United Artists Singapore Theatres Pte Ltd & Another v Parkway Properties Pte Ltd & Another [2002] SGHC 185

Case Number : Suit No 755 of 2001

Decision Date : 20 August 2002

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean JC

Counsel Name(s) : Stephen Christopher Soh and Wong Chiao Shan (Arthur Loke Bernard Rada & Lee); Joseph Ang and Sean Tan (Tan Kok Quan Partnership) for the defendants

Parties : —

Contract – Formation – Whether agreement 'subject to contract' incomplete – Pre-contract payment – Entitlement to repayment

Restitution – Failure of consideration – Total failure of consideration

Restitution – Money had and received – Recovery of money paid in course of negotiations – Contract not materialising

Judgment

GROUNDS OF DECISION ***Cur Adv Vult***

Introduction

1. This action arose out of the proposed development of a 7- screen cineplex at Parkway Parade Shopping Centre ("Parkway Parade"). It was a sizeable project no less complicated by the fact that the site for the proposed cineplex was to be on common property belonging to the 2nd Defendants.

2. As early as 1994, the parties to this action were in discussions for the development of the cineplex. Initially, the proposal was for the Plaintiffs to undertake the construction of the cineplex and thereafter lease the cineplex for 21 years from the 2nd Defendants. Some years later, owing to changes in circumstances, the Plaintiffs decided not to undertake the entire project. Further negotiations for a revised development scheme where the Plaintiffs would only lease the cineplex started in March 1999. Negotiations between the parties came to an end with the sale of the 1st Defendants' interest in Parkway Parade in February 2000. In the end, no lease was signed.

3. In this action, the Plaintiffs are claiming repayment of various sums of money totalling $1,846,900 as money had and received by the Defendants to the Plaintiffs' use. The Defendants are resisting the claim primarily on the ground that the money was part of the Plaintiffs' share of non-refundable differential premium paid to the Land Office for permission to develop the proposed cineplex. The 1st Defendants assert that, on the contrary, it is the Plaintiffs who owed them money. The 1st Defendants have filed a cross-claim in this action for either $1,618,100 or $1,200,000 being the balance of the Plaintiffs' share of agreed contribution towards differential premium ("DP").

The Parties

4. The 1st Plaintiffs, United Artists Singapore Theatres Pte Ltd ("UAST"), are a company incorporated in Singapore. At all material times, UAST managed and/or operated some cinemas in Singapore.

5. The 2nd Plaintiffs, Pacific Media PLC ("Pacific Media"), are a public listed company incorporated in the United Kingdom and are in the media business. The 1st Plaintiffs are a joint venture company of the 2nd Plaintiffs and United Artists Theatre Circuit Ltd ("United Artists"). Both corporations exercise joint management of the 1st Plaintiffs. However, in late 1998 or thereabouts, Pacific Media bought United Artists' stake in UAST and consequently acquired full control of the 1st Plaintiffs. That explains the change in the team involved in the negotiations from Tom Elliot of United Artists in Denver, Colorado to Michael Buckley of Pacific Media in London.

6. The 1st Defendants, Parkway Properties Pte Ltd ("PPPL"), are a company incorporated in Singapore and is a wholly owned subsidiary of Parkway Holdings Limited ("PHL"). Until February 2000, PPPL owned 76% of the strata lots in Parkway Parade.

7. The 2nd Defendants, Management Corporation Strata Title Plan no. 1008 ("MCST"), are the management corporation incorporated for Parkway Parade and is constituted under the Land Titles (Strata) Act.

8. PPPL and PHL were the owners of Parkway Parade until it was sold in February 2000. Tan Kai Seng ("Tan") is a director of the 1st Defendants and PHL. Tan's involvement with the cineplex project started about 1997. At all material times, he was also chairman of MCST.

9. At all material times, Soh Seok Yian ("Elizabeth") was the Group Property Manager of the 1st Defendants. She was also the executive director of Development Planning & Management Pte Ltd ("DPM") and she was involved in the cineplex project throughout. Until the sale of Parkway Parade, DPM, a subsidiary company of the 1st Defendants, was the managing agent of MCST.

10. On the side of the Plaintiffs, the dramatis personae were Tom Elliot of United Artists and Michael Buckley of Pacific Media. Gary Quick became involved in the cineplex project from about February 1998. Gary Quick was the only witness for the Plaintiffs.

11. For present purposes, I will refer to the Defendants, DPM and PHL collectively as "Parkway", only distinguishing between them where necessary to draw a distinction as between the status, rights and obligations of the companies. It is apparent that in their dealings, the parties made no distinction between DPM, MCST, PPPL and PHL.

The Witnesses

12. The negotiations over the period of seven years were well documented. The written testimony of Gary Quick and of Elizabeth with whom Tan adopted as his affidavit of evidence-in-chief provide a chronological account of events reconstructed with the aid of contemporaneous documents in the case.

13. Tan and Elizabeth did not have a good recollection of events than they actually had. Gary Quick was a shade better. It is understandable, especially when their evidence is given years after the event. On matters outside of what had been recorded in the contemporaneous documents, I am unable to regard any of the three witnesses as reliable historians.

14. The parties here have documented the progress and outcome of their negotiations. The issue whether they have entered into a binding contract at law, and if so on what terms, is primarily

to be resolved by construing, objectively, the documents in their factual setting. The intentions of the individuals participating and their beliefs then or later, as to the effect of the documents are irrelevant except to the limited extent to which such matters form part of the factual setting. See *Harmony Shipping Co. S.A. v Saudi –Europe Line Ltd* [1981] 1 Lloyd's Rep. 337 at 414.

15. Therefore, the testimonies of the witnesses on matters of individual intention and belief are, unless they are properly material to the factual setting, excluded from my review of the evidence in coming to a decision on whether there was:

(i) a concluded and binding agreement between the parties under either the original or revised plan and/or;

(ii) a concluded and binding free-standing agreement between the parties in respect of a contribution from the Plaintiffs towards the payment of DP to the Land Office.

The Dispute

(1) The Plaintiffs' case

16. The Plaintiffs' case for money had or received is pleaded on various alternative bases. They are: (i) total failure of consideration; (ii) mistake of fact; (iii) recovery of monies paid/deposits/advances made in the course of negotiations for a contract which never materialised; (iv) recovery of monies/advances made in connection with a contract wholly executory on the Defendants' part or which had been terminated.

17. Alternatively, the Plaintiffs' pleaded case is that, if there is a finding that there existed a binding agreement between the parties prior to the sale of Parkway Parade, the Defendants are liable for damages in the sum of $1,846,900 in that they had breached this agreement by not ensuring that the new owners continue with the cineplex project with the Plaintiffs.

18. In respect of a payment in the sum of $346,900 made on 14 January 1999, the Plaintiffs' pleaded case, as an alternative to a claim for restitution, is based on the Defendants' alleged agreement to refund the money.

(2) The Defendants' case

19. The Defendants say that the total sum of $1,846,900 was the Plaintiffs' partial payment of their share of agreed contribution towards DP. They were paid to PPPL to on-pay to the Land Office or to reimburse PPPL for payments made on the Plaintiffs' behalf to the Land Office. The Plaintiffs are therefore not entitled to claim the money back as money had and received. The payments were not advances or deposits paid in the course of negotiations for a lease of the cineplex. There was no total failure of consideration or operative mistake of fact.

20. In any event, no restitution is permissible at law, as the Defendants had changed their position in that the money was paid to the Land Office and is not refundable.

21. Further, the refund of the sum of $346,900 was superseded by the Plaintiffs' offer of 4 August 1999 to utilise this money as part payment of DP which offer was accepted by the Defendants on 6 August 1999.

22. The 1st Defendants alleged that as the Plaintiffs had agreed to contribute either $3,465,000

o r $3,046,900 towards DP, the Plaintiffs still owed them the sum of $1,618,100 or alternatively $1,200,000 being DP paid by the 1st Defendants at the Plaintiffs' request and on their behalf. The 1st Defendants accordingly counterclaim against the Plaintiffs.

23. The 1st Defendants further pleaded that if the court finds that there was a binding contract to lease the cineplex, they counterclaim the sum of $7,442,857 as damages.

Contract Claim

(1) Is there a binding agreement under either the original plan or revised plan for a straight lease?

24. Although raised in pleadings by both sides, it was not seriously argued that there was a concluded contract under either the original or revised plan.

25. In fact, on 2 May 2000, lawyers acting for PPPL in the sale of Parkway Parade to Lend Lease took the position that there was no concluded contract between the parties and they told the lawyers of Lend Lease so.

26. In respect of both arrangements, the documentation showed that the negotiations between the parties were "subject to contract". I will first deal with the various exchanges of correspondence pertaining to the original plan on this topic.

(i) Original Plan - Construction of shell structure, fit-out and lease arrangement

27. In the early 1990s, Parkway had envisaged a multiplex cinema in Parkway Parade. This project would involve demolishing the play deck and construction of a cinema structure from the car park below. In those days, Parkway was in discussions with Golden Village Entertainment (S) Pte Ltd for the purchase of the common property at the top level of the Shopping Centre Podium Block and for the construction and operation of a multiplex cinema. The idea back then in 1993 was for PPPL to enter into a joint venture with Golden Village Katong Pte Ltd. In the end, negotiations came to naught.

28. In 1994, United Artists came on the scene. It expressed interest to construct and operate a cinema at Parkway Parade.

29. The site of the development was to be on common property owned by MCST. Both PPPL and MSCT were interested in turning the proposed site into an entertainment centre for Parkway Parade. For PPPL, it would be a significant attraction to draw repeat visitors to Parkway Parade and improve human traffic flow throughout the shopping centre thereby enhancing the value of the property. MCST's interest is that it would enjoy higher rental income for space that was not being optimally used.

30. As owner of Parkway Parade, the project was very much led and driven by PPPL. PPPL's participation was important to the Plaintiffs. Under the Land Titles Act, a special resolution of 75% majority in general meeting must be passed to approve improvements to the common area. Together with an associated company, PPPL had a 78.9% majority, thus ensuring support for the project. In that sense, Tan accepted that PPPL at all material times had effective control of MCST (NE 536/539).

31. Negotiations began as long ago as August 1994. Up to early 1999, the arrangement envisaged was for the Plaintiffs to take on the role of developer of the cineplex, design, manage and

operate the cineplex ("original plan"). The scheme involved the execution of a Conditional Agreement dealing with the construction of the main structure of the cineplex and execution of a Lease Agreement. The prospective contracting parties were UAST and MCST.

