai J cited *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133 and *Willmott v Barber* (1880) 15 Ch D 96 at [27] and stated that for estoppel by acquiescence to apply, it has to be shown that the party estopped simply stood by knowing full well that an innocent party was labouring under a mistake as to his rights. There will be no estoppel unless the party estopped is aware of his own rights and of the innocent party's mistaken belief.

120 On my findings of fact, and leaving aside my finding that the true nature of the transaction was a loan with security, the Plaintiff by its conduct after 11 August 2009 clearly led AA to believe that it agreed, for a higher "compensation", to allow AA to look for another buyer and that it would not proceed to complete the purchase of the Property. The SMS messages exchanged are clear in their import and undeniable – the Plaintiff agreed to AA looking for a second buyer in return for a bigger payout. The 1st Defendant has now incurred a liability to the 2nd Intervener and must be taken to have incurred time and expenditure by relying on these representations. The 1st Defendant is, in all likelihood, also liable to the intermediaries who secured the second purchaser. Lastly, AA is now embroiled in this legal action. On this ground alone, the Plaintiff has lost its right to specific performance.

121 I now turn to two other separate issues. These two issues are premised on the finding that the

true nature of the transaction set out in the 1st Option and Deed of Settlement is a loan secured by the Property. These two issues are – whether the 1st Option amounts to a penalty and is therefore unenforceable and whether the 1st Option and Deed of Settlement is a moneylending transaction caught by the Moneylenders Act.

Penalty

122 Both the 1st Defendant and the 2nd Intervener submitted that Clause B(b) of the Deed of Settlement is in the nature of a penalty and hence the 1st Option is unenforceable. Clause (B)(b) of the Deed of Settlement provides that in the event the 1st Defendant fails to "... opt for (a) above...", *ie*, "refund" the option fee and the "compensation" within the 60-day time period, then the Plaintiff or its nominee may proceed to exercise the 1st Option within the option validity period and complete the sale and purchase of the Property according to the terms of the 1st Option, *ie*, at $20 million.

123 The *locus classicus* setting out the indicia of a penalty is *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Ltd* [1915] AC 79, where Lord Dunedin stated at 86 that the essence of a penalty is "a payment of money stipulated as *in terrorem* of the offending party". He further provided some of the applicable tests which determine if a provision is a penalty or a valid liquidated damages clause:

> (a) It will be held to be penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach. (Illustration given by Lord Halsbury in *Clydebank Case*);
>
> (b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid (*Kemble v Farren*).

1 2 4 *Dunlop Pneumatic* has been adopted by numerous Singapore cases, including the Court of Appeal decision in *Hong Leong Finance Ltd v Tan Gin Huay and another* [1999] 1 SLR(R) 755 at [19]. The Court of Appeal held at [27] that the provision which provided for a default interest rate of 18% per annum for late or non-payment of money due under the mortgage had to be construed from the point of the parties at the time of entering into the transaction, and that the character of the provision as either penal or compensatory is to be perceived as a matter of degree depending on all the circumstances, including the nature of the subject matter of the agreement. The Court held that the 18% per annum default interest rate was an extravagant increase from the original interest rate of 5.5% per annum for the first two years of the term loan and 6.75% thereafter and was not referable to the true amount of the loss suffered by the mortgagee.

125 The 2nd Intervener further contends that "... a transaction must be just as objectionable and unconscionable in the eyes of equity if it requires a transfer of property by way of a penalty on a default in paying money as if it requires a payment of an extra or excessive sum of money" and this is clearly so if the value of the property at the time of transfer far exceeds the actual loss of the Plaintiff, citing the English Court of Appeal case of *Jobson v Johnson* [1989] 1 WLR 1026 where Dillon LJ stated at 1034-1035:

> Does it make any difference then, that the penalty in the present case is not a sum of money? In principle, a transaction must be just as objectionable and unconscionable in the eyes of equity if it requires a transfer of property by way of penalty on a default in paying money as if it requires a payment of an extra, or excessive, sum of money. There is no distinction in principle between a

clause which provides that if a person makes default in paying a sum of £100 on a certain day he shall pay a penalty of £1,000, and a clause which provides that if a person makes default in paying a sum of £100 on a certain day he shall by way of penalty transfer to the obligee 1,000 shares in a certain company for no consideration. *Again there should be no distinction in principle between a clause which requires the defaulter, on making default in paying money, to transfer shares for no consideration, and a clause which in like circumstances requires the defaulter to sell shares to the creditor at an under value. In each case the clause ought to be unenforceable in equity in so far as it is a penalty clause*.

(emphasis added)

126 On the other hand, the Plaintiff submits that the penalty clause rule has no application to clause B(b) of the Deed of Settlement which provides for the cancellation of the transaction. The penalty clause rule has no application where the sum of money is payable on an event which is not a breach of contract. The Plaintiff cites *Stansfield Business International Pte Ltd (trading as Stansfield School of Business) v Vithya Sri Sumathis* [1998] 3 SLR(R) 927 at [7]-[9] where Chao J (as he then was) stated the following:

7 What is a penalty clause? The classic statement on this is to be found in the celebrated case *Dunlop Pneumatic Tyre Company, Limited v New Garage and Motor Company, Limited* [1915] AC 79 at 86 where Lord Dunedin stated that a clause is penal if it provides for "a payment of money stipulated as in *terrorem* of the offending party", to force him to perform the contract. And the question whether a sum stipulated is a penalty or a genuine pre-estimate of damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract judged of as at the time of the making of the contract.

