IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1986] SGHC 52

ORIGINATING SUMMONS NO 654 OF 1983

Between

GROUNDS OF DECISION

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Orchard Twelve Investments Pte Ltd ;v Golden Bay Realty Pte Ltd

[1986] SGHC 52

ORIGINATING SUMMONS NO 654 OF 1983
L P Thean J
27 May 1986

1 By an agreement dated 17 February 1981 (the agreement), Golden Bay Realty, the abovenamed respondents (the vendor) agreed to sell to Orchard Twelve Investments the abovenamed applicants (the purchaser) the whole of the office premises known as Unit No 1205 (subsequently renumbered as 13-05) (the said unit) of a multi-storey shopping and residential building known as `Orchard Towers` situate at Orchard Road, Singapore. At the date of the agreement, Orchard Towers had been completed and the said unit was occupied by a tenant under a tenancy agreement dated 22 December 1978 made between the vendor and the tenant. In fact, a certificate of practical completion of the building works was issued by the architect of the vendor as long ago as 8 September 1975, and a temporary occupation licence for the said unit was issued on that day for a period of six months and thereafter presumably was renewed periodically. As at the date of 17 February 1981, the vendor had already sold quite a number of units of Orchard Towers and a substantial part, if not the whole, of the building had been occupied.

2 The purchase price of the said unit was $3,380,000 payable by 12 progress payments at the times respectively set out in cl 4 of the agreement. As the said unit had been completed and was occupied by the tenant on the date of the agreement, 11 of such progress payments amounting to a total sum of $2,535,000 became due and payable. The whole of this amount, after some delay on the part of the purchaser, was paid on 19 May 1981 together with a sum of $54,894.80 representing interest for late payment. It was agreed between the vendor and the purchaser that as of that date, 19 May 1981, the purchaser took possession of the said unit; as from that date the purchaser received the rent from the tenant and became liable for payment of all outgoings payable on the said unit. There still remained a balance of 25% of the purchase price which, under cl 4(1)(1) of the agreement, was payable on completion of the sale and purchase of the said unit as follows: 20% to the vendor and the remaining 5% to the purchaser`s solicitors as stakeholders to be paid to the vendor only on production of the certificate of fitness for occupation issued by the Assistant Director (Building Control) in respect of the said unit. Under cl 14(1) of the agreement, the sale and purchase of the said unit was to be completed at the office of the vendor`s solicitors within 14 days after receipt by the purchaser of a notice to complete and under cl 14(2) the notice to complete was to be given on or before 31 December 1981.

3 The notice to complete was not given by the vendor by 31 December 1981; nor was it given by 31 December 1982. In fact, after possession of the said unit had been given to the vendor on 19 May 1981 nothing eventful in relation to this transaction occurred until 1983. On 12 January 1983, the certificate of fitness for occupation of Orchard Towers was issued and, in accordance with cl 4(1)(1) of the agreement, 5% of the purchase price amounting to $169,000 was paid by the purchaser to the vendor. Then on 17

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June 1983 the vendor`s solicitors gave to the purchaser`s solicitors notice to complete under cl 14(1) requiring completion of the sale and purchase to be effected within 14 days. The sale and purchase, however, was not completed by the date as required for two reasons: (i) the purchaser requested an acknowledgement for production of prior title deeds which the vendor was not in a position to deliver at that time, and (ii) there was a dispute between them: the purchaser claimed that a sum of $376,874.63 was deductible from the balance of the purchase price as liquidated damages under cl 14(2) and the vendor rejected this claim and insisted on payment of the balance of the purchase price in full. On 1 August 1983 the vendor`s solicitors gave to the purchaser`s solicitors a second notice requiring payment of the full balance of the purchase price, maintaining that the delay in obtaining subsidiary strata certificate of title for the said unit was due to causes beyond the vendor`s control and that by reason of cl 15 the vendor was not liable to the purchaser in damages, and requiring completion of the transaction within two weeks. The purchaser disagreed and refused to complete the purchase by the date as required; and no completion took place. On 26 August 1983, the purchaser took out this originating summons asking for the following reliefs:

> (a) a declaration that the purchaser is entitled to a sum of $409,460.98 as liquidated damages calculated in accordance with cl 14(2), and
>
> (b) an order that the vendor complete the sale upon the purchaser paying to the vendor $267,039.02 being the balance of the purchase price less the said liquidated damages.

