Hong Leong Singapore Finance Ltd v United Overseas Bank Ltd
[2006] SGHC 205

Case Number : OS 10/2003, 20/2003

Decision Date : 23 November 2006

Tribunal/Court : High Court

Coram : Sundaresh Menon JC

Counsel Name(s) : T P B Menon, Tan Soo Kiang and Daniel Tan (Wee Swee Teow & Co) for the plaintiff in OS 10/2003; Harish Kumar and Adrian Tan (Engelin Teh Practice LLC) for the plaintiffs in OS 20/2003; Thio Shen Yi, Karen Teo and Angela Thiang (TSMP Law Corporation) for the defendant in OS 10/2003 and OS 20/2003

Parties : Hong Leong Singapore Finance Ltd — United Overseas Bank Ltd

Equity – Estoppel – Proprietary estoppel – Applicable principles – Developer allegedly promising unit in development to plaintiff contractor in return for plaintiff continuing work on development – Development mortgaged by developer to defendant bank – Defendant bank foreclosing on mortgage and denying plaintiff contractor's claim to unit in development – Whether defendant bank estopped from denying plaintiff contractor's interest in development – Section 76 Land Titles Act (Cap 157, 2004 Rev Ed)

23 November 2006 *Judgment reserved.*

Sundaresh Menon JC:

1 The economic crisis that affected a number of Asian countries in the late 1990s claimed its share of casualties in Singapore. This case concerns one of those casualties. The Ban Hin Leong Group ("the BHL Group") was a well-regarded real estate developer with a number of projects under development at that time. One of these was a substantial 37-storey commercial development known as Springleaf Tower. The developer, a joint-venture entity in which the BHL Group had an interest (see [5] below), ran into financial straits amidst several uncompleted projects including this one. An uncompleted building does not generate revenue. Moreover, property prices were falling. The developer's banker was exposed. So too was the second plaintiff in Originating Summons No 20 of 2003 ("OS 20/2003"), Yongnam Engineering & Construction Pte Ltd ("YEC") who was one of the contractors for Springleaf Tower and who had substantial sums owed to it at that time. Despite this, the building was eventually completed. The contractor claims it went ahead with its work and effectively financed a part of the cost to completion because it was led by the bank to believe it would get a floor of the completed development as consideration for completing the work. The bank however foreclosed on its mortgage and denied the contractor's claim. The contest between the contractor and the bank has given rise to these proceedings. There was no concluded contract between them. The question is whether the contractor nonetheless can get an equitable remedy by way of estoppel which after all is founded upon the conscience rather than upon a consensus.

The parties, the players and the property

2 It is useful to begin by identifying the parties. There were two related proceedings before me. The defendant in both sets is the United Overseas Bank Ltd. I refer to it as "the defendant" or "the bank". In fact, the developer's banker at the time of the transaction was the Overseas Union Bank Ltd but that was taken over by the defendant and the proceedings were commenced and continued against it. Where I refer to the bank, it includes the predecessor institution where appropriate. The bank was represented by Mr Thio Shen Yi.

3 There are two plaintiffs in OS 20/2003. They are Yongnam Development Pte Ltd ("YDP") and its related company YEC. As I have noted, YEC was in fact the company engaged as the contractor for a part of the works. For convenience, where I refer to "Yongnam" I refer to the Yongnam group generally without regard to any particular corporate entity. YEC and YDP were jointly represented by Mr Harish Kumar.

4 The plaintiff in Originating Summons No 10 of 2003 ("OS 10/2003") is Hong Leong Singapore Finance Ltd. I refer to it as "Hong Leong". When YEC proceeded with the works after it became apparent that the developer was in no position to pay, YEC needed financing and it eventually obtained this from Hong Leong who took a security interest in the floor that Yongnam thought it would acquire for carrying on the works. Hong Leong was represented by Mr T P B Menon and Mr Tan Soo Kiang. Although it was separately represented and did make some submissions, it was common ground that Hong Leong's rights were entirely dependent upon YEC and/or YDP succeeding.

5 Aside from the parties to these proceedings, there were some other players whom it is useful to identify. Springleaves Tower Ltd whom I refer to as "STL" is a company that is a part of the BHL Group. STL entered into a joint venture with a company now known as Somerset Development Pte Ltd but then known as Liang Court Development Pte Ltd and I refer to the latter as "Liang Court". Springleaf Tower was developed as a joint venture of STL and Liang Court.

6 The main contractor for the development was an entity known as Tuan Kai Construction Pte Ltd whom I refer to as "Tuan Kai". Tuan Kai also was a company within the BHL Group.

7 Tuan Kai appointed YEC as the sub-contractor for the design, fabrication and installation, among other things, of some piles and struts and for the execution of the structural steelwork as a whole.