8 However, a claim for the sum agreed in the contract should be differentiated from a claim in damages or for liquidated damages which is dependent upon a breach. This is put by *Treitel on Contracts* (9th Ed) at p 912 as follows:

> A contract commonly provides for the payment by one party of an agreed sum in exchange for some performance by the other. Goods are sold for a fixed price; work is done for an agreed remuneration, and so forth. An action for this price or other agreed remuneration is, in its nature, quite different from an action for damages. It is a claim for the specific enforcement of the defendant's primary obligation to perform what he has promised; though, as it is simply an action for money, it is not subject to those restrictions which equity imposes on the remedies of specific performance and injunction.

Chitty on Contracts at para 1676 states:

> An agreed sum cannot be a penalty unless payable upon breach. A sum payable upon performance of the claimant's contractual obligation cannot be a penalty; nor, at common law, can a sum which is payable upon an event other than a breach of contract be a penalty.

9 Accordingly, for a question of penalty to arise in relation to a sum payable under a contract, that payment must flow from a breach. A sum payable upon some other event is not a penalty. In *Alder v Moore* [1961] 2 QB 57, a professional footballer received £500 from an insurance company in respect of an injury which was thought to have disabled him permanently and he undertook to repay the money in the event of him again playing professional football. This was held not to be a penalty since he committed no breach when he did play again, as he had made no promise not to

do so.

127 In *Stansfield Business International*, the plaintiff sued its former student for the outstanding school fees when she left the course she enrolled into. A contractual term stipulated that she had to pay the full school fees should she decide not to complete the course for the academic year. Chao J held that this was a claim for the contract sum and hence there can be no issue of any penalty.

128 If I am right in holding that the true nature of this transaction is a loan with security, then it must follow that the 1st Option coupled with Clause B(b) in the Deed of Settlement is unenforceable as a penalty because the consequence of a breach, *ie*, the failure by the 1st Defendant to repay the $1.5 million loan and "compensation" at $180,000 within 60 days, is the loss of the 1st Defendant's ability to at the very least allow HLF to sell the Property as a mortgagee sale, which would at the very least, on the Colliers Valuation, be expected to fetch some $23.2 million or the loss of its ability to sell the Property at market price. On the Plaintiff's own expert evidence, the loss on the former basis would be $1.6 million and on the latter basis be $7 million. This latter sum far exceeds the principal amount of the loan of $1.5 million for 60 days. Given the 2nd Intervener's Option, this is a huge loss of $17 million. This is clearly extravagant and unconscionable on any score. I also find that the "rate of interest" at 6% per month is close to being extortionate, let alone unconscionable.

129 What evidence is there from the Plaintiff to show that Clause B(b) of the Deed of Settlement and the 1st Option is a *bona fide* or genuine attempt to assess the likely loss it would suffer if the 1st Defendant failed to repay the $1.5 million with "compensation"? There is clearly none. I find and hold that the contractual right of the Plaintiff to purchase the Property at $20 million is unenforceable as a penalty.

Moneylending Transaction

130 The 1st Defendant and the 2nd Intervener submit that the transaction entered into between the Plaintiff and the 1st Defendant is caught by the prohibition in the Moneylenders Act which came into operation with effect from 1 March 2009.

131 The *raison d'être* of the Moneylenders Act can be found in Farwell J's judgment in *Litchfield v Dreyfus* [1906] 1 KB 584 at 590:

> This particular Act was supposed to be required to save the foolish from the extortion of a certain class of the community who are called money-lenders as an offensive term.

The English statute allowed the courts to intervene in cases of extortionate rates of interest and terms for lending money that were harsh and unconscionable. The old Singapore Parliamentary Debates also stated that the Moneylenders Act serves to protect the poor from the clutches of unscrupulous moneylenders. This basis is found in the current sections 22 and 23 of the Moneylenders Act. In appropriate cases of unlicensed moneylending, section 14(2) provides that any money paid under the contract for the loan is not recoverable and a guarantee or security shall be unenforceable. Section 3 provides that if a person lends money in consideration of a larger sum being repaid, that person is presumed to be a moneylender. This is a rebuttable presumption and the onus is on the lender to rebut the same: *Mak Chik Lun and Ors v Loh Kim Her and Ors* [2003] 4 SLR(R) 338 at [11].

132 In *Litchfield v Dreyfus* [1906] 1 KB 584, Farwell J also said at 589:

> But not every man who lends money at interest carries on the business of money-lending. Speaking generally, a man who carries on a money-lending business is one who is ready and willing to lend to all and sundry, provided that they are from his point of view eligible. I do not of course mean that a moneylender can evade the Act by limiting his clientele to those whom he chooses to designate as "friends" or otherwise: it is a question of fact in each case...

In *City Hardware Pte Ltd v Kenrich Electronics Pte Ltd* [2005] 1 SLR(R) 733, V K Rajah J (as he then was) undertook a comprehensive analysis of the legal principles governing the application of the Moneylenders Act. He stated at [22]:

> It cannot be denied that *ex facie*, [the Moneylenders Act's] provisions have an extensive reach appearing to embrace a myriad of commercial situations. In my view, it would nonetheless be wholly inappropriate to apply the MLA to commercial transactions between experienced business persons or entities, which do not *prima facie* have the characteristics of moneylending. Having said that, I am constrained to observe that the position could be quite different if the parties had wilfully attempted to structure a transaction so as to evade the application of the MLA. For good measure, I also emphasise that a person or entity that carries on a business with the primary object of conducting unlicensed moneylending cannot avoid the severe consequences of an infraction of the MLA's provisions by pointing out the benefits the borrower has received or derived from the transactions. The court has no alternative but to give effect to the draconian consequences of an infraction in the event that the MLA is offended.