4 Subsequently, however, the parties reached agreement as to the terms on which the sale and purchase should be completed and it was completed on 9 January 1984. Hence, the only outstanding claim before me is the liquidated damages under cl 14(2). The vendor disputes the right of the purchaser to such

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liquidated damages and two issues arise: first, whether the payment of liquidated damages under cl 14(2) is penal in nature, and secondly, whether the delay in completing the sale of the said unit to the purchaser was due to causes beyond the control of the vendor as provided in cl 15.

5 On the first issue it is necessary to set out verbatim cl 14 of the agreement which is as follows:

> *(1) The sale and purchase of the said unit shall be completed at the office of the Vendor`s solicitors, Messrs Lee & Lee, fourteen (14 days) after receipt by the Purchaser or his solicitors of the notice to complete from the Vendor or the Vendor`s solicitors such notice to be accompanied by the certificate of the Vendor`s architect that the Temporary Occupation Licence or Certificate of Fitness for Occupation has been obtained for the said unit, and subject to cl 2 hereof, after receipt by the Purchaser or his solicitors of the notice from Vendor`s solicitors that the Subsidiary Strata Certificate of Title has been issued for the said unit. On completion, the Vendor shall execute in favour of the Purchaser a transfer or lease, as the case may be, of the said unit sold, such transfer or lease to be prepared by and at the expense of the Purchaser.*
>
> (2) The said notice to complete shall be given by the Vendor on or before 31 December 1981. If the Vendor shall fail to give the said notice to complete on the date fixed for completion the Vendor shall pay to the Purchaser liquidated damages calculated from day to day commencing from the date when such notice to complete should have been given at the rate of 9% (9) per annum on a sum equal to 85% of the purchase price, such interest may be deducted from any instalment due and payable to the Vendor.

6 The authority in point in relation to the first issue is clearly ***Phoenix Heights Estate v Lee Kay Guan & Anor*** [1982-1983] SLR 20 (PC). In that case, the vendor, a housing developer, by an agreement dated 26 January 1973, sold to two purchasers jointly one of its houses under development and the agreement provided for payment of the purchase price by instalments, and in accordance therewith the purchasers had paid to the vendor 95% of the purchase price, leaving 5% thereof to be paid on completion. Under the agreement,

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completion was to take place within 14 days after receipt by the purchasers of the notice to complete from the vendor accompanied by certain documents, and such notice to complete was to be given by the vendor on or before 30 June 1973 or such other subsequent date as may be appointed by the Controller of Housing; and if the vendor should fail to serve the notice to complete on the date appointed, the vendor would be liable to pay to the purchasers liquidated damages as provided therein. Pursuant to the agreement the Controller appointed 31 December 1973 as the date by which the notice to complete should be given. There was considerable delay in completing the house, and on 28 November 1974, the vendor obtained a temporary occupation licence permitting the house to be occupied and offered to deliver possession of the house to the purchasers. This offer was at first declined but subsequently was accepted and on 17 April 1975 the purchasers took possession of the house. Only on 7 December 1975 did the vendor serve on the purchasers the notice to complete and the sale was subsequently completed. Soon thereafter the purchasers instituted proceedings against the vendor claiming liquidated damages under cl 11 of the contract for the period from the appointed date to the date on which the notice to complete was served. Clause 11, so far as relevant, is as follows:

> *The sale and purchase herein shall be completed at the office of the Vendor`s Solicitors Messrs Guok & Ganesan of No 11, D`Almeida Street, Singapore fourteen (14) days after the receipt by the Purchaser or his Solicitors of the Notice to Complete of the Vendor`s or of its Solicitors such notice to be accompanied by ...*

7 The said Notice to Complete shall be given by the Vendor on or before 30 June 1973 or such other subsequent date or dates as may after the date hereof be appointed by the Controller of Housing. If the Vendor shall fail to give the said Notice to Complete on the appointed date the Vendor shall pay to the Purchaser liquidated damages calculated from day to day in respect of the period commencing from the appointed date up to the date when the said Notice to

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Complete shall have actually been given at the rate of nine per centum (9%) per annum on the purchase price such interest to be paid and deducted from the balance of the purchase price payable on completion.