32. In November 1995, Jones Lang Wootton put together the outcome of initial discussions in a document entitled "Principal Heads of Terms". It was forwarded on 15 November 1995 to Parkway for approval and the lawyers to prepare the legal documentation. On the top right corner of the document are the words "Subject to Contract and Management Corporation Approval". This Principal Heads of Terms, under Jones Lang Wootton's letterhead, was unsigned.

33. Sometime thereafter, Chor Pee & Partners ("CPP") representing MCST drafted two documents: Conditional Agreement and Lease Agreement. The first drafts of the Conditional Agreement and Lease Agreement were dated 4 December 1995. After some discussions between United Artists and Parkway, the revised drafts dated 30 January 1996 were forwarded to Tom Elliot on 31 January 1996. Later, a Corporate Guarantee was required. It would appear that in April 1996, a draft Corporate Guarantee was sent to United Artists for comments.

34. Gerald Crewe, Corporate Counsel of United Artists, wrote to Parkway on 4 October 1996 for a soft copy of the drafts. Parkway attended to the request and in the covering letter dated 7 October 1996, Parkway told United Artists to take note that "the draft Conditional Agreement and Lease and our draft Corporate Guarantee are Private & Confidential and are Strictly Subject to Contract".

35. The original plan was unique in that the cinema operator rather than the landlord would fork out substantial funds to develop the shell structure, fit out and operate the cineplex.

36. There were many unresolved differences between the parties. As an illustration, on 13 December 1996, United Artists informed Parkway and CPP that they have a great number of problems with the third revised drafts of 18 October 1996 and feared an impasse because of very fundamental differences.

37. Between December 1995 and June 1998, no fewer that ten drafts of the Conditional Agreement and Lease Agreement were prepared. They reflected the on-going negotiations that over the years had proceeded somewhat languidly due to setbacks or events that had cropped up at different stages and times.

38. The first in the series of events concerned the unsuccessful planning application for the cineplex. There was nearly a nine-month interval between the second and third drafts.

39. On 6 February 1996, URA refused the initial planning application for the cineplex. A fresh application was submitted in April 1996. On 24 May 1996, the application was again rejected. An appeal was lodged in June 1996. A re-submission of the planning application was made on 16 August 1996. Provisional permission was finally given on 15 November 1996. All in all planning approval took over nine months to attain.

40. At the end of February 1996, United Artists expressed concern that having spent a lot of money on design and redesigning for the cinema, approval of MCST had till then not been given. On 1 March 1996, Jones Lang Wootton informed United Artists that Parkway have obtained in principle approval of Management Council of MCST. But, the matter was not brought to the General Meeting as the amount of the development charge was at that time unknown. Management Council wanted to be first apprised of MCST's "potential liabilities i.e. the development charge levy".

41. The parties only knew for sure in November 1996 that DP rather than development charge was payable. Another setback to the conclusion of the deal concerned the amount of DP assessed by the Land Office.

42. Until then the discussions were premised on a desktop assessment of $10m with United Artists contributing $3.465m. PPPL would support the cineplex with a contribution of up to a ceiling of $5m. Should DP exceed $8.640m, the idea then was to ask the prospective landlord, MCST, to contribute up to a sum of $1.535m (AB 446). In the overall scheme of things, a corporate guarantee was required to secure the performance and compliance of UAST during the period of construction should MCST be required to contribute to the payment of DP.

43. By way of explanation, the DP amount initially assessed by the Land Office on 6 March 1997 was $17.644m excluding GST. Repeated appeals were lodged for a review and reassessment.

44. Unless the amount of DP was reduced, the project would not be viable. The Plaintiffs were not disposed to discuss the drafts until the issue of DP was resolved. For this reason, negotiations on the many outstanding issues between CPP and Arthur Loke & Partners ("ALP"), representing the Defendants stopped in May 1997.

45. The appeal and re-appeal process were protracted and it was only after many months of representations that on 26 January 1998, the Land Office reassessed the amount of DP payable at $8.469m without GST.

46. After the Land Office's decision, the matter was revived with CPP sending revised drafts of the documents dated 19 February 1998 to ALP under cover of a letter of the same date.

47. The decision of the Land Office was announced at a time when United Artists itself was undergoing corporate changes. It coincided with a merger of United Artist with two other US cinema operators and a Dallas corporation acquiring United Artists as well Pacific Media's decision to increase its equity holding in UAST.

48. Despite Defendants' overtures for a commitment to the project, Pacific Media, who eventually took over United Artists' shares in UAST, was in no position to respond until the corporate exercise was finalised and funding for the cineplex project approved and secured.

(ii) Revised Plan- straight lease arrangement

49. The ownership change of UAST coincided with the Asian currency crisis in 1997/1998. In early 1999, Pacific Media inquired of Parkway to help finance the building of the cineplex. Pacific Media raised with Parkway the possibility of finding a contractor to build and finance the shell structure.

50. Owing to Pacific Media's financial constraints, the parties in March 1999 discussed and explored the possibility of PPPL or its nominee, MCST, taking over the development of the shell structure leaving the Plaintiffs responsible for the fitting out works and operation of the cineplex under a lease (" the revised plan").

51. On 5 May 1999, the Plaintiffs were informed that its *"offer [based on revised plan] for the operation of the proposed multiplex will be considered a new undertaking - which is subject to contract, and to further negotiations."* [emphasis added]

52. It was only after the application for planning approval was transferred to MCST that Parkway in June 1999 started to show some interest in the Plaintiffs' proposals for a straight lease arrangement forwarded in March and May 1999.

53. On 21 June 1999, Parkway advised the Plaintiffs in a letter marked "Without Prejudice & Subject to Contract" that their offer to lease and operate the proposed cineplex was being reviewed by Management Council. Again on 6 August 1999, Parkway's letter, which sought to accept the Plaintiffs' rental package, was marked "Subject to Contract".

54. The Plaintiffs themselves also made use of the same expression "subject to contract" in correspondence. (see AB 1271).

55. On this revised plan, there were three working draft leases. The first working draft lease was dated 16 September 1999 followed by a second working draft on 25 November and the third dated 2 December 1999. The intended lease of the cineplex, which was to be executed between the 1st Plaintiffs and the 2nd Defendants, was never signed.

56. In February 2000, the 1st Defendants sold their interest in Parkway Parade. The Plaintiffs were told of the sale in March 2000. With the sale, all negotiations between the Plaintiffs and Parkway on the intended lease effectively ceased. In July 2000, the Plaintiffs indicated to the new owners their decision to withdraw from the cineplex project.

57. It is well settled that the phrase "subject to contract" makes it clear that the intention of the parties is that neither of them is to be contractually bound until a contract is signed. The negotiations remain subject to and dependent upon the preparation of a formal contract. Either party may withdraw from the negotiations before a final agreement has been concluded: *Winn v Bull (1887) 7 Ch 29 at 32; Spottiswoode, Ballantyne & Co Ltd v Doreen Appliances Ltd* [1942] 2 KB 32 at 35; *Chillingworth v Esche* [1924] 1 Ch 97 at p 109 & 114; *Derby & Co Limited v ITC Pensions Trust Limited* [1977] 2 AER 890 at 896.

58. Elizabeth (DW1) was asked for her understanding of the phrase "subject to contract". She said: "..we usually use that [phrase] when negotiating terms with parties we deal with." She agreed that ordinarily "subject to contract" means parties have to enter in a written contract before terms are binding. To her understanding, the expression "subject to contract " used in correspondence means the " contract has not been signed [yet]." She was similarly aware that parties were entitled to cease negotiations and walk away. Further, she was advised by CPP and in-house counsel to mark her letter of 21 June 1999 "subject to contract". She confirmed that her lawyers would have vetted her letter of 6 August 1999. Hence the suggestion that the letter was marked "subject to contract" on legal advice.

59. Tan (DW3) also was familiar with and knew what the phrase "subject to contract" meant.

60. Gary Quick (PW1) was aware and accepted that further discussions or negotiations with Parkway under the revised plan was "subject to contract".

61. It is clear from the relevant documents that the parties negotiated throughout on a "subject to contract" basis so much so that until both parties executed a written contract, no binding agreement could subsist. The communications between the parties are consistent and reinforce the view that each side recognised that no binding contract was in existence. The solicitors were working on the drafts of the formal contract or lease that were never finalised and executed. This process

started in 1995 under the original plan and then the revised plan and continued right through to February 2000 with no fewer than thirteen drafts being produced.

62. Given the history of this case, nature and importance of the transaction, which was by no means insignificant in terms of magnitude, complexity and cost, it is less likely that the parties would have wanted to bind themselves on 6 August 1999. In my view, the 6 August letter, which was deliberately made "subject to contract", was nothing more than a conditional acceptance of the Plaintiffs' overall rental package of 4 August 1999. The conditional acceptance would result in a contract when a formal lease was signed. Until then, either party was entitled to walk away from the negotiations.

63. I therefore find that no form of a binding agreement under either the original plan or revised plan to fit out and operate the cineplex under a lease was ever concluded. I am satisfied that the parties deliberately left matters not just for future discussions but also for future agreement.

(2) Is there an agreement to pay differential premium and, if so, the amount of the Plaintiffs' share of differential premium

64. On this issue, the Defendants' pleaded case is that there was an alleged agreement between the parties that out of the $8,469,000 non-refundable DP payable to the Land Office, the 1st Defendants was to contribute $5m and the 2nd Plaintiffs was to contribute $3,465,000 or alternatively $3,046,900. It is also the Defendants' pleaded case that the agreement was reached either in January 1996 or January 1999.

65. An analysis of the events set out below under the heading "The Four Payments" and evidence as to the parties' conduct of negotiations after the 6 August 1999 all confirm that there was no concluded and enforceable free-standing agreement between the parties for the Plaintiffs to contribute towards DP in the sum of $3,465,000 or $3,046,900.

66. As I have stated, the most I can extract from the evidence is that as of 6 August 1999, there was a conditional acceptance by the Defendants of the Plaintiffs' offer of 4 August 1999 to pay DP of $3,046,900 if a lease agreement was entered into between the UAST and MCST.