133 Rajah J cited Clifford L Pannam, *The Law of Money Lenders in Australia and New Zealand* (The Law Book Company Limited, 1965) at p 6 where the learned author gave the following guidance in both construing and applying the Moneylenders Act:

> A loan of money may be defined, in general terms, as a simple contract whereby one person ("the lender") pays or agrees to pay a sum of money in consideration of a promise by another person ("the borrower") to repay the money upon demand or at a fixed date. The promise of repayment may or may not be coupled with a promise to pay interest on the money so paid. The essence of the transaction is the promise of repayment. As Lowe J put it in a judgment delivered on behalf of himself and Gavan Duffy and Martin JJ: "'Lend' in its ordinary meaning in our view imports an obligation on the borrower to repay." Without that promise, for example, the old *indebitatus* count of money lent would not lay. *Repayment is the ingredient which links together the definitions of "loan" to be found in the Oxford English Dictionary*, the various legal dictionaries and the text books. *In essence then a loan is a payment of money to or for someone on the condition that it will be repaid*.
>
> (emphasis added)

Rajah J elaborated at [25] and [28] that the courts ought not to be overzealous in analysing or deconstructing a transaction in order to infer and/or conclude that the object of the transaction was to lend money and that if transactions are not loans in nature or in form, the law will be slow to infer or impute a relationship of moneylending. Finally he provided at [47] the following observation on the defence of moneylending in Singapore:

> [47] The defence of moneylending is often invoked in Singapore by unmeritorious defendants who are desperate to stave off their financial woes. Such defendants should not regard the MLA as a legal panacea. It should be viewed as a scheme of social legislation designed to regulate rapacious and predatory conduct by unscrupulous unlicensed moneylenders. *Its pro-consumer protection ethos was never intended to impede legitimate commercial intercourse or to sterilise*

the flow of money. It is not meant to curtail the legitimate financial activity of commercial entities that are capable of making considered business decisions. The court has always taken and will continue to take a pragmatic approach in assessing situations when this defence is raised. The MLA is not invariably contravened in transactions where the object of the transaction is to raise money. In the final analysis, the economic objective of an arrangement to provide credit should not be confused with its legal nature.

(emphasis added)

134 The views expressed in *City Hardware* were affirmed by the Court of Appeal in *Donald McArthy Trading Pte Ltd and others v Pankaj s/o* Dhirajlal [2007] 2 SLR(R) 321 which stated at [9] that the provisions of the Moneylenders Act are not intended to apply to transactions made at arm's length between commercial entities and that it has never been the objective of the Moneylenders Act to prohibit or impede legitimate commercial intercourse between commercial persons.

135 It is clear that the MLA prohibits the business of moneylending and not the act of moneylending. What constitutes a business of moneylending is a question of fact: Litchfield v Dreyfus, Subramaniam Dhanapakiam v Ghannthimathi [1991] 1 SLR(R) 164 at [7] to [10]. In Singapore, there are two accepted tests in determining whether a person is carrying on a business of moneylending. The first is whether there was a certain degree of system and continuity in the transactions, called the Newton v Pyke test: see Ang Eng Thong v Lee Kiam Hong [1998] SGHC 64. If the answer is no, then the test in Litchfield v Dreyfus is applied, ie, whether the alleged moneylender is one who is ready and willing to lend to all and sundry provided that they are from his point of view eligible: see Mak Chik Lun at [11]. Further, a solitary transaction can amount to a moneylending transaction in an appropriate case: see Bhagwandas Naraindas v Brooks Exim Pte Ltd [1994] 1 SLR(R) 932 at [51], Ng Kum Peng v Public Prosecutor [1995] 2 SLR(R) 900 at [43].

136 As stated by Belinda Ang J in *Mak Chik Lun*, if the borrower can show that a person lends a sum of money in consideration of a larger sum being repaid, the person is presumed to be a moneylender under section 3 of the Moneylenders Act. It is then for the lender to rebut the presumption by showing the Moneylenders Act does not apply. The reference to "a larger sum being repaid" in section 3 is not confined to repayment in money only. If the repayment is in kind or partly in cash and in kind, it may still constitute a "larger sum" for the purpose of section 3 because otherwise, it would be easy to circumvent that section: see Woo Bih Li J in *Ding Leng Kong v Mok Kwong Yue* [2003] 4 SLR(R) 637 at [44].

137 In determining whether an impugned transaction involved moneylending, the approach taken by Branson J in *Olds Discount Co Ltd v John Playfair Ltd* [1938] 3 All ER 275 was cited in *Nissho Iwai International (Singapore) Pte Ltd v Kohinoor Impex Pte Ltd* [1995] 2 SLR(R) 170 by Lim Teong Qwee JC at [15]: Branson J stated at 277:

... if it be the fact that the agreement entered into between these parties was an agreement for the purchase of book debts, the agreement is a perfectly good and lawful agreement, notwithstanding that the operative reason in the minds of the defendants for entering into it was that they desired to raise money as a temporary matter in the same way as they would have raised it if they had merely entered into a transaction of loan. *In other words, it is in the nature of the agreement entered into, and not its object, at which the court has to look in order to decide whether in any particular case the agreement is a moneylending agreement or otherwise*.

