Harris Hakim v Allgreen Properties Ltd
[2001] SGCA 61

Case Number : CA 600013/2001

Decision Date : 13 September 2001

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; L P Thean JA; Yong Pung How CJ

Counsel Name(s) : George Pereira (instructed) and Serene Chan Poh Choo (Tan Lee & Choo) for the appellant; BV Peter and R Doraisamy (Ramdas & Wong) for the respondents.

Parties : Harris Hakim — Allgreen Properties Ltd

Damages – Measure of damages – Sale and purchase of property – Payment of purchase price in instalments – Default by purchaser in payment – Clause allowing developer to forfeit 20% of purchase price – Right of forfeiture without prejudice to other rights available at law or in equity – Whether developer can claim sums falling outside the clause – Housing Developers Rules (Cap 130, R 1, 1990 Ed) Form E cll 5(3)(b), 5(3)(c) & 5(4)

Land – Conveyance – Breach of sale and purchase agreement – Standard form sale and purchase agreement of condominium unit – Purpose of Housing Developers Rules – Housing Developers Rules (Cap 130, R 1, 1990 Ed) Form E

Words and Phrases – 'Without prejudice to any other rights available to the vendor at law or in equity' – 'other rights' – Housing Developers Rules (Cap 130, R 1, 1990 Ed) Form E cl 5(3)

Judgment:

Cur Adv Vult

The facts

1. The relevant facts giving rise to the appeal now before us are as follows. The appellant, Mr Harris Hakim ('Mr Hakim') entered into a sale and purchase agreement dated 14 May 1996 ('the Agreement') with the respondents, Allgreen Properties Ltd ('Allgreen'), whereby Mr Hakim agreed to purchase from Allgreen an apartment in a private housing development called 'Springdale Condominium' which was then being developed by Allgreen. The Agreement was in the form prescribed as Form E by the Housing Developers Rules (1990 ed) and incorporated within it the Singapore Law Society's Conditions of Sale 1994, in so far as those conditions were applicable to the sale and were not varied by or were not inconsistent with the terms of the Agreement.

2. The purchase price for the apartment was $1,165,000, which was to be paid by instalments at different stages of the construction as provided in cl 3 of the Agreement. It was provided by cl 5(1) of the Agreement that, in the event that Mr Hakim defaulted in payment of any instalment for more than 14 days, Allgreen would be entitled to charge interest at the specified rate as provided in cl 5(2). By cl 5(3), the Agreement further provided that if Mr Hakim should default in payment of any instalment for more than 14 days, Allgreen would be entitled, at their option on giving not less than 21 days' notice to Mr Hakim, to treat the Agreement as having been repudiated and, unless in the meanwhile the unpaid instalments and interest were paid up, upon the expiration of the 21 days, the Agreement would be annulled, and in such event, without prejudice to any other rights available to Allgreen at law or in equity, Allgreen would be entitled to certain rights as provided in paragraphs (a), (b) and (c) of cl 5(3). We shall refer to the terms of this clause in detail in a moment.

3. About two years later, Mr Hakim ran into financial difficulties, and found it difficult to keep up with

the instalment payments. By that time, the total amount of instalments Mr Hakim had paid to Allgreen under the Agreement amounted to $669,000. By a letter dated 28 July 1998, written by his solicitors to Allgreen, he requested the latter to serve him a notice under clause 5 of the Agreement and thereafter to exercise their rights under cl 5(3): forfeit the sum of $233,000, which is 20% of the purchase price of $1,165,000, deduct it from the sum of $699,000, being the total of the instalments previously paid, and refund the balance thereof to him. Allgreen, however, refused to accede to this request.

4. Mr Hakim continued to default in the payment of further instalments. Finally, on 19 August 1999, Allgreen decided to invoke cl 5(3) of the Agreement. Allgreen's solicitors sent a notice to Mr Hakim pursuant to cl 5(3) which, so far as relevant, read as follows:

> We refer to the above matter and note that the progress payments under clauses 3(1)(h) and 3(3)(a) of the Sale and Purchase Agreement were due on 5 November 1998 and 30 April 1999 respectively.
>
> In view of the above, we are instructed by our clients to and do hereby give to your client(s) notice pursuant to clause 5(3) of the Sale and Purchase Agreement that unless your client(s) pay the unpaid instalment(s) and interest within twenty-one (21) days from the date hereof, the said Sale and Purchase Agreement shall at the expiration of the said twenty-one (21) days be annulled and our clients shall, without prejudice to any other rights available to them at law or in equity proceed in accordance with clause 5(3) of the said Sale and Purchase Agreement.

5. As might have been expected, Mr Hakim was unable to comply with the notice. On 6 December 1999, Allgreen's solicitors sent Mr Hakim a further letter referring to the previous notice and stating, among other things, the following:

> 3 In accordance with Condition 29 of the Singapore Law Society's Conditions of Sale 1994, without prejudice to any other rights or remedies available to our clients at law or equity, the deposit paid by your client has been forfeited and retained for our client's own benefit.