67. Negotiations made progress since 6 August 1999, but the parties nevertheless remained in a state of negotiations conducted subject to contract. The actions of the parties' solicitors in working on the drafts of the proposed lease, the correspondence and communications between them, and also between the parties, were clearly more consistent with the parties on each side recognising no binding contract was in existence until execution of the lease.

68. On the evidence, I find that there was no separate binding contract between the Plaintiffs and Defendants to pay non-refundable DP in the sum of $3,465,000 or $3,046,900.

Claim in Restitution - Money Had and Received

69. Although various alternative bases of the claim in restitution were pleaded by the Defendants, the real issue in this case comes down to simply this: What was the intention and purpose behind the four payments in question as between the Plaintiffs and Defendants and upon what terms were the four payments made?

70. The various payments totalling $1,846,900.00 were made in 1999 at a time when the parties were in a state of negotiations made subject to contract. Generally, payments effected conditional

upon a contract being granted or monies paid during negotiations for a contract that never materialised are dealt with by reference to the law concerning pre-contract deposits.

(1) The Law

71. A pre-contract deposit is prima facie recoverable if the prospective contract in connection with which the payment is made does not come into existence: *Halsbury's Law of England* Vol 9(1) (4th Ed Reissue) 1134; *Chillingworth v Esche* [1924] 1 Ch 97; *Masters & Anor v Cameron* [1954] 91 CLR 353.

72. It is generally appropriate to describe a payment before contract as a "deposit". However, it is important to note the different legal effect of a pre-contract deposit and a deposit paid upon or after entry into a binding contract.

73. The difference between a pre-contract deposit and a deposit paid upon or after the conclusion of a contract (referred to as a 'contract deposit') was explained by Pennycuick V.C. in *Potters v Loppert* [1973] Ch 399.

> "I turn now to the law in relation to pre-contract deposits…Unless and until a contract is concluded, the prospective purchaser can require the return of the deposit at any time, and upon conclusion of the contract, the deposit assumes the position of an ordinary contract deposit." (p. 413)

74. On contract deposit he added:

> " ..a [contract] deposit serves the dual purpose of an earnest to bind the bargain and as part payment of the purchase price. The deposit is frequently paid to some person - usually the estate agent or a solicitor employed by the vendor as a stakeholder. Broadly, it is the duty of the stakeholder to deal with the deposit according to the event" (p. 405).

75. Since *Howe v Smith* [1881] 27 Ch 89, the nature of a contract deposit (as opposed to a pre-contract deposit) is settled in English law. At p 101, Fry LJ said:

> "Money paid as a deposit must, I conceive be paid on some terms implied or expressed. In this case no terms are expressed, and we must therefore inquire what terms are to be implied… The terms most naturally to be implied appear to me in the case of *money paid on the signing of a contract* to be that in the event of the contract being performed it shall be brought into account, but if the contract is not performed by the payer it shall remain the property of the payee. It is not merely a part payment, but it is then also an earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract."
>
> ….
>
> ".. [T]he earnest is lost by the party who fails to perform the contract. That earnest and part payment are two distinct things… They are separate acts. .. The deposit in the present case is the earnest or *arrha* of our earlier writers; that the expression used in the present contract that the money is paid "as a deposit and in part payment of the purchase-money" relates to the two

alternatives, and declares that in the event of the purchaser making default the money is to be forfeited and that in the event of the purchase being completed the sum is to be taken in part payment."

[emphasis added]

76. As to whether a payee is entitled to retain a pre-contract payment depends in each case upon the construction of the document or correspondence under which that payment is made. The onus is on the payee to displace the prima facie rule and to show a right to retain the pre-contract payment.

77. So, unless the prima facie rule is displaced, a pre-contract payment would in law be made on terms which required that if a formal contract is executed, the money is to be applied and treated as a contract deposit and a part payment on the transaction so contracted for, and if there is no executed contract, the money should be returned to the payer.

78. The Plaintiffs have referred me to *Chillingworth v Esche* which the Defendants have dismissed as not relevant. I disagree with the Defendants. In *Chillingworth v Esche*, the prospective purchaser paid some money as deposit and in part payment of the purchase price for a transaction for the sale of land, which was "subject to a proper contract to be prepared by the vendor's solicitors". The prospective purchaser subsequently refused to proceed with the transaction and claimed the return of the deposit. The question that had to be asked [as in the present case] was whether on the evidence (which was entirely documentary) the deposit was intended to pass irrevocably to the vendor if the purchaser did not enter into the transaction (per Pollock MR at p 108 and per Warrington LJ at p 111). The Court of Appeal held that on the evidence it was not so intended. The prima facie rule was not displaced and the Court of Appeal gave judgment in the prospective purchaser's favour for the return of the deposit.

79. Mr. Micklem for the prospective vendor argued that the money was paid by way of guarantee that the purchaser will not break off negotiations for reason other than default of the vendor. It was argued that even though the purchasers were entitled to determine the negotiations, the deposit would nevertheless be forfeited. Mr. Luxmoore for the prospective purchaser contended that the deposit was paid in anticipation of a binding contract.

80. Pollock MR agreed with Counsel for the prospective purchaser that money paid on deposit is prima facie recoverable on the ground that there never was a contract. He said:

> "…It is.... no part of the business of this Court to concern itself with the question why the negotiations [subject to contract] in this case came to an end and whether any one is to blame in the matter, but the duty of the Court is to note that as no contract was entered into the deposit would prima facie be returnable. What ground is there then for saying that the purchasers who were entitled to break off negotiations have thereby lost the deposit? That they were entitled not to complete the purchase seems clear, and I do not accept the view that the purchasers were paying the deposit as a guarantee or earnest of good faith that they would complete the purchase [by entering into a formal contract], because they could have revoked what had up to that time been agreed upon at any moment. It seems to me that when once the negotiations came to an end the rights of the parties were gone, and the purchasers were entitled to receive their money back. " (p. 106)

81. Pollock MR continued:

> "…In all the circumstances of this case, I think the deposit is recoverable by the purchasers. There was no provision made in the documents which would justify the vendor in declining to return it; though if he had, by appropriate words, made provision for that in the document, such a provision could have been upheld." (p. 108)

82. Warrington LJ, noting that the document was "subject to a proper contract to be prepared by the vendor's solicitors" observed:

> "…But where, as here, there is no binding contract, where the whole matter is left indefinite, it seems impossible to say that the purchasers pay the deposit as a guarantee to carry out the bargain, when by the document they have entered into they have not bound themselves to carry out any bargain. …. The purchaser has not bound himself, but in order to show a definite intention he is willing to part with money, and run the risk of the vendor spending the money and being unable to return it if negotiations are broken off. The purchasers contend that this is a deposit paid in anticipation of a final contract and nothing more. That seems to be the true view." (p. 112)

> " ..I look on the whole payment as being sufficiently explained as being an anticipatory payment intended only to fulfil the ordinary purpose of a deposit if and when the contemplated agreement should be arrived at." (p. 115).

83. In such a situation, the payee has no title to the pre-contract payment: *Masters v Cameron* at p364. Neither can he claim it as a gift. Walker LJ in *Guinness Mahon & Co Ltd v Kensington LBC* [1998] 3WLR 829 said:

> " Where a supposed contract is void ab initio, or an expected contract is never concluded, as in *Chillingworth v Esche*, no enforceable obligation is ever created…. An advance payment made in such circumstances is not a gift and is not to be treated as a gift. " (p. 850)

84. On the question of "consideration", Walker LJ pointed out three possible meanings:

> "In English law the expression "consideration" has at least three possible meanings. Its primary meaning is the "advantage conferred or detriment suffered" (*Midland Bank Trust Co Ltd v Green* [1981] AC 513, 531) which is necessary to turn a promise not under seal into a binding contract. In the context of failure of consideration, however, it is, in the very well known words of Viscount Simon LC in *Fibrosa Spolka Ackyjna v Fairbairn Lawson Comber Barbour Ltd* [1943] AC 32 , 48 :"generally speaking, not the promise which is referred to as the consideration, but the performance of the promise." Then there is the older and looser , …usage of "consideration" as equivalent to the Roman law "causa" reflected in the traditional conveyancing expression , "in consideration of natural love and affection…" (p.847)

85. In the context of a "total failure of consideration" where the contract never materialises, the pre-contract payment is recoverable as the consideration for that payment has failed. See Birks *Introduction to the Law of Restitution* (1985) (pp 223-224) quoted with approval by Walker LJ in

Gribbon v Lutton [2002] 2 WLR 842 at pp 858-859; Goff & Jones: *The Law of Restitution (5th ed)* pp 43 & 665.

(2) The Four Payments

86. The Plaintiffs made four separate payments to the Defendants in 1999. On each occasion, the individual payments were remitted to PPPL. The dates and amounts of the respective payments are:

		S$
1.	14 January 1999	346,900
2.	30 July 1999	600,000
3.	9 September 1999	450,000
4.	15 December 1999	450,000
	Total	S$1,846,900

87. The payments were made in the course of negotiations which had been conducted "subject to contract". The documented evidence before me set the matrix for all four payments for the proposed lease under the revised plan. They spelled out the purpose and character of the payments and the proposed use in future of the payments. It is proper to look beyond payment instructions sent to Pacific Media's bankers and to examine the surrounding circumstances, oral evidence and contemporaneous documents and correspondence to consider the purpose, intent and nature of the payments. See *Guardian Ocean Cargoes Ltd & Others v Banco Do Brasil S.A.* [1991] 2 Lloyd's Rep 68.

88. I begin with a chronological account of the events leading to the last three payments. I will deal with the first payment later.

January to March 1999

89. This period was the beginning of the change over from the original plan to the revised plan.

90. On 14 March 1999, UAST proposed a "straight lease deal". In this proposal, Parkway would bear the DP amount and the costs of demolition, construction of shell structure and interior walls built to the specification of the Plaintiffs. UAST would pay a base rent fixed at $3.75 psf or 18% of admission revenue, whichever was the higher.

91. On 15 March 1999, UAST sent a similar proposal with slight adjustments to occupancy and the recalculations showed that MCST would start earning additional rental at a 26.65% occupancy rate.

92. On 23 March 1999, the Plaintiffs proposed depositing a sum of $1m with the Defendants over the period of the building works to demonstrate their commitment to their part of the project, which

sum was to be released to the Plaintiffs once they had completed their fitting out works and opened the cinema. The $1m would be released to the Defendants in the event the Plaintiffs were not able to finish their part of the project due to problems with financing. (AB 1172).