8 It is significant to note in passing that this clause is very similar to cl 14 of the agreement. The vendor admitted liability for payment of liquidated damages from the appointed date to the date when the temporary occupation licence was issued but resisted the claim for liquidated damages for the period thereafter. The claim was dismissed by the High Court [see [1978-1979] SLR 237], but on appeal, the Court of Appeal allowed the claim: see [1978-1979] SLR 102 . Wee Chong Jin CJ in delivering the judgment of the court said, at p 105:

> *In our opinion the agreement between the parties is similar to a building contract. The contract contains a definite date from which liquidated damages for delay in giving a notice to complete are to run. The provision in question, having regard to all the terms of the contract, is clearly a genuine pre-estimate of the loss which is likely to flow from a breach of the contract and accordingly is recoverable without proof of the actual loss suffered. The fact that it is difficult to ascertain the loss caused to the purchaser by delay in giving a notice to complete indicates that the provision to pay a sum as specified in cl 11 is in the nature of liquidated damages so long as the sum specified as payable is not excessive.*

9 Against that decision, the vendor appealed to the Judicial Committee of Privy Council which dismissed the appeal. In disposing of the arguments advanced on behalf of the vendor that the provision for payment of liquidated damages was penal in nature, Lord Brightman (who delivered the judgment of the Board) said:

> *An argument that the agreement for payment of liquidated damages is a penalty faces a formidable problem at the outset. The sale agreement takes a statutory form, in the sense that it was bound to follow the precedent laid down in 1967 by the Minister of Law and National Development, acting under his*

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> *statutory power to make rules to provide for the form of contract to be used by a licensed housing developer. The vendor`s argument is therefore an invitation to the Board to find that the official form of contract from which prima facie the vendor and the purchasers could not lawfully depart, and which must have been used in countless transactions over the last 15 years, is nevertheless unconscionable and void.*

10 Even if that problem is surmounted, and if it is also assumed that the principle of ***Rowe*** `scase forms part of the law of Singapore, and that the delay was not the fault of the vendor, their Lordships see a fundamental objection to the vendor`s argument. The argument for liquidated damages was not directed to different categories of breach of contract, but to a single sort of breach, namely, a delay in serving notice to complete. As their Lordships have already indicated, the purchasers were not bound to pay the least attention to an offer of vacant possession unless and until notice to complete was served. The offer in the present case of vacant possession before completion was never a part of the sale agreement, but was an event altogether outside the contract. It cannot therefore be taken into account in assessing the validity of the agreement for compensation for delay in serving a notice to complete.

11 Mr Price on behalf of the vendor seeks to distinguish that case from this and argues that cl 14(2) is penal in nature. He points out that in ***Phoenix Heights,*** the contract was made while the building work was under construction and the contract was treated as `similar to a building contract` by the Court of Appeal; the vendor was guilty of long delay in completing the building work; there was no provision for delivery of possession of the property in question pending completion of the sale and purchase - possession was to be delivered on completion - and the vendor admitted liability for delay for a period of about 11 months. Hence, the decision in ***Phoenix Heights*** that the payment under cl 11 was not a penalty does not apply. In this case, Mr Price submits, the factual circumstances are entirely different: at the time when the agreement was made,