It is common ground that the reference in the letter to 'Condition 29 of the Singapore Law Society's Conditions of Sale 1994' was an error and that the correct reference intended was 'clause 5(3)(c) of the Agreement'. Nothing however turns on this error.

6. Mr Hakim's apartment was subsequently resold by Allgreen. By a letter dated 23 March 2000, Allgreen's solicitors informed Mr Hakim that out of the total amount of the instalments paid up by him, Allgreen would be refunding him the sum of $399,259.87, and provided the following computation showing how the sum of $399,259.87 was arrived at:

1.	Original Sale Price	$1,165,000.00
2.	New Sale Price	$ 900,000.00
3.	Shortfall	$ 265,000.00
Add	Outstanding Interest	$ 20,896.30
	Legal Fees	$ 350.20
	Outstanding Maintenance Charges	$ 2,532.54

	Agent's Commission	$ 9,000.00	
	Outstanding Property Tax	$ 1,652.09	
	Auction/Valuation Charges	$ 309.00	$299,740.13
4.	Off-set amount paid by original purchaser to date (60%)		$699,000.00
	Refund Amount		$399,259.87

7. Mr Hakim disputed this computation. While he accepted that Allgreen were entitled to claim for the outstanding interest, maintenance charges and property tax, these being accrued debts due to Allgreen, and to claim the sum of $223,000 being the 20% of the purchase price that was forfeited under cl 5(3) of the Agreement, he disputed that Allgreen were entitled to claim for legal fees, the agent's commission incurred during the sale, the auction/valuation charges, as well as the shortfall arising from the resale. His computation of the refundable amount was as follows:

Total payment by Mr Hakim	$699,000.00
Less 20% pursuant to clause 5(3)(c)	$233,000.00
Outstanding interest	$20,896.30
Outstanding maintenance charges	$2,532.54
Outstanding property tax	$1,652.09
Amount to be refunded:	$440,919.07

8. Allgreen were unwilling to refund $440,919.07 as requested by Mr Hakim. They refunded only $399,259.87, which was accepted Mr Hakim without prejudice to his right to claim the balance. Mr Hakim therefore commenced proceedings in Originating Summons No 896 of 2000 ('the present action'), seeking a determination by the Court as to the amount to be refunded by Allgreen to him, and claimed the balance sum of $41,659.20.

Decision below

9. At the hearing below, Mr Pereira, counsel for Mr Hakim submitted that by virtue of the words: 'without prejudice to any other rights available to [Allgreen] at law or in equity', upon the termination of the contract under cl 5(3), Allgreen were entitled to elect either of the two courses:

(i) to re-sell the property and pursue a claim against Mr Hakim for unliquidated damages at common law, or

(ii) to proceed under cl 5(3) by, *inter alia*, forfeiting 20% of the purchase price.

In support of this construction of cl 5(3), counsel relied on three cases decided in England: *Tally and Anor v Wolsey-Neech* (1979) 38 P&CR 164; *Wallace-Turner v Cole* (1983) 46 P&CR 164 and *Sakkas and Anor v Donford Ltd* (1983) 46 P&CR 290. We shall turn to these cases shortly. Reverting to the instant case, Mr Pereira submitted that, as Allgreen had elected to exercise their rights under cl 5(3), they would be entitled only to such compensation as cl 5(3)(b) and (c) allowed, and were not entitled to recover, in addition, any damages at common law. Any loss arising from the re-sale above and beyond the forfeited sum and the interest under cl 5(3)(b) and (c) was irrecoverable.

10. On the other hand, Mr Peter, counsel for Allgreen submitted that the right to invoke cl 5(3) and forfeit 20% of the purchase price was exercisable, in the words of cl 5(3), 'without prejudice to any other rights available to [Allgreen] at law or in equity'. It was thus submitted that in the instant case the 20% forfeited was insufficient to cover Allgreen's losses arising from the resale, and therefore on

the basis of those words in cl 5(3) they were entitled to recover from Mr Hakim the amount of loss they had sustained over and above the 20%.

11. Allgreen's contention was accepted by the judge. He held at 9 as follows:

> 9 On the face of it, cl 5(3) gave Allgreen Properties the right to forfeit the 20% as well as pursue other rights they may have against HH [Mr Hakim] for the breach of contract. And, in the absence of any restrictive words in cl 5(3), these other rights must include Allgreen Properties' right to damages (by way of expenses in the re-sale and any drop in the sale price) should those damages exceed the 20% forfeited by Allgreen Properties under cl 5(3).