93. The proposals were rejected and the Plaintiffs were told on 26 March 1999 to hand over the project to Parkway. At the same time, Parkway acknowledged the Plaintiffs' inability to proceed under the original plan.

94. At this stage, Parkway was in talks with Cathay as an alternative operator and had written to Cathay on 1 March 1999 that PPPL would support the proposal to MCST for Cathay to be cinema operator of the cineplex.

95. The Plaintiffs were rather confused by Parkway's letter of 26 March 1999 which coincided with a subsequent call from someone in Parkway's office who had wanted clarification on the rent proposal. In the result, Pacific Media asked Parkway on the same date to

> "..confirm that you are still happy to entertain entering into a lease arrangement with us under which we fit the cinema rather than construct the shell…Obviously we would be happy to facilitate a hand-over of the shell construction part of the project to you as soon as you would like."

96. On 27 March 1999, Parkway told UAST:

> " If Michael is REALLY REALISTIC & CONFIDENT of the sale of his investment and willing to promise and do the necessary to commit in a REAL way, maybe he and you can reconsider your lease proposal. My personal sentiments are that – in view of the change in the proposal it will take a substantial move on Michael's part to persuade the Council and general body." (AB 1186)

97. Two days later, Pacific Media replied:

> "…I can assure you once again that we would like to complete and operate the cinema for you. Gary will be sending you a proposal tomorrow with a revision of the rental which we believe is fair to both parties. This will be a base rent against a percentage of net admission revenue which will provide you with an increased income stream dependent upon the success of the cinema. Gary has prepared these figures in the knowledge that I am revising our *overall proposal to include a payment to yourselves* to cover in excess of S$3 million (sic) of the premium payable to the Land Office.
>
> *We would be prepared to contribute the sum of S$450,000 towards the six quarterly instalments set out in the instalment scheme from the Land Office*
>
> , the first one being due on 9th September 1999. These six instalments would amount to S$2.7 million which would make out total contribution a little over S$3 million given that we have already sent approximately S$350,000 to you…." (AB 1187)
>
> [emphasis added]

98. The amount of DP proposed was less than the figure of $3,465,000 under the original plan and it omitted reference to interest. It is telling that the Defendants at no time protested or objected

to a reduced DP contribution. They never sought to remind the Plaintiffs of an alleged agreement whereby the Plaintiffs were obligated to contribute DP in the sum of $3,465,000.

99. On 30 March 1999, the Plaintiffs revised their last rental proposal so as to include $3,046,900 for DP. The DP proposal was expressly stated to be based on Michael Buckley's letter dated 29 March 1999 attached to Gary Quick's fax. This $3,046,900 included the earlier payment of $346,900 plus six quarterly instalments of $450,000 each, the first instalment commencing 9 September 1999. (AB 1189).

100. With DP included in the overall package, the base rent was reduced to $2.75 psf versus 15% of net admissions revenue, whichever was higher.

101. On the same day, Parkway replied to the Plaintiffs. Parkway complained that it was not an improvement over the earlier proposal of $3.75 psf. (AB 1191).

102. Further to that, revised rental proposals from the Plaintiffs were sent to Parkway on 31 March 1999. This time the base rent was increased to $3.25 psf versus 16% of net admissions revenue, whichever was the higher. Again it was expressly stated that the base rent proposal was based "..on United Artists making total payments towards the premium of S$3,046,900 [per Michael's proposal]".

103. Up to this stage, it is clear the Defendants had accepted and recognised that there was no binding agreement on the Plaintiffs to pay DP. It is significant that at no time prior to this or for that matter even after the Plaintiffs demanded repayment of $1,846,900 did the Defendants raised the existence of a concluded agreement to pay DP in the sum of either $3,465,000 or $3,046,900. At no time was there ever a request for payment of the unpaid balance DP. It was only raised, as confirmed by Counsel for the Defendants, for the first time in the Counterclaim. These objective and cogent indications speak for themselves. The written statements in correspondence suggest that the Defendants never believed that a contract binding on the Plaintiffs to pay DP ever existed.

Transfer of application of the project to MCST (April –May 1999)

104. As April 1999 commenced, Parkway concentrated on the expeditious substitution of MCST in place of UAST as the named applicant of the cineplex.

105. The second 10% of DP was due on 9 April 1999. On 8 April 1999, Parkway paid the second deposit of 10% in the sum of $906,331.50 inclusive of GST and late interest payment. In their covering letter, Parkway told the Land Office that they would be writing to notify them of an alternative cinema operator. Parkway at the same time sought the Land Office's support to allow a change of applicant's name.

106. Notably, Parkway did not ask the Plaintiff for their share of the DP nor did they inform them of their intention to make payment to the Land Office. That is yet another indication that no agreement binding on the Plaintiffs to pay DP existed. At this material date, the Plaintiffs have yet to transfer the approval to PPPL or its nominees.

107. As at 30 April 1999, the Plaintiffs had offered $3,046,900 towards DP as part of the overall rental package for the straight lease arrangement. Parkway all but ignored the offer preferring to concentrate on securing a switch in the named applicant of the cineplex. URA had advised that since written permission was still valid, a change of applicant's name would not be an issue.

108. On 5 May 1999, MCST confirmed its willingness to consider undertaking the responsibility of being the developer "subject to terms to be agreed with UAST for the transfer of responsibility as 'developer' for the project". (AB 1221). The terms of the transfer of responsibilities are set out in CPP's letter dated 20 May 1999. See AB 1237

109. MCST also considered the *"proposed agreements for UAST to undertake the demolition, development and operation of the 7-screen cineplex at Parkway Parade to be null and void"*. UAST was told that their "..*offer for the operation of the proposed multiplex will be considered a new undertaking-which is subject to contract, and to further negotiations."*

[emphasis added]

110. On 7 May 1999, MCST requested UAST to put forward their "last best offer." UAST responded two days later and they essentially put forward the same 31 March 1999 proposal. (AB 1226).

111. On 13 May 1999, UAST again confirmed to MCST that they would no longer be able to continue as the developer of the cinema project. They confirmed their agreement to MCST undertaking the responsibility as developer. Gary Quick stated:

> "I sincerely regret the inconvenience caused and wish to reconfirm our commitment and continued interest in negotiating a new contract to fit-out and operate the cinema. We are ready willing and able to proceed immediately." (AB 1231)

112. Following from that letter, the Plaintiffs on 19 May 1999 wrote to the Chief Planner, URA, and the consultants namely the architects, quantity surveyors and structural engineers and informed them that MCST would take over the project as developer effective from 19 May 1999.

113. The terms of the transfer came on 20 May 1999. CPP wrote to ALP on 20 May 1999 (AB 1237):

> "..We are further instructed that your clients have no objections to our clients taking over the development of the proposed cineplex. In this regard, please be informed that our clients are prepared to take over the development of the proposed cineplex on the following terms and conditions:-
>
> 1. your clients shall be responsible for the discharge of all the existing architects and other professional consultants two (2) weeks from the date of this letter and shall bear the fees of such architects and other consultants up to the said date of discharge. Your clients shall, at our clients' request, furnish to our clients and/or nominees all the necessary letters of discharge of such architects and other professional consultants within the said one-month period; and
>
> 2. your clients shall, as and when requested by our clients, sign all required assignments, notices and documents and do all that is necessary and expedient for the transfer to our clients and/or nominees of all your clients' rights in respect of all applications, plans, submissions and approvals in respect of the development of the proposed cineplex within the said two-week period; and

3. after the satisfactory taking over of the development of the proposed cineplex by our clients and/or nominees within the said two-week period, Parkway Properties Pte Ltd will refund to your clients (without interest) the sum of $346,900 which was paid by your clients *towards* the Differential Premium; and

4. subject to all of the above, each party shall not require from the other any reimbursement of costs and expenses (including but not limited to administrative costs, legal costs, costs of appeal, submission fees and processing fees) which were incurred by that party in respect of the proposed agreements and/or the development of the proposed cineplex and *the matter shall be treated as null and void and neither party shall have any claims against the other in respect thereof.*

Please let us have your confirmation on the foregoing on an urgent basis…"

[emphasis added]

114. Here in this letter, the refund of $346,900 was looked upon as payment *towards* DP rather than a reimbursement of DP to Parkway. The matter was also expressly treated as null and void and neither party shall have any claims against the other in respect thereof.

115. On 21 May 1999, PPPL wrote separately to UAST to confirm that once the plans and documents have been handed over to MCST, PPPL "will return (without deductions or interest) the $346,900 paid on 14 January 1999". Tan requested particulars of bank account to enable PPPL to effect the telegraphic transfer.

116. Again in this letter, which was written by Tan, the nature of the payment of 14 January 1999 was not described as a reimbursement as it is now claimed. The Defendants were ready and wanted to return the first payment of $346,900 to the Plaintiffs. The inference to be drawn from this is that Parkway was willing and prepared to bear the entire DP. So far, Parkway had at that stage paid close to $1.8m to the Land Office. At that time, the application was already transferred or in the process of being transferred to MCST.

Payment of $346,900 on 14 January 1999

117. I will now interrupt the chronological account of the facts to deal briefly with the January 1999 payment of $346,900.

118. In my view, at the time Parkway made payment of the first 10% of DP to the Land Office there was clearly no binding agreement to contribute towards DP. At the stage of the original plan, there was merely a provisional understanding or limited consensus which was subject to contract (as opposed to a concluded bargain) that the Plaintiffs as developer of the cineplex would contribute $3,465,000 towards DP, PPPL a sum of $5 million and the excess, if any, to be borne by MCST.

119. Prior to Parkway paying the first 10% of DP to the Land Office, Parkway indeed tried to bind the Plaintiffs to this contribution. Tan wrote first on 16 April 1998 (AB 732) followed by a letter dated 22 April 1998 from PPPL's lawyers M/s Tan & Tan enclosing a Deed Of Undertaking and a Deed of Assignment for the Plaintiffs' attention. (AB 747). The Plaintiffs were required to sign and return the confirmation to Tan's letter of 16 April by 24 April 1998 before PPPL paid Land Office the first 10 % of DP.

120. The Plaintiffs did not provide the confirmation sought. ALP on 24 April 1998 told M/s Tan & Tan that they would take clients' instructions on the Deed of Undertaking. (AB 755).