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Orchard Towers had been completed and, insofar as the said unit was concerned, the temporary occupation licence had been issued and the said unit was occupied by the tenant. What the purchaser had agreed to purchase under the agreement was in fact a completed unit. Under the agreement possession of the said unit was required to be delivered upon payment of 75% of the purchase price, and possession in fact had been given to the purchaser since 19 May 1981, and the purchaser had been in receipt of rent therefrom. I accept the factual differences between the two cases. But in my view, ***Phoenix Heights*** in principle is indistinguishable from this case and the decision in that case applies. In both cases, the forms of contract were based on statutory forms. In ***Phoenix Heights,*** the contract was based on a statutory form prescribed by the Housing Developers Rules 1965 (as subsequently amended) made under s 21 of the Housing Developers (Control and Licensing) Ordinance 1965, and in the present case, the agreement was based on a statutory form prescribed by the Sale of Commerc ial Properties Rules 1979 made under s 9 of the Sale of Commercial Properties Act 1979. The two contracts have a great deal of similarity; the provisions for payment of liquidated damages in both are, in substance, almost indistinguishable, though the formulae for calculating the amounts are different.

12 Mr Price places great stress on the provision of the agreement requiring possession of the said unit to be given to the purchaser and the fact that the possession was given to the purchaser on 19 May 1981 and that since then it had been receiving the rent from the tenant. The purchaser therefore had suffered no damage. This in fact is what the High Court decided in ***Phoenix Heights*** which was not accepted by the Court of Appeal: see [1978-1979] SLR 102 . It seems to me that the answer to Mr Price`s argument is plainly this. The agreement takes a statutory form and the scheme of payment thereunder

dictates that upon payment of 75% of the purchase price the purchaser is entitled to possession; that the balance of 25% is to be paid as follows: 5% upon production of certificate of fitness for occupation and 20% upon completion when the purchaser receives the title to the property, and that if the notice to complete is not given by a certain date (which would mean a delay in completion) liquidated damages at the rate of 9% per annum on 85% of the purchase price accrues. The purchase consideration is fixed on that basis and is part of the transaction agreed to by the parties. It may not be irrelevant to add the parties are commercial organisations and they obviously had done their respective calculations in a businesslike manner on the basis of such scheme of payment.

13 On the authority of ***Phoenix Heights***

14 I am of the opinion that cl 14(2) is not penal in nature. This is sufficient to dispose of the first issue; but a point has been raised in the course of arguments which I think should be considered. In ***Phoenix Heights,***

15 Lord Brightman referred to the fact that the contract there was based on a form statutorily prescribed and that being so was a `formidable problem` confronting the argument advanced on behalf of the vendor that the payment of liquidated damages under the contract was a penalty. Mr Price submits, and I agree with him, that the `formidable problem` so posed had unfortunately not been decided, but avoided, and did not form part of the ratio decidendi of that case. Mr Lowe on behalf of the purchaser, while conceding this, has developed his argument on this `formidable problem`. It is this (if I may summarise it). The agreement follows the form in Sch B prescribed by the Sale of Commercial Properties Rules 1979 (the Rules) made by the Minister for National Development under s 9 of the Sale of Commercial Properties Act 1979 (the

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Act). That being so, the proper approach to adopt in considering the question whether cl 14(2) is penal in nature is to construe the statutory form as such and the construction would then govern the construction of the agreement. The court should not construe individually a specific agreement which is made in a statutory form - particularly in circumstances where the parties are required by law to enter into the agreement in that form. Because the agreement is in a statutory form it is not open to anyone to argue that `what the court must do must be to place itself in thought in the same factual matrix as that in which the parties were` (per Lord Wilberforce in ***Reardon Smith Line v Hansen-Tangen*** [1976] 1 WLR 989 at p 997). To do so would result in contracts based on a statutory form having different meanings and effects. There are two objections to an individual construction of a specific contract. First, it will be contrary to the policy of the Act and the Rules which must be to establish a uniform code subject only to such variation as may be allowed by the Controller of Housing. Secondly, if a specific agreement is construed differently from the statutory form it would be inconsistent to s 5(2) of the Act, which avoids any term or condition of sale that is inconsistent with the terms and conditions of sale prescribed by the Rules.