The judge rejected the three cases relied upon by Mr Pereira on the ground that 'the context and content of the conditions' in those cases were materially different from the provisions of cl 5(3), and the courts in those cases held that those conditions provided for liquidated damages, and that the parties, having pre-agreed on the quantum of damages, were precluded from claiming additional amounts as damages. Turning to cl 5(3) the judge said:

> 11 Clause 5(3) in our present Agreement does not appear to be a clause setting out the liquidated damages payable on breach. Whilst cl 5(3) entitled Allgreen Properties to forfeit 20% of the purchase price, it does not say, nor can it readily be inferred from the context, that this 20% is to be treated as liquidated damages. Indeed, cl 5(3) leaves the question of damages for breach open because the right to forfeit the 20% is prefaced by the words "without prejudice to any other rights available to him at law or in equity". These words appear to have the effect of preserving the right of Allgreen Properties to recover damages or seek other remedies at common law or in equity should Allgreen Properties suffer damages in excess of the 20%. The effect of the words "without prejudice to any other rights available to him at law or in equity" in cl 5(3) appears to me to be that should the damages suffered by Allgreen Properties be less than 20%, Allgreen Properties are entitled to all of that 20% but should the damages exceed 20%, Allgreen Properties are entitled to the additional damages.

12. In the result, the judge found that Allgreen were entitled to make the deductions as they did and he dismissed Mr Hakim's claim. Mr Hakim now appeals against this decision.

The appeal

13. The issue before us is one of construction of cl 5(3) of the Agreement and in particular the words 'without prejudice to the other rights available to [the vendor] at law or in equity'. It is convenient at this stage to set out in full cl 5(3) and also cl 5(4) of the Agreement, which are as follows:

> (3) If any such unpaid instalments and interest remain unpaid for any period in excess of fourteen (14) days after its due date, the Vendor shall be entitled at its option on giving to the Purchaser or his solicitors not less than twenty-one (21) days' notice in writing to treat this Agreement as having been repudiated by the Purchaser and (unless in the meanwhile the unpaid instalments and interest shall have been paid) this Agreement shall at the expiration of such notice (and in this respect time shall be of the essence) be annulled and in such an event, without prejudice to any other rights available to him at law or in equity, the Vendor shall be entitled:-

(a) to resell or otherwise dispose of the building unit as the Vendor shall see fit as if this Agreement had not been entered into;

(b) to recover from the instalments (excluding payments for interest) previously paid by the Purchaser all interest calculated in accordance with paragraph (1) of this clause owing and unpaid; and

(c) to forfeit and retain for his own benefit a sum equal to twenty (20) per cent of the purchase price from the instalments (excluding payment for interest) previously paid by the Purchaser.

(4) The balance of the instalments prepaid by the Purchaser after making deductions in accordance with paragraph (3)(b) and (c) shall be refunded to the Purchaser.

Historical perspective

14. The Agreement was in a statutory form, namely Form E prescribed by the Housing Developers Rules (1990 ed) for the sale by a developer of a flat or any housing accommodation in a condominium project. All the relevant forms of sale and purchase agreements for sale of housing units by developers have been prescribed by law since the amendments made in 1967 to the Housing Developers Rules 1965. Such forms have been amended from time to time by the legislature, and it would be helpful for our purpose to examine the relevant amendments made to the statutory forms which led to the evolution of the cl 5(3) now under consideration.

15. The Housing Developers (Licensing and Control) Act (Cap 130, 1985 ed) was enacted in 1965 and became law on 1 October 1965. Under s 22 of the Act, the Minister is empowered to make rules for the purpose of carrying out the provisions of the Act and in particular for regulating, inter alia, (a) the payments to be made by a purchaser to a housing developer before and during the construction of the premises in question, (b) the form of contract to be made between a housing developer and a purchaser, and (c) the terms and conditions of such a contract. The first set of rules was the Housing Developers Rules 1965. At that time, the 1965 Rules did not prescribe any specific form of agreement between a housing developer and a purchaser, but Rule 9 contained specific provisions - (a) prescribing the sum of $500 as the maximum sum as the booking fee to be paid by a purchaser for an option or right to purchase the property; (b) prescribing a sum equal to 10% of the purchase price as the maximum to be paid by the purchaser either as a deposit or the first instalment of the purchaser price; (c) requiring the developer to submit to the Controller of Housing for approval a proposal regarding the amounts of instalments payable by the purchaser at various stages of the construction of the building, and upon such approval, requiring the developer to adhere to the proposal; and (d) prescribing 90% of the purchase price as the maximum to be paid by the purchaser, until the issue and delivery of the certificate of fitness for occupation for the premises.

16. The statutory forms of agreement between a developer and a purchaser were introduced for the first time by the Housing Developers (Amendments) Rules 1967. For the sale of flats the form prescribed was then Form B. The agreement in that form provided, inter alia, payment of the purchase price by instalments according to the stages of the construction of the premises in question and payment of interest on any instalment which the purchaser failed to pay. The forerunner of the present cl 5(3) under consideration was cl 5 of Form B, which so far as material was as follows:

5 . . . . . .If any of such unpaid instalments and interest shall remain unpaid for any period in excess of forty days after its due date the Vendor shall be entitled at its option on giving to the Purchaser or his solicitors not less than thirty days' notice in writing to treat this Agreement as having been repudiated by the Purchaser and (unless in the meanwhile such unpaid instalment and interest shall have been paid) this Agreement shall at the expiration of the said notice (and in this respect time shall be of the essence) be annulled and in such an event -

(a) The Vendor shall be entitled to deal with or otherwise dispose of the said Flat in such manner as the Vendor shall see fit as if this Agreement has not been entered into.