121. Eventually, the Plaintiffs, through ALP, gave a qualified undertaking on 24 April 1998 for the payment of the first 10% of DP. It was couched in language which only obliged the Plaintiffs to pay their share of the balance of the DP when the Conditional Agreement was signed. If it was not signed by end of May 1998, the Plaintiffs would pay interest on their share of the balance of the DP from 1st June 1998 to date of payments of that balance. Should the Conditional Agreement not be signed at all, two scenarios would follow: the Plaintiffs would reimburse PPPL for its payment of the Plaintiffs' share of the first 10% of DP payment to the Land Office if the project ended there. But if the application, plans and drawings were assigned to PPPL, there would be no reimbursement to PPPL. (AB 756).

122. This communication is significant as it demonstrates that the Plaintiffs had no intention to pay DP at all if the Defendants continued with the project and took over as developer. The refund of $346,900 contained in CPP's letter of 20 May 1999 is consistent with this thinking. As a term of the transfer of application to MCST, all prior arrangements on the original plan were treated as null and void and the money was agreed to be returned to the Plaintiffs. This is the clean break Parkway wanted. According to Elizabeth's internal memo, she received legal advice to "terminate UA early – to avoid 'misleading' them". See AB 1168

123. Tan's oral testimony (NE 586) that it is "beyond doubt that if they [the Plaintiffs] had not committed, we would not have paid the DP in April 1998" is contradicted by the contemporaneous documents.

124. On 13 January 1999, Pacific Media remitted $346,900 to PPPL. This remittance was not pursuant to the qualified undertaking given in April 1998. Quick in 165 of his affidavit of evidence-in-chief said that he and Michael Buckley had dinner with Parkway's representative on 5 January 1999. Over dinner, Parkway sought to pressure the Plaintiffs into making some sort of initial or advance payment towards the intended project. In his written testimony, Quick said that the January 1999 remittance was an advance payment. From the evidence, it appears that Quick, had during cross-examination, mistakenly agreed with Counsel for the Defendants that the payment was a reimbursement to the Defendants rather than an advance payment. Thus, contrary to the submission of the Defendants, the payment of $346,900 in January 1999 did not discharge any debt owing to PPPL. There was no debt at all in the first place to speak of.

125. Even if the January remittance was meant to reimburse PPPL the Plaintiffs' share of the first 10% of DP paid at the request of the Plaintiffs and on their behalf, the status of this payment changed following the Defendants' agreement to refund the money in May 1999.

126. The Defendants' pleaded case is that there was an agreement by the 2nd Plaintiffs to contribute DP. This agreement, according to the Defendants, was reached either in 1996 or in January 1999. The negotiations under the original plan were subject to contract and the payment of DP was a term of the Conditional Agreement that was never finalised and signed. Neither was the Deed of Undertaking finalised and signed. Further, exchanges of correspondence do not show any concluded agreement to pay DP in the sum of $3,465,000. Definitely by end May 1999, any possible or arguable hint of an agreement to pay DP had been treated as null and void.

127. ALP on 16 July 1999 had written for the $346,900 to be returned to Pacific Media. The money was to be returned on the basis of a clean break. (AB 1301). However, there was no purpose

subsequently in pressing for its return since the Plaintiffs wanted to remain as the operator of the cineplex under the revised plan. In my view, the Plaintiffs left the January 1999 payment with the Defendants as part of the $1m good faith deposit offered by Pacific Media under the revised plan.

128. As Gary Quick said, the refund was "rolled into the new proposal" (NE 71). It was part of the overall package and as it was already in the Defendants' hand it was incorporated as part of the good faith deposit in July 1999.

129. I now return to the history of events in June - September 1999.

June – September 1999

130. Earlier in the month on 9 June 1999, DPM had sent to Council Members the offers from both UAST and Cathay. After Council Members met on 16 June, a decision was made to request financial commitment on performance from the respective operators. This would allow Council Members to endorse the party to be selected as cinema operator. At that time, the sale of Pacific Media's internet business was not yet completed. The latter had on 9 June, requested PPPL to postpone giving "this contract to any other party until after 30 June" which was when the announcement of the sale and purchase of Pacific Media's internet business was expected.

131. According to draft minutes of Council Meeting held on 16 June 1999, whilst Pacific Media was not ready, Cathay was "ready to commit to an offer of the lease for the operation of the cineplex based on the terms submitted in the table at Appendix 2." Also "Cathay..had expressed that they are ready to sign the lease agreement if the management council can accept their terms." See AB 1285.

132. Tan, in his oral testimony, confirmed that in June 1999, Cathay was the only party with whom the Defendants were still talking to. By this time, the Defendants had made payment of the second 10% instalment of DP to the Land Office in April 1999 without calling upon the Plaintiffs to contribute their share unlike previously with the first payment. Also by this time, MCST had taken over as developer of the project. These are objective indications consistent with there being no binding agreement between the Plaintiffs and the Defendants to contribute towards DP in the sum of $3,465,000 or $3,046,900.

133. Earlier in the month, URA was told on 8 June 1999 that MCST had taken over as named applicant developer from UAST. MCST also alluded that it was considering the project with another party who will require an amendment to the proposed layout submitted by UAST. The proposed layout was 10-15% smaller than the approved layout. In view of this, MCST was seeking an adjustment to the amount of DP. On 16 June 1999, MCST wrote a similar letter to Land Office for adjustment of the DP.

134. Parkway responded to the Plaintiffs' offer of 9 May 1999 on 21 June. The language used by Parkway was deliberate with the intention to start afresh their relationship and re-negotiate. Not only was the subject matter headed " Interest to lease and operate the proposed cineplex at Parkway Parade", the letter was marked "Without Prejudice & Subject to Contract". Parkway advised the Plaintiffs that whilst their offer to lease and operate the proposed cineplex was being reviewed by Management Council, the latter had:

> "…requested .. an undertaking from your organization - as a form of financial commitment during this period of finalisation of the proposed leased terms and conditions.

> The form of financial commitment may be in a confirmation of your financial status to commit to the proposed project with a reference from your bank and with a "performance guarantee".
>
> We appreciate if you would revert by 30 June 1999 on the above to demonstrate your ability to undertake the proposed project." (AB 1265)

135. The Plaintiffs were not willing or able to provide a banker's performance bond. On 25 June 1999, the Plaintiffs instead proposed other means of security (AB 1271):

> *As a gesture of good faith we would be prepared to*
>
> *deposit with you the sum of $500,000 which would be forfeited should we fail to complete the project.* This offer is made *without prejudice and subject to contract* expressly on the understanding that it would be available to us to complete the contract and would not be held by you once the Cineplex had commenced operations."
>
> [emphasis added]

136. There was continual doubt in the Defendants' minds over the Plaintiffs' ability to carry through with the project since the proceeds of disposal of the internet business were not earmarked for the project and furthermore Pacific Media was going on a fund raising exercise for US$25 m.

137. On 13 July 1999, Pacific Media told Parkway that they were confident of their financial ability to complete the project so much so that they would be prepared to place a deposit with Parkway on the following terms:

> "I believe that you currently have a *deposit from us of S$345,000* towards the premium payable to the Land Office. I would be happy to give you a further deposit of $500,000 upon signing a lease making a total of $845,000. This money would be used as a final payment of our portion of the premium but the whole amount of S$845,000 would be released to your company as a penalty payment if we were unable to complete the construction of the cinema successfully. Whilst I would expect the interest accruing on this money to be paid to us on an agreed time scale, this interest would also be waived in the event of non-completion which means that you would receive a penalty payment of close to S$1 m if we did not fulfil our part of the contract.
>
> I am sure that you will agree *this proposal is a significant gesture of good faith* regarding our intentions and our ability to complete the project. … I suggest that we now ask our respective lawyers to prepare a new lease for signature in the very near future. I will be in Singapore next week and would be happy to meet you to finalise any outstanding points and to sign the lease if it can be prepared within that time scale.." (AB 1298)
>
> [emphasis added]

138. It is quite clear from this letter that the intended purpose was for the $346,900 to form part of the good faith deposit which was supplemented by an "additional deposit" of $500,000.

139. Parkway viewed this proposal as minuscule. There is a handwritten note with the comment

that $1m was "peanuts". (AB 1299).

140. Pacific Media increased the amount of the "additional" good faith deposit from $500,000 to $600,000 on 20 July 1999:

> "I feel that the offer contained in my letter of 13th July to Elizabeth Soh regarding the *additional deposit* of $500,000 which we are prepared to place with you together with the support of this existing cash flow should be sufficient for you to execute the lease with us. As a final gesture of goodwill I am prepared to *increase the additional deposit from $500,000 to $600,000 in the hope that we can now execute the lease and proceed with our joint development*." (AB 1303)
>
> [emphasis added]

141. At this stage, the total good faith deposit came up to $946,500 (i.e. $346,900 plus $600,000).

142. The proposal of 20 July was revised again three days later. This time the Plaintiffs proposed a corporate guarantee from Pacific Media to secure the performance of the lease by UAST. The lease would be in the name of UAST:

> "In order to resolve this long standing situation I am now prepared to send you a letter from Pacific Media guaranteeing the obligations of UAST *if that company enters into a lease with you to construct and operate the proposed multiplex as a substitute for all previous offers of financial assistance.*
>
> You will understand that I am prepared to do this in the belief that the funding of this development will not present any difficulties…
>
> I suggest that we now proceed to sign the lease once it has been amended to reflect the latest agreed proposals between us and I see no reason why this could not be achieved before the end of next week. *I hope that this proposal is acceptable, being much more substantial than all previous offers of support.*" (AB 1310)
>
> [emphasis added]

143. The proposal was not acceptable to Parkway. Pacific Media on 26 July wrote to Tan of PPPL:

> " As I explained to the[Council] meeting, we are basically putting all of the Group resources behind this project in that the lease will taken in the name of UAST and I will write a letter from this company guaranteeing their obligations. This has the effect of providing you with the day to day cash flow from Singapore in support of the project as well as all of the Group resources in terms of cash available, new funds which become available through financing packages as well as borrowing capabilities within the group which are currently un-utilised.
>
> Specifically our proposal is as follows:
>
> 1. We amend the existing draft lease to reflect the new arrangement agreed

between us and enter into this as soon as possible.

2. We send you the sum of S$600,000 within five working days of execution for the lease. The current agreement between us is for us to pay you six quarterly instalments of $450,000 towards our proportion of the premium due to the Land Office, the first instalment becoming due on 9 September 1999. I suggest that this deposit is used to provide a part payment of $100,000 towards each of these six payments.