8 YEC was represented, at the time the construction works were being done, by a law firm known as Yeo Wee Kiong & Partners whom I refer to as "YWKP". STL was represented at the material time by a law firm known as May Oh & Wee whom I refer to as "MOW". The bank was represented then, as now, by Thio Su Mien & Partners whom I refer to as "TSMP". The latter firm has since been corporatised.

9 At various times, several individuals were involved and some of them gave evidence before me.

10 Those giving evidence included the ones I now mention. Mr Seow Soon Yong, whom I refer to as "Mr Seow" was the managing director of YEC. His counterpart at STL was Mr Richard Lim, whom I refer to as "Mr Lim". The principal officers from the bank who were involved in this matter were Mr Sam Tan ("Mr Tan") and Mr Jimmy Lek ("Mr Lek").

11 The dispute centred on the rights of the parties to the 23rd floor of Springleaf Tower. I refer to this as "the Unit". YEC, YDP and Hong Leong lodged caveats against the Unit. The bank on its part sought to register the foreclosure it had obtained. The plaintiffs contend that the foreclosure was bad in law. YEC further seek an order that the Unit be released and discharged from the mortgage registered by the bank.

The background

12 The development of Springleaf Tower had been jointly undertaken by STL and Liang Court. The land on which Springleaf Tower was to be built was owned by these two companies as tenants-

in-common in the proportion of 70:30 in favour of STL. Under the terms of a document known as the "Supplemental Joint Development Agreement", the individual strata units in the project were to be allocated between the parties and as it turned out the 23rd floor of the building was allocated to STL.

13 The developer obtained financing for the project from the bank which held a paramount mortgage over the development, and it appointed Tuan Kai as the main contractor. Tuan Kai in turn entered into two separate sub-contracts with YEC to do certain structural works including the structural steelwork. The structural steelwork contract was entered into in June 1997 and it was for a contract sum of $12.1m. The works were to be completed by 31 July 1998.

14 YEC started work under these sub-contracts sometime in September 1997 and submitted its first progress claim for payment of a sum of about $2m in November that year. Payment was not immediately forthcoming from Tuan Kai ostensibly because the financing arrangements for the project had not been completed. By late March 1998, YEC threatened to stop work if payment was not made. There followed exchanges between YEC and Tuan Kai, with the former doing its best to coax, cajole or otherwise coerce the latter to meet its payment obligations. A guarantee agreement was eventually entered into with STL guaranteeing payment to YEC.

15 Payments were made but not in accordance with the contractual requirements. Nonetheless, YEC did carry on with its works. By May 1998, the first progress payment had still not been paid in full and the second progress payment for a sum of around $2.2m certified by the architect was overdue. By October 1998, YEC appeared to have reached the limit of its ability to shoulder the burden of working without a regular and predictable flow of cash. It issued an ultimatum to the effect that unless arrangements were made to assure regular payments, it would stop work. This led to further discussions. These initially involved YEC, Tuan Kai and STL.

16 During the course of these discussions, the idea was floated that, given the cash flow pressure faced by the BHL Group, YEC might consider taking a floor in the completed development as payment in kind for the unpaid work it had already done and for that which remained to be done. The upshot of these discussions was that YEC would continue its work, and STL undertook to transfer title to the 23rd floor of Springleaf Tower upon completion to YEC or its nominee (which, as it transpired, was YDP) in lieu of Tuan Kai's payment obligations under its sub-contracts with YEC. In line with this, on 13 February 1999, YEC, Tuan Kai and STL entered into a settlement agreement ("the settlement agreement") giving effect to the broad understanding between them. The key terms included the following:

(a) Upon completion, the developer would transfer the Unit to YEC or its nominee in consideration of the purchase price of $13,964,6000. This was arrived at on the basis of a price of $1,300 per square foot ("psf").

(b) YEC was entitled to set off money owing by Tuan Kai for the construction work against the purchase price of the Unit.

(c) As the total sum that would be due and owing to YEC by Tuan Kai under the sub-contracts was estimated to be $11,234,487.80, inclusive of interest for late payment, a compensatory credit of $2,730,112.20 ("the compensatory credit") was allowed to YEC by Tuan Kai and STL. The compensatory credit was to be applied as payment towards the purchase price of the Unit.

(d) The compensatory credit was further explicitly acknowledged as being a discount on the purchase price of the Unit given by STL to YEC. This was done in a separate side letter of the

same date as the settlement agreement ("the side letter").

17 Additionally, it is relevant here to note that cl 7.5 of the settlement agreement specifically acknowledged the existence of the bank's paramount mortgage over the development. That clause provided as follows:

> The parties acknowledge that the Bank has a paramount mortgage ("the Paramount Mortgage") over the Springleaf Tower development, including the Floor, and STL hereby agrees and undertakes to Yongnam that STL shall procure that the Bank shall release its mortgage over the Floor on or before the Agreed Date.