16 As a matter of construction, the provision of cl 14(2) of the statutory form is quite clear. Clause 14(2) imposes an unqualified obligation on a vendor to give notice to complete on or before a date specified therein and if he fails to do so he is liable to pay liquidated damages from day to day at the rate of 9% per annum on 85% of the purchase price from the date specified in cl 14(1). Clause 14(2) of the statutory form, Mr Lowe submits, is intra vires the Act; it has statutory force and takes effect in precisely the same way as if the provision were contained in a form set out in a schedule to the Act. In consequence, a contract in a statutory form will not have all the incidents of an ordinary contract

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(in a non-statutory form) and in particular will not be subject to the ordinary rule relating to penalty. If such a statutory form of contract when entered into is subject to the ordinary rule in relation to penalty, then different contracts will operate differently depending on individual circumstances; this would be inconsistent with the Act and the Rules. It is therefore not open to a vendor who has entered into a contract in a statutory form (and who is obliged to enter into such form) to say that in the circumstances of the particular case the provision therein for payment of liquidated damages is penal in nature. It can only be successfully attacked on the ground that the provision is ultra vires the Act; but such is not seriously the argument advanced.

17 I think Mr Lowe`s argument is well founded and I agree with him entirely. I have only this to add. It cannot be said that the legislature intended by the Rules to enact or prescribe a form of agreement which contains, inter alia, provisions which may be penal in nature. It must be taken that the legislature in providing for liquidated damages has considered various factors and adopted a formula as set out in cl 14(2) as a genuine pre-estimate of damages.

18 Assuming that the ordinary incidents of contract and in particular the rule of equity as regards penalty apply to the agreement and that ***Phoenix Heights*** is distinguishable from this case, can it really be said that the payment of liquidated damages under cl 14(2) in the circumstances of this case is really a penalty? The principles for determining whether a payment under a contract is penal in nature were laid down by Lord Dunedin in ***Dunlop Pneumatic Tyre Co v New Garage & Motor Co*** [1915] AC 79 and, insofar as they are relevant here, are these: (i) the question whether a sum stipulated is a penalty or liquidated 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

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of the making of the contract and not as at the time of the breach; (ii) to assist the task of construction, two of the tests which have been laid down and are applicable here are: (a) it would be held to be a 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 and (b) it is no obstacle to the sum stipulated being genuine pre-estimate damage that the consequences of the breach are such as to make precise pre-estimation almost an impossibility; that is just a situation when it is probable that pre-estimated damage was the true bargain between the parties.

19 Applying these principles here I can hardly agree with Mr Price that the provision for payment of liquidated damages is penal in nature. Judged of as at the time the agreement was made the amount of liquidated damages is certainly not extravagant or unconscionable; it is only 9% per annum on 85% of the purchase price calculated as from 31 December 1981. I am aware that it has assumed an impressive figure of $376,874.63; but that was because of the delay on the part of the vendor. It is argued that as the purchaser had possession of the said unit and had been receiving rent from the tenant thereof as from 19 May 1981 and thus had the benefit of what it purchased. As I have demonstrated, giving possession of the said unit to the purchaser is part of the scheme for payment of the purchase consideration; if possession is not required to be given the rate of payment of liquidated damages may well be greater as in ***Phoenix Heights*** which was 9% per annum on the full purchase price. It must also be borne in mind that as from the date of possession the vendor had derived considerable benefit from the fact that possession of the said unit had been delivered to the purchaser: the vendor thenceforth had been relieved from payment of all outgoings of the said unit, such as property tax and maintenance and service charges, which are no inconsequential amounts.