3. We will undertake to open the cinema within 280 days from the start of construction the date to be mutually agreed…." (AB 1314)

144. On 28 July 1999, Elizabeth writing on behalf of "our" Tan Kai Seng asked for various undertakings from Pacific Media to "confirm the offer".

"……Specifically we shall need you to undertake the following before we confirm the offer:

1. *Remit* the sum of *$600,000* within the next working days *to commit UAST to the project.*

2. The current arrangement for UAST to pay six quarterly instalments towards contribution of the premium due to Land Office, the first instalment due on 9 September 1999, shall remain as originally agreed by you for quarterly instalments of S$450,000.

3. The sum of S$600,000 required under para 1 above shall remain as *good faith deposit until we hand over the cinema to UAST for fitting-out works. We will consider the utilization of this sum against your contribution towards UAST's contribution to the premium in our negotiation for the revised terms for the draft lease agreement for the proposed cineplex.*

4. As indicated in your letter of 26 July 1999, UAST will proceed to finalise all terms and conditions to go into the contract with Management Corporation.

5. As indicated in your letter of 26 July 1999, Pacific Media to furnish a corporate guarantee on terms satisfactory to the Management Corporation to guarantee the obligations to be agreed by UAST in the proposed agreements for the lease and operation of the proposed cineplex.

We need you to undertake the above as specified to confirm the offer of the proposed cineplex to you. We look forward to your agreement to the Management Council's request and receipt of the "*good faith" deposit* by Friday 30 July 4pm local time." (AB 1325)

[emphasis added]

145. Pacific Media gave the undertakings requested on 28 July 1999 to Parkway :

"……Thank you for your letter of 28th July and I would respond as follows:

1. We will instruct our bankers to send S$600,000 to you tomorrow, Thursday

29th July, this money to be sent to the same bank and account details as the *previous deposit* [i.e.$346,900].

2. We confirm that UAST will pay six quarterly instalments of S$450,000 towards its contribution of the premium due to the Land Office with the first instalment being paid on or before 9th September 1999.

3. I appreciate your agreement to discuss the utilisation of the *S$600,000 good faith payment* towards UAST's contribution to the premium once you have handed over the cinema to us for fitting out. My suggestion would be that we pay the quarterly instalments of S$450,000 due 9th September 1999 and 9th December 1999 in full and that the four remaining payments are then reduced to S$300,000 per instalment with S$150,000 of the S$600,000 being applied to each of the four instalments.

4. Gary, Brian and our lawyers will be available to finalise all terms and conditions of the lease at your convenience.

5. Pacific Media will furnish a corporate guarantee on terms to be agreed between us which will guarantee the construction obligations of UAST, whether these are contained within a contract or the lease. The ongoing obligations of UAST under the lease following the opening of the cineplex will not be guaranteed by us, but obviously these obligations will be supported by the existing cash flow of UAST, the cash flow generated from your development and any other cash flow from additional future developments within UAST.

I trust that the above responses are satisfactory and hope that the bank transfer arrives by Friday afternoon. I will confirm tomorrow that the bank has issued the transfer and no doubt it will arrive by Monday at the latest.

It was kind of you to apologise for not staying until the end of the meeting last Friday but I should like to thank you for having arranged it at such short notice…" (AB 1328)

146. Elizabeth wrote on 27 July to Linda, presumably from accounts:

"Linda: Plse note ..that $600,000 shld be in our bank (PPPL) . You will need to clarify with TKS on whether this is to be transferred to MCST – since this is a *holding deposit* for landlord who is MCST. Plse let me know on Monday am when the money is in." (AB 1330)

[emphasis added]

147. The good faith deposit of $600,000 was remitted and received by PPPL. The money was transferred to MCST on 3 August 1999 where it remained until after the sale of Parkway Parade to Lend Lease when by way of journal entry, the money was transferred to PPPL on 29 February 2000.

148. On 3 August 1999, DPM requested UAST to confirm the items, which UAST will provide, based on current negotiations and outstanding legal issues pertaining to previous draft lease terms not acceptable to the Plaintiffs. (AB 1344).

149. The next day, UAST forwarded a revised rental proposal (AB 1345). This proposal made minor adjustment to their last proposal of 31 March 1999 (AB 1193). The percentage of net admissions revenue upon which the minimum base rent was to be calculated was increased from 16 % to 18%. The proposed rental package now included an additional variable element i.e. comprising 5% of the net concessions revenue for the first 4 years of the intended lease. The adjustments were being offered on the basis that the Defendants were now to undertake the M&E works, in particular, the air conditioning works for the complex (AB 1345 and 1347). As the letter did not deal with the $2.7 m, a follow- up letter was sent on the same day. The follow-up letter of 4 August 1999 reads:

> "….I am pleased to confirm our offer as discussed earlier today.
> Estimated square footage [revised] - 33,344 sq. ft.
>
> Development Premium
>
> | | |
> |---|---|
> | Previously paid | S$ 346,900 |
> | Due 09 September 1999 | S$ 450,000 |
> | Due 09 December 1999 | S$ 450,000 |
> | Due 09 March 2000 | S$ 450,000 |
> | Due 09 June 2000 | S$ 450,000 |
> | Due 09 September 2000 | S$ 450,000 |
> | Due 09 December 2000 | S$ 450,000 |
>
> -
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> | | |
> |---|---|
> | Total Contribution | S$ 3,046,900 |
>
> * Regarding the S$600,000 we sent to DPM on 30 July 1999, we would like to apply it equally against the last four (4) payments [a reduction of S$150,000 each].

<u>Rental Terms</u>

First term [7 years]

Base rent - S$3.25 per square foot per month

Percentage rent - 18% of net admissions revenue versus base rent [whichever is higher]

Additional rent - 5% of net concessions revenue. This is an additional amount paid in addition to base rent and/or percentage rent.

Second and third terms [Years #8 - #12]

Base rent - To be discussed

Percentage rent - 18% of net admissions revenue plus 5% of net concessions revenue. The total of these two figures versus the base rent [whichever is higher]

Additional rent - NONE!! The 5% of concessions revenue becomes a part of the percentage rent calculation.

....

We are anxiously awaiting your favourable reply to our offer. " (AB 1348)

150. In response, DPM wrote on 6 August 1999. The letter was marked "Subject to Contract". It reads:

> "....We refer to your letter of 4 August 1999 and are pleased to accept your offer stated therein.
>
> As discussed during our teleconversation on 5 August 1999, we confirm your agreement to the adjustments in rent on renewal/s of the lease as follows:-
>
> 2nd and 3rd Terms of 7-Year Lease Less 1 Day
>
> [Base Rent *] OR [18% of Net Admissions Revenue Plus 8% of Net Concession Revenue]
>
> whichever is higher.
>
> * *Base Rent at prevailing market rate to be capped to an increase which shall not exceed 15% of the contracted base rent of the preceding lease term.*
>
> Please note that the remaining major issues to be resolved are:-
>
> 1. Schedule governing the respective obligations of MCST and UAST in building/fitting-out of the respective premises and the time frame for discharging such obligation.
>
> This shall require the input of the various consultants for the demolition/construction of the project. We are arranging for a meeting with the consultants to determine the schedule/dates.
>
> 2. MCST's/UAST's obligations to provide certain facilities.

We are waiting for Brian's revised component schedule as per our discussions.

Other terms and conditions of lease for the proposed cineplex shall follow the draft lease agreement (which was prepared by the Management Corporation's solicitors based on original intention for the proposed Cineplex) with the understanding that appropriate amendments would be made to reflect the current agreed terms.

Our solicitors will now proceed to draft a finalised lease agreement for execution.

We look forward to working with you more closely on this project.

Thank you and with our best regards....." (AB 1358)

151. Pacific Media on 9 August 1999 wrote to Parkway to confirm the provision of the corporate guarantee and of the terms under which it is given.

152. The next communication was a fax from Parkway dated 24 August 1999 reminding Pacific Media of the due payment of DP in the sum of $450,000 on 9 September 1999 and requesting remittance by 7 September 1999. A reminder was sent on 3 September . The letter requested "payment to allow us to facilitate payment to Land Office".

153. On the same day, Pacific Media confirmed that the money would be sent by 9 September. The money was remitted on 9 September 1999. The next payment of $450,000 was remitted on 15 December 1999. In the Plaintiffs' bank application for remittance of the various payments to PPPL, the words "Differential Premium" was written in the box "Details to be notified to beneficiary".

154. The contemporaneous documents showed that PPPL, meanwhile, had intended to pay the balance of the DP to the Land Office in full. Elizabeth said that she spoke to Michael Buckley and Quick about this. This oral testimony is not in her affidavit of evidence-in-chief nor recorded in any of the contemporaneous documents. In 289 of his affidavit of evidence-in-chief, Quick stated that the Plaintiffs were not informed of and were completely unaware about Parkway's full payment of the balance of DP on 9 September 1999. Under cross-examination, he said he did not recall having this conversation.

155. Earlier, Parkway had on 7 September 1999 asked the Land Office for waiver of interest on the basis that full payment of the balance 80% of DP would be paid by 10 September 1999.

156. On 9 September 1999, Parkway paid the remaining 80% of DP plus GST. After that, Land Office reverted with its decision not to waive interest. The Defendants paid interest on 31 December 1999.

157. In my view, that Defendants took themselves out of the instalment plan and paid the remaining 80% of DP in full in order to improve their chances of securing a waiver of interest charge from the Land Office.

(3) Findings and Decision

(i) Intention and Purpose behind the Four Payments

158. The Plaintiffs' contention is that the various payments were made (i) in the course of

negotiations for the intended lease;(ii) with a view to securing and/or in consideration of the intended lease; and/or (iii) to account of their anticipated obligations under the intended lease. The Plaintiffs submitted that the payments were advances made in good faith to evidence their sincerity and commitment to the project and on the assumption that the intended lease agreement was going to be finalised and executed in due course. The Plaintiffs relied on *Chillingworth v Esche* and *Goff & Jones: The Law of Restitution (5th ed.)* pp 43 and 665 in support of their claim.

159. The Defendants' submission is that the payments were remitted as non-refundable DP for the Land Office. The 1st Defendants had paid DP to the Land Office at the Plaintiffs' request and the four payments were meant to reimburse the 1st Defendants for the Plaintiffs' share of their contribution towards DP payment, which had been agreed at either $3.465 m or $3.046 m.