18 As the consideration for the proposed transfer of the Unit from STL to YEC was not in the form of a cash payment, but rather was to be by way of a set-off, the standard form sale and purchase agreement had to be varied. This was recognised in the settlement agreement which provided that YEC's solicitors, YWKP would, on behalf of STL, Liang Court and YEC, apply to the Controller of Housing ("the Controller") for the necessary amendments to be made to the standard form contract. On 17 March 1999, the Controller gave his consent for the standard form contract to be amended such that the sale of the Unit to YEC could be concluded on the basis set out in the settlement agreement. The Controller subsequently also agreed to the substitution of YDP as the purchaser in place of YEC.

19 On 31 March 1999, a standard form sale contract ("the S&P Agreement") was executed between STL, Liang Court and YDP. On the same day, a supplemental sale and purchase agreement ("the SS&P Agreement"), with those variations approved by the Controller, was also executed by the same parties. (These two documents are referred to as "the sales contracts"). The main amendment made to the S&P Agreement to bring it in line with the arrangement in the settlement agreement was reflected in cl 3.1.3 and cl 3.1.6 of the SS&P Agreement which replaced cl 5 and cl 8 of the S&P Agreement, (see [136] below).

20 The pairing of the above documents was not coincidental. It became apparent during the course of the hearing that STL had been anxious to suppress certain aspects of the set-off arrangement from the bank and for this reason, the documents were prepared in such a way as would facilitate a selective disclosure of these matters to the bank. It was apparent that at some stage, the bank did get involved in the discussions I have referred to but the precise circumstances in which the set-off arrangement took hold, the manner in and extent to which it was understood by each of the affected parties, the extent to which there had been disclosure of the relevant facts and the terms on which it was proposed and upon which YEC allegedly relied in eventually completing the sub-contracted works were all hotly disputed before me and were explored in ten days of evidentiary hearings and arguments. What is clear however, is that YEC did continue the sub-contracted works through 1999 and eventually completed them in 2000.

21 As YEC did not receive any further cash payments from STL or Tuan Kai for the works that it did following the settlement agreement, it sought and obtained financing from Hong Leong. YEC charged its interest in the Unit to Hong Leong by way of a Deed of Assignment of YEC's contractual interest. Hong Leong's solicitors then lodged two caveats in the land register, against the Unit, to protect Hong Leong's interest as equitable mortgagees. For this reason, as I have noted, Hong Leong's rights to the Unit are wholly dependent on YEC and/or YDP succeeding.

22 Subsequently, on 9 January 2001, following the completion of YEC's works, STL confirmed to YDP that it had received the full purchase price of $13,964,600 for the Unit. STL's solicitors, MOW, also sent a letter to the bank's solicitors, TSMP, requesting the discharge and release of the

mortgage over the Unit and enclosing the letter of 9 January 2001 from STL to YDP and a draft deed of release in duplicate on 11 January 2001. It was several months before the bank responded to say it would not agree to discharge the mortgage in respect of the Unit and it did so on the basis that it had not been paid. On 28 October 2002, the bank filed Originating Summons No 1559 of 2002 against STL seeking an order of foreclosure of STL's seven-tenth share in the land, and on 22 November 2002, an order of foreclosure was made foreclosing STL's seven-tenth share in the land (and therefore the units built thereon) save and except certain units more particularly set out in the order of foreclosure. Neither Yongnam nor Hong Leong were party to the foreclosure proceedings. This led to a series of court actions including the present one.

23 YDP first brought an action against STL and Liang Court for breach of the sales contracts in June 2002. Default judgment was entered against STL who, by that time, had become insolvent. On 1 December 2003, the High Court dismissed YDP's claim against Liang Court principally on the grounds that Liang Court had no substantive or beneficial interests in the Unit, and was not concerned with the settlement agreement between YEC and STL (*Yongnam Development Pte Ltd v Springleaves Tower Ltd* [2004] 1 SLR 348). YDP's appeal was similarly dismissed by the Court of Appeal on 18 August 2004 (*Yongnam Development Pte Ltd v Somerset Development Pte Ltd* [2004] SGCA 35 ("*Somerset*")). YEC then commenced an action in negligence against the four erstwhile partners of YWKP. The thrust of its complaint was that had its lawyers done their work properly, it would have obtained title to the Unit; alternatively, that it would not have entered into the settlement agreement had it been advised about the bank's paramount mortgage. The High Court dismissed this claim as the evidence showed that the defendants had specifically advised YEC that the bank had a paramount mortgage over the Unit and that unless it consented, or released the mortgage in respect of the Unit, YEC or its nominee would not get title: see *Yongnam Engineering & Constructions (Pte) Ltd v Yeo Wee Kiong* [2006] SGHC 62.