(emphasis added)

138 There are significant indicia in this case which fit the offending criterion reviewed above. Although this appears to be a one-time transaction, KC Tan and Melvin had never met AA before 5 June 2009 (although there was some very tentative evidence of AA and KC Tan having met before, the nature of that meeting was more of a fleeting one at some function, they certainly were not well known to each other). As laid down in *Litchfield*, AA was, to all intents and purposes, "all and sundry". KC Tan and Melvin knew before they entered into the transaction that AA was desperate for a short term loan. On the facts as I have found the Plaintiff entered into the transaction as a loan with security. It never really intended to purchase the Property. I accept that they and their lawyers then structured the deal as an apparently normal option to purchase property but with an accompanying Deed of Settlement to cater for the repayment terms. I have also found their lawyer, CS Lee, was aware of and thought about the problem of the transaction being impugned as a moneylending transaction. The return for the loan of 60 days at 6% per month or 72% per year can be considered extortionate or usurious, as was the ability to take over the security at a not insignificant undervalue, if the "loan" and "compensation" was not repaid within the 60 day period. Unlike the *City Hardware* and *Donald McArthy* cases, there was no existing business relationship between the parties nor was there any contemplated future business relationship, transactions or operations. The 1st Defendant was a company with a $1 paid up capital, its only shareholder and director was AA and AA was in fact the one who was in need of money. There can be no doubt that AA was the sole directing mind and will of the 1st Defendant.

139 However, despite the above, I have come to the conclusion, very reluctantly, that this transaction was not the kind of transaction that the Moneylenders Act was meant to prohibit.

(a) First I draw guidance from the comments of Rajah J in *City Hardware* which was approved by the Court of Appeal in *Donald McArthy*. AA is no babe in the woods, he is an experienced business entrepreneur and moreover had the benefit of advice from his lawyer and his CFO before he signed the 1st Option and the Deed of Settlement. In my judgment, these two factors kept this transaction from falling within the Moneylenders Act. It was in a commercial context of a loan with security between corporations, even though it was AA who was the directing will and mind of the 1st Defendant; it was not the kind of transactions the Moneylenders Act was meant to catch, nor was AA the kind of person the Moneylenders Act was meant to protect. He knew the commercial risk he was taking, but he miscalculated on his ability to repay the loan within the 60 day period and he did what one would expect him to do, he proposed ever higher "compensation" on each default which the Plaintiff accepted, until it decided it could make much more money due to the significant rise in property values and therefore decided to push through with the purchase of the Property.

(b) Secondly, and perhaps to underscore the above, the Moneylenders Act introduced a new concept of "excluded moneylender" which is defined, *inter alia*, as a party who lends money solely to corporations: section 2(e)(iii)(A). Even though in my judgment above I have treated AA as being synonymous with the 1st Defendant, the transaction here was nonetheless made between corporate entities with their legal, and in the case of the 1st Defendant, with its financial, advisers at hand. AA, as the only shareholder and director of the 1st Defendant, was a seasoned businessman. If a literal interpretation of the Moneylenders Act is taken, even if the transaction was in substance a loan to the 1st Defendant, the Plaintiff would be an "excluded moneylender" under the Moneylenders Act. The result would be the same if a purposive interpretation was adopted. However I must not be taken to say that so long as a borrower is a corporation, no matter what the circumstances or nature of shareholding, the excluded moneylender exception would apply. Depending on the facts and circumstances, it may.

(c) I make this ruling despite the 2nd Intervener's forceful submissions that such an interpretation would be entirely contrary to the legislative intent of the Moneylenders Act to "deregulate the lending to money to businesses which might be in the form of companies or partnerships for the legitimate purposes of these businesses, to meet their legitimate business needs" and that the Plaintiff should not be allowed to hide behind the 1st Defendant, a corporation, to avoid the application of the MLA to what was essentially a loan to an individual (AA). I must admit I was initially of the view that rapacious conduct such as that practised by the Plaintiff should not be allowed. However, as I have alluded to before, unconscionability and business are not good bedfellows. It still remains true that the law will not, subject to established exceptions, intervene just because a party has made a contract on unfavourable terms.

140 The 1st Defendant and 2nd Intervener therefore fail in this defence and contention that the 1st Option and Deed of Settlement are prohibited by the Moneylenders Act and therefore unenforceable.

The 1st Intervener

141 The 1st Intervener has some issues with the 1st Defendant and perhaps vice versa, but they are not the subject of these proceedings. The 1st Intervener has no objections to HLF and the 2nd Intervener's pleaded positions. The issues extant between the Plaintiff and the 1st Intervener were agreed, prior to the hearing, as:

(i) Has there been a wrongful rejection by the Plaintiff of the purported cancellation of the 1st Option by the 1st Defendant?

(ii) Whether the purported sale of the Property by the 1st Defendant to the Plaintiff at an undervalue was in contravention of section 340 of the Companies Act?

(iii) Did the Plaintiff induce the 1st Defendant to act in breach of its contractual obligation to the 1st Intervener?

Mr Tan sensibly asked for and was granted a reservation of their position vis-*a*-*vis* the 1st Defendant. At the hearing and submissions, the 1st Intervener took objection to the Plaintiff's claim for specific performance on two grounds. First, the purported sale was at an undervalue that if carried through would obliterate any benefit of the 1st Intervener's Charge and was a fraudulent transaction in contravention of section 340 of the Companies Act. Secondly, the Plaintiff induced the 1st Defendant to act in breach of its implied obligations to the 1st Intervener.

142 The following are not in dispute. On 2 June 2009, the Plaintiff made a search on the 1st Defendant and must have seen the 1st Intervener's charge. On 8 July 2009, the Plaintiff obtained a copy of the Charge Deed. When the 1st Intervener discovered the existence of the 1st Option when it carried out a search on the Property, it immediately wrote to the Plaintiff on 30 July 2009 putting them on notice that $20 million was at a gross undervalue. The Plaintiff did not reply. On 20 August 2009, before the Plaintiff exercised the 1st Option, it carried out another search in respect of "Company Charges Transactions" of the 1st Defendant.