160. Since I have decided that there was no concluded free-standing agreement binding on the Plaintiffs to contribute towards DP, the primary contention of the Defendants falls away.

161. Quick's oral evidence is that the Plaintiffs need not have to pay DP to the Land Office. By July/August 1999, the Plaintiffs were no longer developer of the project. MCST had taken over from them.

162. Quick's testimony is that DP under the straight lease arrangement was part of the overall offer. (NE 77). Pacific Media's letter dated 29 March 1999 expressly stated that the Plaintiffs have included contribution of DP as part of the Plaintiffs' *overall proposal* to fit out and operate the cineplex. The offer to contribute DP was a sweetener to enhance their overall package to make it more attractive to the Defendants. (NE 54,57,59).

163. The Defendants certainly viewed the DP contribution of $3.046m to be an integral part of the rental package. An illustration of this is from the Defendants' comparison of the offer from Cathay with the Plaintiffs'. In the computation of net rental income of the Plaintiffs' offer, the benefit of the DP contribution was amortised over different projected lease periods and matched to their respective rental income streams.

164. The Plaintiffs' offer was more financially attractive than Cathay's.

A contribution by the Plaintiffs towards DP in their proposal was important to the Defendants as it reduces the upfront costs needed for the cineplex project and hence reduces the overall funding requirements of the project. In the event that Cathay was chosen as the cinema operator, borrowings for the project would have been a net $2,531,900 more resulting in a higher interest bill. Further, the full repayment of the borrowings would be stretched by a further six years from year 2013 (based on UAST's offer) to year 2019 (based on Cathay's offer). See AB 1319-1324.

165. Yet the Defendants wanted tangible assurance from the Plaintiffs of their commitment and financial ability to do the deal. Cathay's financial standing was acceptable to the Defendants but not their offer.

166. Parkway told URA on 22 June 1999: "[W]e are in the process of determining the financial standing of each party to enable MCST to make a prudent decision so as to allow us to proceed on the project."

167. It is clear that in June 1999, the Plaintiffs turned down Parkway's request that a performance bond from a bank be provided. Other options were then offered in a series of communications that ended with the undertakings from the Plaintiffs on 28 July 1999.

168. An examination of all the circumstances gathered mainly from the contemporaneous documents showed what the parties were about. In fact, they showed that the payments were made in response to the attitude of the Defendants which at that time was one of serious concern as to whether the Plaintiffs would financially be in a position to see through and hold up to their end of the bargain after the lease of the cineplex was awarded to them. At that time, the shell structure had yet to be constructed.

169. In *Guardian Ocean Cargoes Ltd & Ors v Banco do Brasil SA* [1991] 2 Lloyd's Rep. 68, the same inquiry as in the present case was before Hirst J, namely, the purpose and intent of the payments made before contract. There the plaintiffs recovered judgment for repayment of US$600,000 deposited with the defendant bank as a token of good faith in a proposed shipbuilding re-financing deal in which negotiations broke down after 5 years. The prima facie rule on pre-contract deposits was not rebutted and the plaintiffs in *Guardian Ocean,* as in *Chillingworth v Esche* succeeded in recovering the money back.

170. In *Guardian Ocean*, the object of the negotiations was for the plaintiffs (who had demise chartered the "Golden Med") to take over the responsibilities of the owners who had defaulted on the shipbuilding contract and loan from the bank, and for the transaction to be refinanced by the defendant bank.

171. Negotiations were protracted and spread over a five-year period. Draft contracts were produced but revised due to constant changes to proposals as the value of the vessel dropped in a deteriorating shipping market. During the five years, the plaintiffs traded the vessel commercially. Relations broke down with the bank's arrest of the vessel. In the end, no contract was ever entered into between the bank and the plaintiffs.

172. The plaintiffs argued that the money was deposited with the bank as a token of genuine intent for future use in the intended acquisition by the plaintiffs of the vessel "Golden Med" and was only to be applied by the bank for that purpose if negotiations between the plaintiff and bank for the refinancing of the vessel were successful; the remittance were conditional on the conclusion of the financing deal.

173. The original proposal for the 3 remittances emanated from Mr. Juchem who was the in-house lawyer of the shipyard in order to give [like in the present case] a tangible assurance to the bank that the plaintiffs were financially sound, and that they were serious in their intent to take over the shipbuilding contract. In his written testimony, he said the payments were intended to show good faith on the part of the buyers (the plaintiffs) and to help influence the bank to grant the loan. Once made it should be possible to convince the bank that their loan would be repaid. The goodwill payments would show the bank that the "Golden Med" was really up to date again, and help influence them to go ahead and loan the remainder of the required funds. He went on to testify that knowing the bank, it was important that a prospective new borrower should show a willingness to make a substantial payment on account and as a sign of goodwill before concluding the deal. The importance and significance of the plaintiffs making a goodwill payment totalling US$600,000 must be viewed against the attitude of the bank. (p81)

174. Mr. Juchem said that everyone expected the deal to go through and the money applied to the promissory notes, but everything was meant to be dependent on the refinancing being secured. The intention was to make a deposit not a payment, and the money would be set against the promissory note debt when the final refinancing documents were signed. (p81)

175. Mr. Petropoulos for the plaintiffs testified that he made it clear that his prime concern in entering the negotiations for refinancing was to minimize his losses and safeguard the investment he had already made in two vessels. He said that the goodwill payments were to convince the bank of the company's sincerity, and to be applied towards the purchase price if the refinancing went through; he never considered making an outright payment. (p82)

176. The bank's position on the other hand, was that the remittances were outright payments.

177. It is the bank's case that prior to the first remittance of US$200,000 the scheme was fundamentally changed and that instead of mere conditional deposits, outright payments were proposed to be made by the plaintiffs on behalf of Timber Point for the credit of the yard in payment of the dishonoured promissory notes. The bank contended that these were voluntary payments made unconditionally and therefore irrecoverable by the plaintiffs.

178. Hirst J considered the same question as in *Chillingworth v Esche*, namely, was it intended that the payments should pass outright and irrevocably to the bank whatever the outcome of the negotiations or only if those negotiations resulted in a concluded refinancing.

179. The bank argued that the evidence of Mr. Juchem and Mr. Petropoulos did not support the plaintiffs' case of a conditional payment. Hirst J did not agree with the bank's analysis of the evidence. Hirst J said that " ..when Mr. Juchem referred in [his written statement] to "goodwill payment", "payments for a specific purpose", "payments as a sign of good faith" and the like, he was intending to refer to the payments being conditional [i.e contingent upon the conclusion of a refinancing deal]." (p. 83)

180. The importance and significance of Mr. Petropoulos making a goodwill payment of US$600,00 must be viewed against the attitude of the bank [in the same way as the Defendants' concern here about the financial ability of the Plaintiffs].

181. Quick's testimony is that he had no reason to doubt that a lease would not be signed. Even though the negotiations had been conducted "subject to contract", the parties to this action had been discussing the cineplex project for so long that both parties had confidently expected a formal contract to eventuate.

182. The payments were "inextricably linked" and made in anticipation of the intended lease. (270.20 of Quick's affidavit of evidence-in-chief; NE 66). The sum of $346,900 was held by the Defendants to account of future liability under the intended lease. See (270.22 of Quick's affidavit of evidence-in-chief.)

183. After 6 August 1999, there were negotiations on what would happen to the DP contribution of $3.046m in the event of default of performance of the executed lease. To illustrate, there were negotiations on a refund of the $3.046m if MCST was not able to hand over the shell structure by 28 February 2001 to the Plaintiffs to fit out and there were negotiations on the future use of the $600,000 such as applying the money to the instalment payments. There was even a proposal on 4 October 1999 to utilise part of the $600,000 towards the rental deposit which is equal to three months' base rent required under the draft lease and the balance applied towards the last instalment payment of $450,000 due on 9 December 2000.

184. Quick's evidence is that there was no reason to make the payments except for the lease. Without the lease, there was no reason for the Plaintiffs to contribute towards DP. Elizabeth and Tan accepted that. They also agreed that the Land Office's approval obtained from payment of DP would

be meaningless to the Plaintiffs without a lease from MCST. (NE 391,169 and 545).

185. The statements in the documented evidence referred to "gesture of good faith", "good faith payment", "good faith deposit", 'deposit", 'additional deposit" and "additional good faith deposit". Quick disagreed with Counsel for the Defendants who suggested in a question put to him that the four payments were not deposits or advances.

186. A significant feature of the present case is that the Defendants had asked the Plaintiffs for tangible assurance of their financial ability to undertake and complete the revised plan. I would characterise the four payments as pre-contract deposits which served as an indication of the Plaintiffs' confidence with funding, genuine interest and seriousness in being the cinema operator of the cineplex at Parkway Parade. The four payments were deposited with the Defendants as tangible assurance of genuine intent. In my view, the four payments were to be kept aside and held against the conclusion of a final lease and for use of the money deposited after the lease was signed.

187. I accept the Plaintiffs' evidence that the payments were made in anticipation of the lease. They were not intended to be outright payments. There was no commercial reason for the Plaintiffs to pay $1.8m, which is not an insignificant amount of money as non-refundable DP without or regardless of a signed lease. The Plaintiffs needed a long lease to recoup their investment. Quick's evidence that the Plaintiffs paid because they thought they would get a lease, is clear indication that they never intended to make outright payments equivalent to gifts.

188. Tan (NE 616) accepted Counsel's suggestion put to him that "the [various] payments were [made] *to account* of Plaintiffs' obligation to MCST under the intended lease arrangement." [emphasis added] In other words, the payments were to be used to fulfil the terms of the lease if and when that is executed.

189. The DP contribution to MCST is reflected in the draft lease and is an obligation that only arises if the lease was signed. The six quarterly instalments in Clause 4 of the working draft lease followed the timetable for payment to the Land Office. The same schedule was used as a matter of convenience. If indeed the money from the Plaintiffs were meant to pay the Land Office, the date of instalment payment would have been a couple of days earlier than the due date of payment to the Land Office. The obligation to pay DP under the intended lease was to MCST and not PPPL.