(b) The instalments previously paid by the Purchaser to the Vendor excluding any interest paid shall be dealt with and disposed of as follows: -

(i) firstly all interest calculated up to the date of the expiration of the said notice owing and unpaid shall be paid to the Vendor;

(ii) secondly a sum equivalent to 25 per cent of the balance thereof shall be paid and forfeited to the Vendor; and

(iii) lastly the residue thereof shall be refunded to the Purchaser.

(c) Neither party hereto shall have any further claims against the other for costs, damages, compensation or otherwise hereunder.

(d) Each party hereto shall pay its own costs in the matter.

Thus, in the event that this clause was validly invoked, the developer's rights for any loss he suffered were limited to recovering from the instalments previously paid (i) all the interest owing and unpaid up to a certain date, and (ii) thereafter a sum equal to 25% of the balance of the instalments (previously paid). After the recovery of these sums, the developer was obliged to refund the residue to the purchaser. The developer was not entitled to claim damages for any other loss occasioned by the breach of contract on the part of the purchaser.

17. The 1965 Rules were repealed by the Housing Developers Rules 1976. The 1976 Rules introduced new forms of sale and purchase agreements. Form B as prescribed there was the form of sale agreement for the sale of a flat or any housing accommodation in a condominium project. Clause 1 of the new Form B incorporated for the first time the conditions of sale by public auction known as 'The (Revised) Singapore Conditions of Sale' so far as they were applicable to a sale by private treaty and were not varied by or inconsistent with the special conditions contained in Form B. In so far as relevant for our purpose, cl 5(3) of the then Form B was substantially the same as the material parts of cl 5 of the previous Form B under the 1965 Rules (as amended in 1967), and was as follows:

(3) If any of such unpaid instalments and interest remains unpaid for any period in excess of forty (40) days after its due date the Vendor shall be entitled at its option on giving to the Purchaser or his Solicitors not less than thirty (30) days' notice in writing to treat this Agreement as having been repudiated by the Purchaser and (unless in the meanwhile such unpaid instalment and interest shall have been paid) this Agreement shall at the expiration of the said notice (and in this respect time shall be of the essence) be annulled and in such an event -

(a) the Vendor shall be entitled to deal with or otherwise dispose of the housing unit in such manner as the Vendor shall see fit as if this Agreement had not been entered into;

(b) the instalments previously paid by the Purchaser to the Vendor excluding any interest paid shall be dealt with and disposed of as follows:-

(i) firstly, all interests calculated in accordance with paragraph (1) hereof owing and unpaid shall be paid to the Vendor;

(ii) secondly, a sum equal to twenty-five (25) per cent of the balance thereof shall be paid and forfeited to the Vendor; and

(iii) lastly the residue thereof shall be refunded to the Purchaser;

(c) neither party hereto shall have any further claims against the other for costs, damages, compensation or otherwise hereunder; and

(d) each party hereto shall pay its own costs in the matter.

18. The next significant amendments made to the statutory forms of agreement were introduced by the Housing Developers (Amendment) Rules, 1981. For our purpose we need to mention only two material amendments to the relevant form, namely, Form B. First, Rule 9 of the 1981 Rules deleted the reference to 'The (Revised) Singapore Conditions of Sale' in Clause 1 of the sale and purchase agreement and replaced it with the 'Singapore Law Society Conditions of Sale, 1981'. Secondly, Rule 12 amended cl 5(3) of the sale and purchase agreement by deleting paragraphs (2) and (3) thereof and substituting new paragraphs (2), (3) and (4). Paragraph (2) prescribed the interest rate payable for overdue instalments; paragraph (3) was the cl 5(3) which is now under consideration, and paragraph (4) was cl 5(4) of the Agreement. For the first time, the words 'without prejudice to any other rights available to him at law or in equity' were inserted in cl 5(3). It was suggested by Mr Pereira that these words were derived from condition 29 of the 'Singapore Law Society Conditions of Sale, 1981' which were incorporated into the statutory form of agreement. His reason for saying this was that condition 29, which deals with the situation where the purchaser fails to complete on the completion date, provides that if the purchaser does not comply with the notice to complete served by the vendor pursuant to condition 29, then -

(a) ...

(b) *without prejudice to any other rights and remedies available to him at law or in equity*, the Vendor may:

(i) forfeit and retain for his own benefit the deposit paid by the Purchaser, and

(ii) resell the property whether by auction or by private treaty without previously tendering a conveyance to the Purchaser.