143 The 1st Intervener contends that the 1st Defendant's sale of the Property at an undervalue is a transaction for a fraudulent purpose, in contravention of section 340 of the Companies Act. Section 340(1) stipulates that in any proceedings against a company, where it appears that any of its business has been carried on with intent to defraud creditors of the company or for any other person or for any fraudulent purpose, the court may, on application of any creditor of the company, if it thinks it is proper to do so, declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court shall direct. A plain reading of that section shows that it has no applicability to the facts of this case and I need say no more. The 1st Intervener's disputes with AA and/or the 1st Defendant are not before me and the 1st Intervener is free to pursue whatever claims or remedies it alleges it has against AA or the 1st Defendant elsewhere.

144 The second ground cannot hold because on the evidence there was clearly no inducement by the Plaintiff of the 1st Defendant at all. It was the 1st Defendant who sought out the Plaintiff for a short term loan. Further I do not think that on the facts of this case, even though the Plaintiff made the searches that they did on the charge and the charge documents, there was an implied obligation or duty on the Plaintiff to only deal with the 1st Defendant bearing in mind the latter's obligations to the 1st Intervener or to see that it bought the Property at the market price: see *eg, Beckkett Pte Ltd v Deutsche Bank AG & Anor* [2009] 3 SLR(R) 452 at [114].

145 On the issues before me, there are no claims by the 1st Intervener against the Plaintiff or AA except to argue against the Plaintiff's claim for specific performance. In this judgment and on the orders I am going to make, as far as the 1st Intervener is concerned, the result it desires is achieved. I do not think I should say more than this ere I prejudice any of its possible claims against any of the parties hereto and to leave open the 1st Intervener's claims it may wish to make post this judgment against any parties. In this case Mr Tan has reserved his position and limited his cross-examination to eliciting relevant facts to the issues before me, but no more.

The 2nd Intervener

146 I now make my findings of facts in relation to the 2nd Intervener, TC. I found TC to be an intelligent and very straightforward witness. He answered the questions honestly and to the point without any ducking or weaving. It is noteworthy that no one, other than Mr Lee SC, had any questions to ask of him. His cross-examination was short, taking just over 7 pages in the Notes of Evidence, starting around 5.52 pm and ending by 6.08 pm on 9 July 2010. Maybe it had something to do with the hour of the day but it was probably because everyone accepted that he had innocently walked straight into this mêlée. I questioned him at some length and it only served to confirm my views of him and the reliability of his evidence.

147 TC and his family have invested previously in good class bungalows in Singapore and abroad. TC was introduced to the Property by his property agent, Kelvin Tan ("Kelvin"). Kelvin came to know about the Property from one Amy Tee, who was put forward as the vendor's representative and who had full authority to negotiate the sale. AA tells me that Amy Tee is his private banker. Kelvin Tan told TC about the Property on 6 October 2009 and TC viewed the Property the next day with Kelvin and two of Kelvin's colleagues. TC liked the Property very much. He was told the purchase price was $38 million and that it was a "hotly contested" property. Kelvin then negotiated directly with Amy Tee and they eventually agreed on a purchase price of $37 million. I accept TC's evidence that since he

found this Property very desirable and as it was being hotly contested, he had to be decisive and agreed to pay an option fee of $1 million to close the deal. I accept that TC had no time to engage or consult lawyers or do any preliminary searches before paying the option fee. I also find that this is not unusual and TC cannot be criticised for doing this. The 1st Defendant granted TC the 2nd Option on 7 October 2009, payment of $1 million for the option fee was made on 8 October 2009. It is not disputed that TC had no personal contact or dealings with AA or the 1st Defendant or Amy Tee or the Plaintiff.

148 As stated in the preceding paragraph, TC had purchased good class bungalows before and his evidence was that $37 million for the Property was a fair price. This purchase price of $37 million on 7 October 2009 goes to show that the price had certainly moved up since the Colliers Valuation of $29 million as at 15 April 2009.

149 After TC paid the $1 million option fee, he engaged lawyers and sometime in the afternoon of 12 October 2009 he was informed of the caveats registered against the Property. He queried Amy Tee through Kelvin and was informed that the caveats were in respect of some loan and there was an agreement to discharge the caveats shortly. TC also received repeated assurances that the misunderstanding with the Plaintiff would be sorted out. TC was now caught in a bind. If he did not proceed, his $1 million was "gone". Since he had received repeated assurances from the 1st Defendant that the caveats would be withdrawn and his option stipulated that he would get title free from all encumbrances he decided to go ahead. I believe his explanation and accept that being caught in this predicament, he acted in good faith to go ahead as the lesser of two evils. TC exercised the 2nd Option on 6 November 2009 by paying the further stipulated sum of $850,000 which together with the option fee, came up to 5% of the purchase price. He stamped the 2nd Option on or around 20 November 2009 and paid the stamp duty of $1.1 million. Whilst some may question the paying of such large sums of money to preserve the $1 million, I should mention that TC is a managing director of an investment management division in Goldman Sachs, and he had valid reasons to take the course that he did.

150 No one questions TC's *bona fides* in entering into the contract with the 1st Defendant. He only got to know about AA "after the fact". He had no knowledge of what had transpired between the Plaintiff and the 1st Defendant and AA, or indeed between AA and the 1st Intervener. He never met Amy Tee although she was a signatory, together with AA, on his option. TC obviously liked the Property very much and described it as a well shaped and well sited elevated piece of land in "...a quiet, highly exclusive and sought-after enclave". He and his family have plans to construct a new bungalow on this piece of land for their own personal enjoyment and he has engaged a well-known architect to do so.