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20 I do not agree that since the purchaser had possession and had been in receipt of rent since 19 May 1981 it had not suffered any loss or damage arising from the breach by the vendor of cl 14(2). Loss undoubtedly there was; difficult it may be to assess and determine it. So long as the sale has not been completed the purchaser does not have a legal title to the said unit. Such a title is of course important; any experienced conveyancer in Singapore would have no hesitation in saying that getting in the legal title to the property is absolutely vital, and so long as such title is outstanding a purchaser is subject to certain exposure. Until such title has been obtained the purchaser`s interest in the said unit is merely an equitable one and like all equitable interests is subject to a risk of being over-reached by other interests. It is true that the purchaser can take all the necessary steps to protect its interest in the said unit, as it did, by lodging a caveat forbidding registration of any instrument affecting the said unit; such a caveat is not an absolute protection (see ss 103 to 105 of the Land Titles Act) and plainly is not comparable to a legal title. The purchaser without the title may be able to dispose of its interest; on the other hand it may not be able to do so to its best advantage. The said unit may be disposed of in this way: by the purchaser assigning to the sub-purchaser the benefit of the agreement and whatever interest it has in the said unit and withdrawing the caveat lodged on its behalf and further by the sub-purchaser contemporaneously or immediately thereafter entering into a fresh sale and purchasing agreement with the vendor in substitution of the agreement and lodging a caveat against any dealing of the said unit. This form of transaction is common in Singapore; however, all the same no experienced conveyancer acting for the sub-purchaser can feel very assured that the interest of his client has been fully protected; all he can say is that he has done all he could in the circumstances. He would, unless he is over sanguine, feel concerned at the absence of the legal title and the delay in obtaining it. Undoubtedly he would have to advise the sub-purchaser

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accordingly; if he is a very cautious conveyancer he may even advise the sub-purchaser against buying it. I therefore do not agree with Mr Price`s suggestion that a transfer to the purchaser of the legal title to the said unit is very much a formality; it certainly is not. The loss of the purchaser in this form is difficult to estimate and quantify. It is precisely in such situation that a provision such as cl 14(2) is required to by-pass the difficulty and expense of proving the damage suffered.

21 There are two subsidiary points in connection with cl 14(2) raised by Mr Price. The second sentence of cl 14(2) provides (insofar as material): `If the vendor shall fail to give the said notice to complete on the date fixed for completion the vendor shall pay ...`. First, Mr Price submits that the word `fail` connotes a failure by reason of misconduct or want of diligence on the part of the vendor: see ***Loates v Maple*** (1903) 88 LT 288. The short answer to this is that almost the same argument had been addressed to the Court of Appeal in ***Phoenix Heights*** [1978-1979] SLR 102 and was disposed by the learned Chief Justice in the following terms at p 105:

> *It is contended on behalf of the respondents that they were unable to give the notice to complete as provided by cl 11 because they were then unable to make title to the land and premises for reasons beyond their control in that the competent authority had delayed in issuing a certificate for title for the land in question. We are unable to see how this difficulty can affect the bargain agreed upon by the parties.*

22 In my view the words, `If the vendor shall fail to give,` means `If the vendor shall not give.` Secondly, Mr Price argues that the words `on a date fixed for completion` are grammatically and logically a nonsense and give rise to uncertainty which uncertainty renders the whole of the sentence ineffective. This argument I am unable to accept. It is clear to my mind that the `date fixed for completion` means the date `fixed` in the preceding sentence and the words

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`for completion` are meaningless and ought not to be present; I think they were inserted in error.

23 I now turn to the second issue, namely, whether cl 15 in the circumstances relieves the vendor from payment of damages. Clause 15 reads as follows:

> *Notwithstanding anything herein contained if by reason of any strike, riot, civil commotion, earthquake, flood or natural disaster or any other cause or causes over which the Vendor has no control there shall be any delay on the part of the Vendor in completing the Building or completing the sale of the said unit to the Purchaser, the Vendor shall not in any way be liable to the Purchaser in damages or otherwise.*

24 On this issue I have two observations. First, the burden of showing that the delay in completing the sale was due or attributable to cause or causes beyond its control lies with the vendor. Secondly, as Mr Lowe submits and I agree, the vendor must be treated as having control in relation to matters dealt with or ought to have been dealt with by its advisors, whether they are architects, surveyors, solicitors or others. On this aspect of the matter, so far as cl 15 is concerned, the vendor must be held responsible for any act or omission on the part of any of its advisors. It would be absurd to suggest that the vendor could escape liability under this clause by showing that its failure to discharge its obligations under the agreement was occasioned by those whom it engaged to handle the matter. The case of ***Honeywell & Stein v Larkin Brothers*** [1934] 1 KB 191 cited by Mr Price is of no assistance on this point.