[Emphasis is ours]

This is not seriously disputed by Mr Peter. We think that Mr Pereira is probably right. We would say in passing that condition 29 was itself modelled on condition 19 of the English Law Society's General Conditions of Sale: see *The Singapore Law Society's Conditions of Sale 1981* by Mr C C Tan (1982) MLJ xxxix. The same words 'without prejudice to any other rights or remedies available to him at law or equity' are also contained in condition 22 of the English National Conditions of Sale. These words in the context of condition 19 of The Law Society's General Conditions of Sale and condition 22 of the National Conditions of Sale have been construed by the courts in England in the three cases relied upon by Mr Pereira, to which we shall refer in a moment.

Construction of Clause 5(3)

19. Having traced the historical evolution of cl 5(3) to the form now under consideration, we turn to consider how the words 'without prejudice to any other rights available to him at law or in equity' in the context of cl 5(3) should be construed.

20. Mr Pereira's submission is that when cl 5(3) is validly invoked these words merely give to the developer an option to elect either to claim damages at common law or to claim the amounts under paragraphs (b) and (c) of cl 5(3). Thus, in this case Allgreen had that right of election, and since they had exercised their rights under cl 5(3), they were entitled only to the sums stated in paragraphs (b) and (c) of cl 5(3) and were not entitled, in addition, to damages at common law. In support, he relies on the three English cases.

21. Mr Peter, on the other hand, submits that when cl 5(3) is validly invoked and the contract is annulled, as was the case here, the vendor is entitled to forfeit the 20% of the purchase price under clause 5(3)(c) and this right is exercisable, in the words of cl 5(3), 'without prejudice to any other rights available to [the vendor] at law or in equity'. It follows that, if the amount forfeited exceeds the actual loss or damage suffered by the vendor, the latter may retain the surplus. But, if the amount forfeited is insufficient to cover the loss, the vendor is entitled to recover from the purchaser the amount of loss over and above the amount forfeited. Therefore, in the instant case, as the loss sustained by Allgreen exceeded the sum forfeited, they were entitled to claim the excess amount as well.

22. We turn first to consider the cases relied upon by Mr Pereira. In *Talley and Anor v Wolsey-Neech* (1979) 38 P&CR 45, the plaintiffs agreed to sell a house to the defendant for 55,000 and the defendant paid a deposit of 5,500. The sale and purchase agreement incorporated The Law Society's General Conditions of Sale (1973 rev.), of which condition 19, so far as material, reads:

19(2) If the sale shall not be completed on the date fixed for completion either party may on that date or at any time thereafter give to the other party notice in writing to complete the transaction in accordance with this condition

19(3)

19(4) If the purchaser does not comply with the terms of an effective notice served by the vendor under this condition, then -

(b) *without prejudice to any other rights or remedies available to him at law or in equity*, the vendor may -

(i) forfeit and retain for his own benefit the deposit paid by the purchaser, and

(ii) resell the property whether by auction or by private treaty without previously tendering a conveyance to the purchaser,

(c) if on any such re-sale contracted within one year from the date fixed for completion the vendor incurs a loss, the purchaser shall pay to the vendor as *liquidated damages* the amount of such loss, which shall include all costs and expenses reasonably incurred in any such re-sale or any attempted re-sale, subject to the vendor giving credit for any deposit and any money paid on account of the purchase price, but any surplus money shall be retained by the vendor. [Emphases is ours]

The defendant failed to complete on the date fixed for completion. The plaintiffs served on him the requisite notice to complete under condition 19(4) but the purchaser still failed to complete, and in consequence the vendor resold the house. The house fetched a price, which was 4,000 below the price at which the defendant contracted to pay. The plaintiffs brought an action against the defendant claiming:

(i) 4,000, being the reduction of price on resale.

(ii) costs and expenses in effecting the resale, and

(iii) interest on the amount of the purchase price which should have been paid by the defendant, for the period stretching from the date when the defendant should have completed to the date of completion of the resale.

The Court of Appeal held that the third head of damage, i.e. the interest, was not recoverable, since it did not fall within the scope of condition 19(4). Browne LJ held at pp 51-53:

When a buyer defaults by failing to complete on the due date after time has been made of the essence of the contract, the seller can choose between various rights and remedies .

> If he decides to sue for damages, he can choose whether to sell or not, and the measure of damages will be different according to his choice.
>
> In my view, the object and effect of the opening words of condition 19(4)(b) [i.e. "without prejudice to any other rights or remedies available to him at law or in equity"] are to make it clear that these rights of choice are preserved to the seller, but, if he chooses to exercise his rights and remedies under condition 19(4)(c), he can, in my view, only do so in accordance with and within the limits of the provisions of this condition.
>
> If, as [counsel for the vendor] suggests, the effect of condition 19(4)(c) were merely to provide machinery for the simple quantification of one element in the damages at common law, it could and would have been very differently worded. It seems to me that the words "liquidated damages" are conclusive.
>
> In my judgment, the plaintiffs, having chosen to exercise their rights and remedies under condition 19(4)(c), are only entitled to recover the "liquidated damages" defined by that condition