151 TC says, and I accept his evidence, that litigation is something he tried to avoid. He tried talking to the parties to amicably settle the matter since his purchase price would comfortably cater for the mortgage and competing claims and still leave a surplus for AA. The 1st Intervener supported TC's claim for obvious reasons as did the 1st Defendant until its recent change of mind which I shall deal with below. The agreed issue between the Plaintiff and the 2nd Intervener is:

(a) Does the Plaintiff have a prior valid and enforceable right and interest in the Property?

In my judgment and on my findings of fact, the answer to this issue must be no. For the reasons given herein, the Plaintiff is not entitled to specific performance and therefore has no equitable

interest in the Property, (see below). The Plaintiff has a cause of action for breach of contract and a claim in damages against the 1st Defendant. As between the 1st Defendant and the 2nd Intervener, the agreed issues are:

(b) Was the 2nd Option given to the 2nd Intervener on the basis that the Plaintiff will agree to withdraw their caveat option and their claim to an option on the Property?

(c) If so, is the 1st Defendant's only obligation to refund to the 2nd Intervener the option fee paid by him to the 1st Defendant?

(d) Whether the 2nd Intervener is entitled to an order for specific performance of his contract with the 1st Defendant?

(e) Whether the 2nd Intervener is entitled to a refund of all sums paid by him pursuant to his contract, including the option fee of $1 million?

(f) Whether the 2nd Intervener is entitled to damages (to be assessed) against the 1st Defendant for breach of contract?

The answer to issue (b) above is clearly no, the express terms of the Option are clear and the 1st Defendant did not adduce any evidence to this effect. Issue (c) does not arise. To answer the above issues (d), (e) and (f), I must first deal with the issue whether the 1st Defendant could have passed any interest to the 2nd Intervener after having granted the 1st Option to the Plaintiff.

Did the 1st Defendant have any interest to pass to the 2nd Intervener on 7 October 2009

152 My decision in *Cheong Lay Yong v Muthukumaran s/o Varthan & Anor* [2010] 3 SLR(R) 16 was cited for the proposition that following, *inter alia*, *Lysaght v Edwards* [1875] 2 Ch 499 at 506 "...the moment [a purchaser has] a valid contract for the sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser...". The question then arises, once the Plaintiff exercised the 1st Option could the 1st Defendant give a second option to a second purchaser? The Plaintiff contends the 1st Defendant could no longer do so as the beneficial ownership of the Property had already passed to the Plaintiff.

153 The learned judge in *Lysaght v Edward* however went on to state at 507, that a "valid contract" means "...in every case a contract sufficient in form and in substance, so that there is no ground whatever for setting it aside as between the vendor and purchaser – a contract binding on both parties". This was expanded upon by Lord Parker in the Privy Council decision of *Mildred Howard v William Miller* [1915] AC 318 at 326:

> It is sometimes said that under a contract for the sale of an interest in land the vendor becomes a trustee for the purchaser of the interest contracted to be sold subject to a lien for the purchase-money; *but however useful such a statement may be as illustrating a general principle of equity, it is only true if and so far as a Court of Equity would under all the circumstances of the case grant specific performance of the contract*.
>
> (emphasis added)

My judgment in *Cheong Lay Yong's* case at [56] is to the same effect: "... once a contract for the sale of real property, *which can be enforced by specific performance*, has been entered into..." (emphasis added)

154 The Singapore Court of Appeal in *Chi Liung Holdings Sdn Bhd v Attorney-General* [1994] 2 SLR(R) 314 similarly premised the passing of the equitable interest on the availability of specific performance to the purchaser in the contract of sale and purchase of property. The Court of Appeal quoted *Central Trust and Safe Deposit Company v Harvey G Snider* [1916] 1 AC 266 at 272, another Privy Council decision, with approval:

> If, for some reason, equity would not enforce specific performance, or if the right to specific performance has been lost by the subsequent conduct of the party in whose favour specific performance might originally have been granted, the vendor or covenantor either never was, or has ceased to be, a trustee in any sense at all.

This principle is now settled law. *Lysaght v Edwards* has been referred to in another Court of Appeal decision, *Cheng-Wong Mei Ling Theresa v Oei Hong Leong* [2006] 2 SLR(R) 637 where it stated at [17] that if for any reason specific performance is not available, the purchaser is not deemed to have been the owner of the property. This principle can be found in *Tan Sook Yee* at p 418 and is also the position in Australia: see *Bahr v Nicolay* (1988) 62 AJLR 268.

155 As I have found and held that the Plaintiff is not entitled to specific performance, the 1st Defendant's grant of an option to the 2nd Intervener was not subject to the Plaintiff's prior equitable rights, as it had none. There was therefore no prior equitable interest of the Plaintiff that would have been a competing equity or impediment to the 1st Defendant issuing the 2nd Option on the facts of this case.