190. The Plaintiffs had expected the lease to be executed before any of the six instalments began. But negotiations on the terms of the intended lease were still on-going at the time Parkway sent reminders to the Plaintiffs to pay. It is evident that the Plaintiffs remitted the payments in September and December 1999 of $450,000 each as good faith pre-contract deposits.

191. The good faith payment was recorded in ALP's letter of 26 November 1999 which commented on Clause 3.12 of the working draft lease and CPP's note to the clause. Clause 3.12 deals with the consequence of MCST's inability to give UAST access to the shell structure after 28 February 2001 for fitting out works. In the event, the tenant may rescind the lease. The only refund that was provided was the lease deposit of three months. ALP said: " [W]e are of the firm view that our client's continuing contribution towards the DP in good faith must be refunded if your clients are unable to hand over the premises to our clients for the fitting out works by the agreed date".

192. It is clear from the correspondence that the remittance of $600,000 as well as the earlier sum of $346,900 were to be treated together as a good faith pre-contract deposit.

193. The $346,900 was already in hand. The Plaintiffs remitted $600,000 in July 1999. From the

correspondence, the $346,900 and $600,000 were referred to as the "deposit" and "additional deposit" respectively. The $600,000 was referred to by Elizabeth as a "holding deposit" for the landlord. A "holding deposit" is a term used to describe pre-contract deposits. It is generally paid by a "prospective purchaser" or "prospective lessor" such as in the case of the Plaintiffs who had made the payment subject to contract. See *Sydney Harbour Casino Holdings v NMBE Pty Ltd* (1999) 9 BPR 16,679 at p16,687.

194. The $600,000 was transferred to MCST's bank account on 3 August 1999 where it was kept for sometime. The transfer of the money back to PPPL by journal entry in February 2000 was between PPPL and MCST. That accounting entry does not in my view change the purpose and intention of the payment as between the Plaintiffs and Defendants.

195. I find, on the evidence, that the four payments, namely, the sum of $346,900, $600,000 and each of the $450,000 remittances were pre-contract deposits. In the case of the $346,900 remitted in January 1999 it was subsequently agreed in May 1999 to be refunded to the Plaintiffs. By July/August 1999, the Plaintiffs permitted it to be retained by the Defendants as part of good faith deposit.

(ii) The terms, if any, upon which the payments were made

196. I now consider the terms, if any, upon which the four payments were made. Were they to be non-refundable in the event the lease was not signed? Where there is no contract and in the absence of any express term governing the pre-contract deposit to the contrary, the prima facie rule is that the money is to be returned to the Plaintiffs.

197. The Defendants' contention is that the Plaintiffs knew that DP paid to the Land Office was not refundable. That may be so. But in this case, the question is whether or not the Plaintiffs paid the money on the basis that it would be non-refundable if the parties failed to execute a lease for the cineplex and not whether the Plaintiffs knew that DP paid to the Land Office was non-refundable.

198. *Sydney Harbour Casino Holdings Ltd v NMBE Pty Limited*, is a case where the parties had agreed that the deposit should be returned if a lease was signed but not otherwise. The Court of Appeal held that as a matter of construction, it is not possible to imply from that express provision the converse situation whereby the payee is to retain the deposit if no lease was entered it.

199. In that case the appellant Sydney Harbour Casino Holdings Ltd ("SHCH") wanted to lease the premises from the respondent NMBE. In negotiating the lease agreement, SHCH paid a "holding deposit" to the respondent pending completion of the formal document. The appellant found cheaper premises and decided not to proceed with the lease. SHCH sued for repayment of the amount paid.

200. Before Rolfe J, NMBE submitted that if NMBE failed in establishing a binding contract for the lease of the premises had been entered into, SHCH might still not succeed in recovering the $300,000. SHCH's evidence showed that the $300,000 was paid by it to NMBE in consideration for NMBE not negotiating with other prospective lessees whilst it was negotiating with SHCH, and that the only basis upon which SHCH was entitled to recover it was if a binding agreement was entered into. The agreement was subject to the condition that the $300,000 would be refundable upon the execution of the lease. This line of argument did not find favour at the appellate level. The parties' mind were directed to what was to happen if the lease was executed. Nothing was said about what was to happen in the event that the negotiations did not end with execution of a lease.

201. In that circumstance, the appellate court held: " …where neither party had directed their

minds to what would happen if an executed lease did not eventuate, no express agreement could be inferred as to what would happen in this event. In this situation it is necessary to have recourse to the law relating to pre-contract deposits."

202. On appeal, it was held that NMBE had no right to keep the deposit because a pre-contract deposit is prima facie recoverable if the prospective contract it is connected with does not come into existence.

203. *Gribbon v Lutton* [2002] 2 WLR 842, is a case where the parties had stipulated as to what is to happen to the deposit if no contract is signed. On the facts, the Court of Appeal held the solicitors were negligent in failing to secure an enforceable bipartite agreement under which the deposit would have been forfeited had the purchaser failed to purchase the land. The Court of Appeal recognised that the vendor's claim to the money could be enforced not because he had given consideration for the promise but because he has imposed a burden on the purchaser by stipulating that the deposit was non-refundable should there be no concluded contract.

204. As to what to do with the $1,846,900 paid if the lease was not signed, I find that the parties here were silent both orally and in writing. I agree with the Court of Appeal in *Sydney Harbour* that the inference to be drawn from the parties' "consequent silence in their ..writings and words on the question what would happen to the deposit in the event no lease was executed" is that "they made no express agreement at all about what would happen in that event." Once that stage in the analysis of the evidence is reached, the issue is to be determined in accordance with the law on pre-contract deposits. On this approach, the money is to be returned to the Plaintiffs. In my judgment, the Defendants have not displaced the prima facie rule to show a right to retain the pre-contract payments.

205. The Defendants argued that the Plaintiffs had assumed the risk of their payments where the parties were negotiating on a "subject to contract" basis and everybody knows that there is a risk that at the end of the day, either side may back out if the negotiations before a contract is executed. Given my findings, this argument also fails.

206. The negotiations were "subject to contract". The phrase "subject to contract" means, as matter of construction, that the four payments were conditional on the conclusion and execution of the lease. The only consideration for the payment was the making of that contract. Without a signed lease, the consideration for the payments fails. On the evidence, applying the law relating to pre-contract deposits, the Plaintiffs are entitled to recover the total sum of $1,846,900 on the ground of total failure of consideration.

207. It is evident from the documented evidence that PPPL was representing MCST in the negotiations in respect of the proposed cineplex project. Elizabeth reported to and took instructions from Tan. I therefore find that PPPL was at all material times the agent for MCST.

208. Both Defendants are liable to repay $1,846,900 to the Plaintiffs. The money was remitted to PPPL and received by PPPL as agent of the prospective lessor, MCST. The intended lease between 1st Plaintiffs and 2nd Defendants did not materialise. In the circumstances, both are liable to repay the sum of $1,846,900. See *Gribbon v Lutton* [2002] 2 WLR 842 at 843.

(4) The Defendants' submissions on the claim in restitution

209. The Defendants' contention for declining to return the money was based on the alleged ground that there was an agreement to contribute towards DP and the monies were paid to the Land

Office as part of the Plaintiffs' share of the contribution. They were to reimburse PPPL for payment of DP made on behalf of the Plaintiffs at their request. These arguments fall on the way side as there is no free-standing contract to contribute towards DP. I have also found that the total sum of $1,846,900 was not paid on terms that if no lease were executed, the money would irrevocably pass to and be retained by the Defendants.

210. Counsel for the Defendants further submitted that the payments were made in exchange for an opportunity to negotiate the terms of the lease. The payments were for a confirmed offer of the proposed cineplex. The Defendants argued that the words "confirmed offer of a lease" in Parkway's letter dated 28 July 1998 comprised an opportunity or chance to negotiate the terms of a lease. There was therefore consideration for the payment.

211. In support of this argument, Counsel relied on Tan's oral testimony of Tan (NE 546):

> "…DP is payable when approval [was obtained] from [the] authorities. For all intents and purposes [a] lease should have been struck at that time. In order to secure the right to stay in the deal a payment has to be made. Would say DP has to be paid in order to stay in [the] game for negotiations…."

212. This oral testimony is not stated in Tan's affidavit of evidence-in-chief. Neither is it in Elizabeth's affidavit. In fact, she repeatedly denied during cross-examination that the payments were for a confirmed offer from Parkway.

213. The Plaintiffs' contention is that the "opportunity to negotiate" argument was not pleaded. The Defendants disagreed and said that their argument is consistent with their pleaded case that failure of consideration was partial. I agree with the Plaintiffs on the pleadings point. The constituent facts making up a plea of partial consideration must be pleaded.

214. In any event, the Defendants' argument is really nothing more than a promise to negotiate or continue to negotiate a lease agreement subject to contract. This is not consideration recognised by law. An arrangement or agreement whereby the parties agree to negotiate in the future will not be enforced on the ground that the agreement is incomplete, uncertain or is not supported by consideration. Accordingly the law does not recognise as an enforceable contract, an agreement to agree or negotiate a contract: *Courtney and Fairbairn Ltd v Tolaini Bros (Hotels) Ltd* [1975] 1 WLR 297; *Mallozzi v Carapelli SpA* (1976) 1 Lloyd's Rep 407; *Walford v Miles* [1992] AC 128.

215. The Defendants submitted that Plaintiffs' claim for restitution is based upon the doctrine of unjust enrichment. It is not disputed that the underlying principle of an action for money had and receive is unjust enrichment.

216. All three elements of unjust enrichment- benefit, at the plaintiffs' expense and unjust "factor"-are undoubtedly present on an analysis of the payments based upon the doctrine of unjust enrichment.

217. Here the payments were made while negotiations were 'subject to contract' and the deal failed to materialise. Given the conclusions reached in this judgment, the Defendants have no right to retain the money. Since they cannot retain the money, they are unjustly enriched.

Other Issues

218. There is no need to deal with the other alternative issues, which will only arise if I reached

the opposite conclusion on the central issue.

219. Given my findings, the facts in evidence fall short of satisfying the elements of the defence of change of position.

Conclusion

220. There be judgment for the Plaintiffs against the Defendants in the sum of $1,846,900 with interest thereon at 6% per annum from the date of the writ to date of Judgment and costs.

221. As a corollary to this decision in favour of the Plaintiffs, the 1st Defendants' Counterclaim is therefore dismissed with costs.

Sgd:

BELINDA ANG SAW EAN

JUDICIAL COMMISSIONER

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