25 It is the contention of Mr Price that in considering whether the delay in completing the sale of the said unit was due or attributable to causes beyond the vendor`s control, what took place or did not take place prior to the date of the agreement are irrelevant and should be excluded; the court should consider only

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the position as from the date of agreement. Mr Price`s attempt to exclude the period prior to the date of the agreement is understandable; as on the evidence the vendor clearly was throughout this period extremely dilatory in its efforts towards obtaining subsidiary strata certificates of title to the units of Orchard Towers. I accept that the task of obtaining the subsidiary strata certificates of title in this case is a complicated one, involving, inter alia:

> (a) alienation by the government of two backlanes to the vendor;
>
> (b) application for amalgamation of parts of the land held under the common law title with these parts comprised in certificates of title issued under the Land Title Act;
>
> (c) application for approval of subdivision of the building, and
>
> (d) application for approval of strata title plan.

26 However, approval by government for alienation of the two backlanes was given on 28 February 1973 and 27 May 1975, and the building appeared to have been substantially completed by September 1975; certainly the temporary occupation licence for the said unit was issued on 8 September 1975. About this time instructions were given by the vendor to its advisor to proceed with the application for approval under s 9(3) of the Planning Act for subdivision of the building for individual strata titles to the units. Yet between September 1975 and December 1980 no application for subdivision approval had been submitted to the competent authority under the Planning Act. Nor did the vendor and its advisor really come to grips with any of the matters listed above. The vendor had allowed all these matters to drift throughout this period without any apparent sign of concern.

27 Then came 17 February 1981 - the date on which the parties entered into the agreement. The vendor must have been aware of the situation as it existed

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at that time. Yet it accepted, by the agreement, the obligation to give the notice to complete by 31 December 1981; it could perhaps have selected a later date, but it did not do so. The question then is since that date what had it done to discharge its obligations? The answer unfortunately, on an examination of the events, is disappointing: nothing of any significance had been done. The only event which deserves any mention is the submission of the application for subdivision approval together with relevant plans to Development Control Division of the Ministry of National Development on 22 April 1981, but the plans were returned on 1 June 1981, as they did not comply with numerous requirements. The application appeared to have been resubmitted but was again returned on 25 September 1981 owing to non-compliance with certain requirements. Those were all the development that took place up to 31 December 1981. In other words, the vendor had again allowed the matters to drift, notwithstanding its obligation under the agreement.

28 It was only as from March 1982 or thereabout that the matters preparatory towards obtaining subsidiary strata certificates of title to the units of Orchard Towers really started to move, and the following are the material events leading to the issue of the subsidiary strata certificates of title:

> (i) 8 March 1982:
>
> Vendor`s solicitors wrote to the Registrar of Titles for direction under s 13 of the Land Titles Act in respect of Lots 11-14, 11-5, 11-6, 11-8, 11-9, 11-10 and 11-30 being land held under the common law title.
>
> (ii) 11 March 1982:
>
> Vendor`s solicitors wrote to Commissioner of Lands requesting the Government to issue Grants in fee simple in respect of the back-lanes approved to be alienated to the vendor and to grant a temporary occupation licence in respect of the overhead bridge.

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(iii) 28 April 1982:

Direction of Registrar of Titles to bring Lots 11-4, 11-5 and 11-6 under the Land Titles Act was issued.

(iv) 13 May 1982:

Certificate of Title in respect of a backlane was issued.

(v) 28 May 1982:

Direction of Registrar of Titles to bring the remaining 4 Lots, Lots 11-8, 11-9, 11-10 and 11-30 under the Land Titles Act was issued.