156 The Plaintiff also argues that under the Torrens System, it is the lodgement of caveats that determines the priority between two competing interests, citing J Baalman, *The Singapore Torrens System; being a commentary on the Land Titles Ordinance 1956 of the State of Singapore* (Singapore Government Printer, 1961). This submission cannot be right because first of all the caveat itself is not the interest, it is only a notification on the land register of a claim of the person lodging the caveat of having an interest in the land in question. That person will be notified if there is another caveat lodged or a challenge is mounted and calling for its removal. In *Cathay Theatres Pte Ltd v LKM Investments Holdings Pte Ltd* [1998] 1 SLR(R) 234, Thean JA quoted (at [31]) the Court of Appeal decision in *Alrich Development Pte Ltd v Rafiq Jumabhoy* [1993] 1 SLR(R) 598 where Warren Khoo J stated at[37]:

> A caveat has been described as nothing more than a statutory injunction to keep the property in status quo until the court has had an opportunity of discovering what are the rights of the parties: per Owen J in *In re Hitchcock* (1990) 17 WN (NSW) 62. It is not for the purpose of giving notice to the world of a claim by the caveator to an estate or interest in land, but for the purpose of prohibiting the caveator's interest from being defeated by the registration of a dealing without the caveator having had an opportunity to invoke the assistance of the court to give effect to his interest.

Thean JA in *Cathay Theatres* further stated the purpose of a caveat at [32]:

> Thus, the purpose of the caveat is to protect whatever interest the caveator claims he has in the property and to preserve the status quo by preventing registration of subsequent dealings

which, by virtue of the indefeasibility of title by registration conferred on a new registered owner under section 46 of the Land Titles Act, would otherwise extinguish the rights of the caveator without first giving him a chance to prove his claim.

Tan Sook Yee at p 359 also states that: "[t]he primary function of the caveat is to prevent the registration of dealing which would adversely affect the right of the caveator without first giving him a chance to prove his claim..." and the Plaintiff's caveats "... neither evidences an interest in land, nor does it create an interest in land". Accordingly if, for argument's sake, an equitable interest passed to the 1st buyer who lodged his caveat, and a conveyance is completed with a second buyer, because the caveator/1st buyer did nothing for more than 30 days after receiving a notice under section 120(1) of the Land Titles Act (Cap 157, 2004 Rev Ed), absent any issue of fraud, there can be little doubt that the second buyer becomes the new registered proprietor on the land register who now holds both the legal and equitable interest in the property. That must be the effect of section 121(1)(a) which provides that the caveat in the circumstances above lapses at the expiration of 30 days and ceases to affect the property and section 47 of the Land Titles Act which allows anyone dealing with the registered proprietor to get a good title free of any trust or other unregistered interest, any rule of law or equity to the contrary notwithstanding. Secondly, on the authorities reviewed earlier, the Plaintiff did not have any prior equitable right as it was not entitled to specific performance.

The Effect of the Section 45 Bankruptcy Act Interim Order

157 Reliance has been placed by the 1st Defendant on the fact that the Certificate of Title of the Property shows that the 1st Defendant holds the Property "on trust" for AA. It is not disputed that AA is the only shareholder and director of the 1st Defendant and that its issued and paid-up capital is $1. I have also stated that there was no application before me to stay these proceedings as a result of the section 45(3) IVA Order despite AA and/or his nominees being given the opportunity to do so. Unless there is such an application, supported by a proper affidavit, I cannot be expected to deal with factual issues or disputes by statements from the Bar. For example, the 2nd Intervener does not accept the validity of the Trust Deed pointing out that one is dated 2 August 2006 and another is dated 4 September 2006 and each of them were witnessed prior to the date of the Deeds, *ie*, on 29 June 2006. I had specifically directed on 18 May 2010 that the 1st Defendant's solicitors make available the Trust Deed to all parties early so that disputes like this can be resolved in a timely fashion. Another example is Mr Chan's statement that the Property was now worth more than $37 million; however Mr Chan very properly added that he did not have a valuation to back that up.

158 The "indefeasibility of title" concept under our Land Titles Act and indeed the Torrens System is well known to all students of land law. I have referred to section 47(1)(c) of the Land Titles Act above. Section 166(4) of the Land Titles Act states that "...[a]ny purchaser dealing with the registered land which is held in a fiduciary capacity shall not be concerned to enquire whether a dealing of that land is within the powers of the registered proprietor and the purchaser is entitled to assume that the registered proprietor has all the powers of disposition of a beneficial owner and as the absolute proprietor of the estate or interest in question". It is clear that neither the Plaintiff nor the 2nd Intervener needed to be concerned about the power of the trustee who is also the registered proprietor to transfer good title: see also Yeo Kia Yong & Anor v Yeo Kia Hock [1998] 2 SLR(R) 602 at [36]-[37]. Moreover, AA himself chose not to lodge any caveat and he signed the options granted to the Plaintiff and the 2nd Intervener. I agree with counsel's submissions that on the facts before me, a fortiori since AA and/or his nominees chose not to take out an application before me despite being given the opportunity and time to do so, a determination that AA has an interest in the Property and

therefore the section 45(3) IVA Order taken out by AA operates to stay this action because of such an interest cannot be right in view of the statutory provisions of the LTA. AA was in court throughout these proceedings and held his peace, preferring to direct the contest against the other parties. As matters stand, I also accept counsel's submission that if AA is subsequently made a bankrupt, his trustee in bankruptcy cannot stand in a better position than AA vis-a-vis these parties before me. If it comes to that, the trustee in bankruptcy has his rights in law to make such applications as he deems fit.

1st Defendant's Application to Amend its Case

159 I find it quite incredible that AA, in the 1st Defendant's Supplemental Submissions dated 21 July 2010, (the third round of submissions), wishes to amend the 1st Defendant's Case and ask for a stay of proceedings on the ground that the Property is caught within the section 45(3) IVA Order. The basis is that the 1st Defendant holds the Property on trust for AA. The amendments sought are:

(a) Alternatively, the 1st Defendant was unable to give title to the Property that was in order and free from encumbrances, contrary to the 2nd Option granted on 7 October 2009 and in the circumstances the said option lapsed or was not capable of performance and the 2nd Intervener should only be entitled to repayment of the option fee.