23. The next case is *Wallace-Turner v Cole* (1983) 46 P&CR 164. There, the plaintiff agreed to sell a flat to the purchaser and the agreement incorporated the National Conditions of Sale, 19th ed (1976). Condition 22(3) provided that if, on the purchaser failing to complete, the vendor resold the property within the 12 months stated therein, the vendor would be entitled, on crediting the deposit, to recover from the purchaser 'the amount of loss occasioned to the vendor by expenses of or incidental to such resale, or by diminution of the price'. The purchaser failed to complete, in spite of the notice to complete under condition 22. The plaintiff contracted to resell the flat and issued a writ claiming the diminution of the price as the measure of his loss. That contract, however, was not completed. Subsequently the plaintiff resold the flat and claimed 9,600 being the diminution in the price of the flat. It was held, inter alia, that under the terms of condition 22(3) the vendor was put to his election between liquidated damages under the condition and unliquidated damages at large for loss of bargain and breach of contract and that when the plaintiff took judgment for the unliquidated damages, he opted for unliquidated damages. Mr John Mowbray QC, sitting as a deputy High Court judge, said at p 167:

> In my judgment *Talley v Wolsey-Neech* shows that a vendor cannot recover both a contractual sum under such a condition as condition 22 and damages for the delay. The conditions there were the Law Society's General Conditions of Sale (1975 rev.), and they referred to the sum expressly as "liquidated damages," and the Court of appeal relied on those words; but in my judgment the sum payable under condition 22 of the National Conditions of Sale was also liquidated damages and that does not distinguish *Talley v Wolsey-Neech*.

The learned judge further said at p 168:

> ... The basis of the decision in *Talley v Wolsey-Neech*, as I understand it, is that a vendor is put to his election between his different remedies. It is common ground between counsel that he is put to an election between damages and specific performance. *Talley v Wolsey-Neech* is, in my view, a decision that he is likewise put to his election between liquidated damages under this kind of condition and unliquidated damages at large for loss of bargain and breach of contract.

24. The third case relied on by Mr Pereira is *Sakkas and Anor v Donford Ltd* (1983) 46 P&CR 290, which was decided Mr Grantchester QC, sitting as a Deputy High Court judge. In that case, the defendant purchased the property at a public auction and the contract incorporated the National Conditions of Sale (19th ed). Subsequently the purchaser refused to complete the contract on discovering certain material information relating to the property which was not disclosed in the particulars of the property at the auction. The learned judge held that the purchaser was entitled to rescind the contract on the ground that the vendor had failed to disclose the material information concerning the property and that the particulars of the property furnished by the vendor contained information which was untrue to the knowledge of the vendor. However, he went further to consider the question of damages, should the claim of the vendor be upheld. In that connection, he considered condition 22(3) of the National Conditions of Sale and following *Talley v Woolsley-Neech* held at p 309:

> ...In my view that case is authority for the proposition that where a vendor elects to proceed under a condition similar to the condition in that case, what he then obtains thereunder is only the difference between the initial sale price and the re-sale price and the costs of the re-sale. Condition 22 of the National Conditions of Sale (19th ed.) in the present case, although the words "as liquidated damages" do not appear therein, says that after a notice to complete such as was given in this case, then the purchaser's deposit may be forfeited and the vendor can re-sell. Thereupon the condition provides that the vendor shall be entitled upon crediting the deposit to recover from the purchaser thereunder the amount of any loss occasioned by the vendor by expenses of or incidental to such re-sale or by diminution in the price. Such condition, as I read it, in the circumstances that happened in this case, indicates that the rights of the plaintiffs on the re-sale at 12,000 are only to claim for the 2,300 shortfall, plus the costs of the re-sale of 258.75.

25. For completeness, we should mention that about a month before the decision in *Sakkas*, a different conclusion was arrived at in the case of *Bruce v Waziri* (1983) 46 P&CR 81. There, the plaintiff entered into a contract to sell her house to the defendant and the contract incorporated the National Conditions of Sale, 19th ed (1976). The purchaser failed to complete on the date fixed for completion and the vendor gave him a notice to complete under condition 22 but the purchaser still failed to complete. The vendor treated the contract as discharged and resold the property at a lesser price resulting in a loss of 42,500. The vendor claimed against the purchaser special damages for the loss occasioned. In allowing the claim, Mr Julian Jeffs QC, sitting as a Deputy High Court judge, distinguished the case before him from *Talley v Woolsley-Neech* on the ground that the two conditions, namely condition 22 of the National Conditions of Sale and condition 19 of The Law Society's General Conditions of Sale, are different. He held at pp 86-87:

> If, on a proper construction of condition 22 of the National Conditions of Sale, which govern the contract in this case, the same provision occurs as was contained in The Law Society's Conditions of Sale which were under consideration in *Talley v Wolsey-Neech*, that is decisive of the matter. The plaintiff has her remedy according to that condition and none other.
>
> However, in my judgment, the two conditions cannot be equated and condition 22 of the National Conditions of Sale does not provide a remedy limited to liquidated damages. I can emphasise this by going back to the specific wording of the conditions in question. Looking at condition 19(4) of The Law Society's General Conditions of Sale as set out in *Talley v Wolsey-Neech*, which I have

> already read, it is to be noted that there are three sub-paragraphs to condition 19(4).... Paragraph (c) reads: "if on any resale contracted within one year from the date fixed for completion the vendor incurs a loss, the purchaser shall" - (it is mandatory) - "pay to the vendor as liquidated damages," certain sums which are there set out. I emphasise the words "shall" and " as liquidated damages."
>
> On my construction of paragraph (3), *the words* "without prejudice to any other right or remedy available to the vendor" govern the whole of it, and the last section is put in to clarify the vendor's entitlement in respect of certain heads if the property is resold. I accordingly hold in this case that the two conditions are distinguishable and that the plaintiff is entitled to recover the special damages which she claims.

26. We do not find these English cases of any assistance in our construction of cl 5(3) of the Agreement. There is a material difference between, on the one hand, the context in which the words 'without prejudice to any other rights or remedies available to him [the vendor] at law or in equity' are set out in condition 19(4) of The Law Society's General Conditions of Sale and condition 22(3) of the National Conditions of Sale and, on the other hand, the context in which a similar wording is set out in cl 5(3) of the Agreement. For this purpose, we need to revisit the material wording of condition 19(4) which is as follows:

> 19(4) If the purchaser does not comply with the terms of an effective notice served by the vendor under this condition, then -
>
> (a) ..
>
> (b) *without prejudice to any other rights or remedies available to him at law or in equity*, the vendor may -
>
> (i) forfeit and retain for his own benefit the deposit paid by the purchaser, and
>
> (ii) resell the property whether by auction or by private treaty without previously tendering a conveyance to the purchaser,
>
> (c) if on any such re-sale contracted within one year ..the vendor incurs a loss, the purchaser shall pay to the vendor as *liquidated damages* the amount of such loss, which shall include .., subject to the vendor giving credit for any deposit and any money paid on account of the purchase price, but any surplus money shall be retained by the vendor.

With the condition so structured, it is plain that, if and when condition 19(4) applies, the words 'without prejudice to any other rights or remedies available to [the vendor] at law or in equity' operate to give the vendor the options available to him at law or in equity. Accordingly, the vendor has the option of (a) treating the contract as still subsisting and pursuing a claim for specific performance and damages in addition or in lieu thereof, or (b) treating the contract as having been

repudiated and (i) claiming unliquidated damages at large for loss of bargain and breach of contractor, or (ii) claiming the amounts under paragraphs (b) and (c) of condition 19(4). The same position applies to condition 22(3) of the National Conditions of Sale: *Wallace-Turner v Cole* and *Sakkas v Dunford* (supra).

27. Turning to cl 5(3), we find that the entire clause is differently structured and the context in which the words 'without prejudice to any other rights available to him at law or in equity' are set out is different. At the risk of repetition, the material part of cl 5(3) is as follows:

> (3) If ., the Vendor shall be entitled at its option on giving to the Purchaser or his solicitors not less than twenty-one (21) days' notice in writing to treat this Agreement as having been repudiated by the Purchaser and (unless in the meanwhile the unpaid instalments and interest shall have been paid) this Agreement shall at the expiration of such notice (and in this respect time shall be of the essence) be annulled and in such an event, without prejudice to any other rights available to him at law or in equity, the Vendor shall be entitled:-
>
> (a) to resell.
>
> (b) to recover all interest calculated ..
>
> (c) to forfeit and retain ..twenty (20%) per cent of the purchase price from the instalments ..

Thus, as and when such clause is validly invoked, the agreement is 'is annulled' and is at an end. In that event, the consequences set out in paragraphs (a), (b) and (c) apply and the words 'without prejudice to any other rights available to [the vendor] at law or in equity' has a narrower scope. In our opinion, these words in the context in which they are set out do not operate to give to the vendor an option or a right to elect either to claim for unliquidated damages at large or to claim the sums stated in paragraphs (b) and (c) of cl 5(3). In the context in which they are set out they cannot be construed in the manner in which similar words in condition 19(4) of The Law Society's General Conditions of Sale or condition 22(3) of the National Conditions of Sale have been construed in those cases which we have discussed.

28. It is eminently clear that the purpose of the Housing Developers Rules and the forms and contents of the sale agreements prescribed thereunder are intended for the protection of purchasers of housing units developed and sold by developers. The Housing Developers Rules, since they were first enacted, contain restrictions on the rights of the developers with regard both to the form and the terms of the contract which they are at liberty to make with their purchasers. The statutory forms of contract prescribed by the Rules dictate, among other things, the number and the amount of instalments of the purchase price which a developer is allowed to receive from a purchaser at different stages of the construction, the period of the notice required to be given for calling such payments, the rates of interest the developer is entitled to charge for any default in the payment of any instalment, the period required to be given to a purchaser before the developer is entitled to treat the agreement as having been repudiated and to annul it, and the measure of damages the developer is entitled to recover from the purchaser.