(vi) 8 June 1982:

Approval for amalgamation and subdivision approval under s 9(3) of the Planning Act was granted.

(vii) 17 July 1982:

Application to Chief Surveyor for approval of strata title plan was submitted.

(viii) 26 July 1982:

Certificate of title for the other backlane was issued.

(ix) 1 December 1982:

Approval of strata title plan was granted by the Chief Surveyor.

(x) 21 January 1983:

Applications for new certificate of title for 2 new lots and for registration of strata title plan and for issue of subsidiary strata certificates of title were submitted to the Registrar of Titles.

(xi) 26 May 1983:

Subsidiary strata certificates of title were issued.

29 If one looks at the whole history starting from September 1976 leading to the issue of the subsidiary strata certificates of title one would come inescapably to this conclusion: there had been inordinate delay on the part of the vendor, and such delay could have been avoided or minimised considerably if the vendor had attended to, or caused to be attended, the various matters concerned with diligence. Assuming that the period prior to 17 February 1981 is to be disregarded, I remain of the view that the vendor has failed to show that

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the delay in completing the sale was due to causes beyond its control; it has failed to show that since the date of the agreement diligent efforts had been made to obtain the issue of subsidiary strata certificates of title and in spite of such efforts it had not been able to obtain them by 31 December 1981. On the contrary, throughout 1981, nothing of significance had been done or carried out by the vendor. Apart from a couple of haphazard attempts towards getting subdivision approval no serious effort appeared to have been made by the vendor; it was content to let the matter lie dormant until March 1982 or thereabout. I therefore find that the vendor has failed to discharge the burden of showing that the delay in completing the sale of the said unit was due to causes beyond its control.

30 There is one last point in dispute which is comparatively a minor one. The vendor`s solicitors gave to the purchaser`s solicitors on 17 June 1983, notice to complete the sale. So far as the breach under cl 14(2) is concerned - the failure to give the notice to complete - it was remedied on 17 June 1983, and the liability of the vendor for payment of liquidated damages terminated as of that day. The parties were then obliged under cl 14(1) to complete the transaction within 14 days from that day; but they did not complete the transaction within the period. It appears that there were two obstacles in the way. First, the purchaser required an acknowledgement for production of prior title deeds duly executed by the vendor to be delivered on completion, and secondly, the purchaser insisted on deduction of a sum of $376,874.63 as liquidated damages computed from 31 December 1981 to 16 June 1983 which the vendor refused to accept. The acknowledgement of production of prior title deeds is a reasonable and prudent requirement in conveyancing practice but the purchaser should have made this request much earlier; its solicitors did not inform the vendor`s solicitors of this requirement until 22 June 1983. At any

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rate, under cl 14(1) this is not a document required to be delivered by the vendor on completion and the purchaser was not entitled to this additional document on completion; in this respect the purchaser was in error. A more major obstacle to the completion of the sale was undoubtedly the deduction of liquidated damages which was hotly in dispute. On this point, neither party gave way and each adopted an uncompromising stand. The sensible and practical solution is for the purchaser to pay this amount to its own or the vendor`s solicitors to be held as stakeholders on an interest bearing account to abide by the decision of the court - a course which was not proposed by the vendor`s solicitors until 8 December 1983 and the proposal was not accepted by the pur chaser`s solicitors until 4 January 1984. Neither party had really acted sensibly and reasonably. It is submitted by Mr Lowe that if the vendor wrongfully failed to complete the sale, liquidated damages under cl 14(2) should continue to accrue, I do not agree. If the vendor wrongfully failed to complete the sale after the notice to complete was given, then it was in breach of cl 14(1); but that question is not before me and I refrain from expressing any opinion thereon.

31 In the result, I make the declaration that the purchaser was entitled to liquidated damages under cl 14(2) from 31 December 1981 to 16 June 1983 amounting to a sum of $376,874.12 and order that this amount together with interest held by the solicitors for the vendor be paid to the purchaser. The vendor is to pay the costs of these proceedings.

32 ***Order accordingly.***

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