(b) Further and/or alternatively, the 2nd Intervener knew about the existing caveats when he exercised the said option and well knew that the sale could not take place if the caveats were not lifted. The 1st Defendant has no control over the actions of the Plaintiff.

160 Some history of these proceedings is necessary. At the first interlocutory hearing of this matter on 5 March 2010 before me, with numerous applications being made by various parties, I expressed my doubts as to whether the matter could proceed as an originating summons given the disputes on facts evident from the affidavits filed to date. Unusually, all counsel asked me not to convert this into a writ action as the delays caused thereby would push the resolution of the disputes too far back. There were many competing claims to the Property or the proceeds and the parties needed a quick decision.

161 I was persuaded, reluctantly, I must admit at first, to allow this to proceed as an Originating Summons with cross examination of witnesses. After discussion with counsel I issued directions that simplified Statements of Claims and Defences would be filed by the parties as against competing interests, counsel were to agree a list of issues of fact and/or law as between the various parties, (which would therefore limit the scope of cross-examination), dates were set for final affidavits and short replies to be filed, opening statements were to include contentions of facts and points of law with authorities, an agreed list of witnesses and estimated cross-examination times by different counsel were to be filed no later than 3 days before the hearing and after checking diaries, the Originating Summons was set for hearing at the end of April 2010. There was inevitable slippage in the hearing dates because of changes in lawyers as one Senior Counsel after another fetched up at the frequent PTCs that had to be held to bring this Originating Summons into preparedness for a hearing. Mr Lee SC appeared as late as 11 June 2010 when the hearing was fixed to start on 28 June 2010. At the end, the hearing was completed quite smoothly without the dire chaos that I was dreading. I can only say I am greatly indebted to all counsel who co-operated to make this possible, including clearing their diaries at great inconvenience to themselves. The documentation, the list of issues and witnesses and the orderliness of the evidence taking is testimony to their professionalism and co-operation. So for this application to come in at this time, after all that had occurred and an agreed

list of issues of fact and law, is nothing short of incredible. I cast no blame on Prof Tan SC or Mr Balachandran who are constrained, despite I am sure great personal embarrassment, to put forth their client's application as best they can, but AA cannot be allowed to amend the 1st Defendant's case at this late stage in the same way he filed his affidavits and gave contradictory answers, and in fact new versions, in cross-examination. The 1st Defendant chose not to cross-examine TC whose evidence is therefore unchallenged as far as the 1st Defendant is concerned. The 1st Defendant also did not call Amy Tee to give evidence. More importantly the amendment contradicts the clear wording of the 2nd Option which provides that title is to be free from encumbrances. Insofar as the first amendment is concerned it is doomed to failure. The second amendment suffers from the same defects and all the more so on the unchallenged evidence given by TC. There is no evidence to support either amendment and they must be disallowed.

162 For all the reasons I have set out, this application by the 1st Defendant to amend his case must be rejected. It is obvious that it would do irreparable harm to the other parties which cannot be compensated by costs.

Conclusion

163 I therefore find and hold:

(a) For the reasons set out herein, the Plaintiff is not entitled to a decree of specific performance;

(b) As the Plaintiff agreed to a payment in lieu of its contractual rights, there is no issue of restitution to it, and the Plaintiff is limited to its claim against the 1st Defendant in damages for breach of contract; damages are to be assessed by the Registrar; for the avoidance of doubt I make no ruling as to whether AA is additionally liable to the Plaintiff as that was not an issue before me;

(c) The Plaintiff is to withdraw its caveats lodged against the Property forthwith;

(d) The 1st Defendant's claims against the Plaintiff to recover damages and interest, including interest payable to the 2nd Defendant and any claims for damages, interest or costs payable by the 1st Defendant to the 2nd Intervener are dismissed;

(e) The 2nd Intervener is entitled to and granted a decree of specific performance and with all the usual default orders if the 1st Defendant fails to execute a valid transfer; completion shall take place as soon as is reasonably practicable, bearing in mind [164] below;

(f) The 2nd Intervener is entitled to any damages caused by the 1st Defendant, including but not limited to additional interest payments if any to discharge HLF's mortgage as a result of delays and to any damages he is entitled to under the 2nd Option; such damages to be assessed by the Registrar if not agreed.

164 HLF's mortgage together with all outstanding interest and costs shall be paid out of the proceeds of sale payable by the 2nd Intervener in the first instance, without prejudice to the 2nd Intervener's rights to seek recovery from any of the parties hereto or otherwise. Calculation of the sum payable to HLF shall be notified to all parties 5 clear days before payment is effected. There shall

be liberty to apply on an urgent basis to me if there is any dispute on the sums payable to HLF.

165 There is no necessity for any orders in respect of the 1st Intervener who is free to take such action as it deems fit against the 1st Defendant, and/or AA and/or the balance proceeds of sale in court.

166 After discharging the mortgage and all sums outstanding thereunder to HLF, the 2nd Intervener shall pay the balance of the purchase price into Court pending further order. Any party having a claim to these funds shall make an application to court and serve the papers on the relevant parties, including the 1st Defendant and AA or his solicitors, Shook Lin & Bok LLP.

167 There shall be liberty to apply.

168 I shall hear the parties on costs, interest or any ancillary or further orders required at a date to be fixed by the Registry. It remains for me to thank counsel for the co-operation and hard work put in by all of them to complete this matter in the time it took and I am indebted to them for their very helpful and concise submissions.

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