29. For these reasons, it could not have been the intention of the legislature to provide to the developer by cl 5(3) a right to claim damages at common law, in addition to their rights to recover the amounts under paragraphs (b) and (c) of cl 5(3) as contended by Mr Peter. Nor, in our opinion, could it have been intended to provide the developer an option to elect either to claim damages at common

law or to proceed to recover the amounts under paragraphs (b) and (c) of cl 5(3) as contended by Mr Pereira. In our opinion, as and when cl 5(3) is validly invoked and the agreement is annulled, the rights of the developer to the amount of damages which he is entitled to recover from the purchaser is confined to paragraphs (b) and (c) of cl 5(3). That is the measure of damages the developer is entitled to. He is not entitled to claim damages for breach of contract at common law and recover more than what he would be entitled under cl 5(3). We are reinforced in our conclusion by the presence of cl 5(4), which unequivocally provides:

> The balance of the instalments prepaid by the Purchasers after making deductions in accordance with paragraph (3)(b) and (c) shall be refunded to the Purchaser.

By reason of this sub-clause, the vendor is under an express obligation to refund the purchase moneys after making the deductions specified in paragraphs (b) and (c) of cl 5(3). This means that the vendor can only keep what has been deducted under clause 5(3).

30. Turning to the words 'without prejudice to any other rights available to the vendor at law or in equity', we are of the opinion that they are intended to preserve to the developer 'other rights' he may have, such as his right to payment of other sums which has accrued under the agreement: see *Lim Lay Bee and Anor v Allgreen Properties Ltd* [1999] 1 SLR 471. The words 'other rights' mean rights other than the rights to damages which the developer is entitled to recover under paragraphs (b) and (c) of cl 5(3) of the Agreement.

31. It is also instructive to refer briefly to *Lim Lay Bee*. The case concerned another apartment of the same development 'Springdale Condominium' and involved the same developers, namely, Allgreen. There, the purchaser had paid only the booking fee which was 5% of the purchase price. Under the agreement, the first instalment payable was 20% of the purchase price, which included the 5% already paid. The purchaser defaulted in payment of the balance of the first instlament ('the balance sum') and also a subsequent instalment. Allgreen therefore served on the purchaser an annulment notice under cl 5(3) of the agreement, and thereafter commenced proceedings against him claiming the balance sum due and two other sums representing interests due. It was held by the Court of Appeal that Allgreen's right to payment of the balance sum under cl 3(1) accrued prior to the termination of the agreement; that reading cl 3(1)(a) and cl 5(3)(c) together this right survived the termination of the agreement; and that Allgreen were entitled to recover this amount and forfeit it. In the course of the judgment the Court said obiter at 11:

> Loh's defaults in payment of the instalments, the respondents in exercise of their rights under cl 5(3) annulled and terminated the agreement, and their rights and remedies in such an event are governed by cl 5(3) which is quite explicit and specific: it provides that 'without prejudice to any other rights available to' them, they are entitled to the rights as set out in paras a) to c) of that clause. In so far as the monetary compensation is concerned, the respondents are entitled, first, under para (b) to 'recover from the instalments (excluding payments of interest) previously paid by the Purchaser' the interest on the overdue instalments, and secondly, under para (c) to forfeit and retain, also from the instalments (excluding payments of interest) previously paid by the Purchaser' a sum equal to 20% of the purchase price. The respondents are thus empowered to have recourse to the sums previously paid under cl 3(1) for the purpose of satisfying the two amounts under paras (b) and (c) of cl 5(3)

Conclusion

32. In our judgment, as the Agreement had been annulled under cl 5(3), Allgreen were entitled to payment of the amounts under paragraphs (b) and (c) of cl 5(3). They were also entitled to be paid by Mr Hakim the outstanding maintenance charges and property tax, as their rights to these sums had accrued prior to the termination of the Agreement. Subject to payment of these sums, Allgreen are obliged to refund to Mr Hakim the balance of the instalments paid under the Agreement.

33. We therefore allow the appeal with costs here and below, and set aside the judgment below. Allgreen were obliged to refund to Mr Hakim the sum of $440,919.07. It appears that Allgreen had refunded to Mr Hakim the sum of $399,259.87. That being the case, there will be judgment for Mr Hakim for the refund of the balance. The deposit in court, with interest, if any, is to be refunded to Mr Hakim or his solicitors.

- Sgd -	- Sgd -	- Sgd -
YONG PUNG HOW	**L P THEAN**	**CHAO HICK TIN**
Chief Justice	**Judge of Appeal**	**Judge of Appeal**

Date: 13 September 2001