24 This action was then commenced by the plaintiffs against the bank. The plaintiffs' claim is premised on proprietary estoppel and the most significant issue that arises concerns how the second plaintiff formed the expectation that it would receive title to the Unit in exchange for its work on the project and in particular whether that was created, encouraged or acquiesced in by the bank.

The discussions concerning the resumption of work by YEC

25 As I have noted in the brief factual background to the case, the discussions concerning the resumption of work by YEC initially involved YEC, Tuan Kai and STL. These took place towards the end of 1998. By February 1999, those three companies had entered into a settlement agreement which saw YEC agreeing to resume and complete the work and acquiring the Unit in consideration for that. The critical question is to what extent did the bank get involved in those discussions and what position did it take? In particular, was there anything that the bank said or did which caused or contributed to the resumption of the works by YEC?

26 The evidence that was given on this issue principally by Mr Seow and Mr Lim for the plaintiffs on the one hand and by Mr Tan and Mr Lek for the bank on the other was divergent on many points. In coming to a resolution of the conflicts of evidence, I took into account not only the impressions I formed from seeing the witnesses, but I also had regard to how their evidence fared when tested against extrinsic facts, matters reflected in the contemporaneous documents and what emerged from the evidence of other witnesses. It was in this light, that I considered the evidence.

Preliminary observations

Pleadings

27 This action was commenced as an originating summons. It soon became evident that there would be extensive conflicts on the evidence and the matter was set down for trial. However, in spite of Mr Thio's efforts, there was no agreement on directions for pleadings to be filed. In my judgment, that was unfortunate. In a case like this with very many issues of fact, pleadings would have been of much assistance and would likely have shortened the trial by enabling points of fact to be specifically set out and particularised.

Documents and discovery

28 The evidence even as to how the bank got to learn of the situation on the site from time to time, as well as what it was told and by whom were all hotly contested. It was a matter of some importance to establish just what the bank in fact knew.

29 Perhaps the best evidence of what the bank's knowledge was, is found in a series of its own internal reports and memoranda. These were not initially disclosed by the bank following directions. Yongnam then applied for further discovery. The position initially taken by the bank's solicitors was that there were no such documents. Subsequently, the bank fell back on banking secrecy. Discovery was ordered but the bank was permitted to blank out portions of the documents in question to the extent this was required by banking secrecy requirements.

30 When the internal memoranda were eventually produced, it was asserted on behalf of the bank that these had been filed incorrectly and had only recently been discovered. Mr Kumar submitted that this explanation was untenable given that Mr Lek was the principal author of the memoranda and must have known of their existence. Yet he had earlier stated such documents were not in existence. Mr Kumar also took issue with the lateness of the disclosure of documents having regard to when it appeared they had first been seen by a solicitor from Mr Thio's firm.

31 To cut to the chase, issues on discovery were not resolved until well after the trial started. As late as on the seventh day of the trial, documents were still being disclosed and Mr Kumar did in fact use these documents in cross-examining the bank's witnesses. Some of these documents that were produced in the midst of the trial were plainly relevant and appeared to fall within the classes of documents that had been requested months earlier. In some instances, it was only possible for Mr Kumar to renew his attempt to obtain discovery as a result of what had been said by the bank's witnesses during cross-examination.

32 Mr Kumar submitted that counsel for the bank must have been aware of the existence of some of these documents and the apparently inconsistent position being taken by the bank in relation to its discovery obligations. I am not prepared to reach that conclusion.

33 However, I do consider that the conduct of discovery by or on behalf of the bank was not satisfactory. Reference may be made here to the following brief statement of principle contained in *Singapore Civil Procedure 2003* (Sweet & Maxwell Asia, 2003) at para 24/1/5 (omitting some citations for convenience):

> It is necessary for solicitors to take positive steps to ensure that their clients appreciate at an early stage of the litigation, promptly after the writ is issued if not sooner, not only the duty of discovery and its width but also the importance of not destroying documents which might possibly have to be disclosed … Moreover it is not enough simply to give instructions that documents be preserved. Steps should be taken to ensure that documents be preserved … "It cannot be too clearly understood that solicitors owe a duty to the court, as officers of the court, carefully to go through the documents disclosed by their client to make sure, as far as possible,

that no relevant documents have been omitted from their clients' affidavit" *per Salmon* J (as he then was) in *Woods v Martins Bank Ltd* [1959] 1 QB 55 at 60.

The responsibility of solicitors extends further than this to an independent duty to give proper discovery. This duty includes having a sufficient understanding of the case to know which documents to look for and to appreciate which documents are relevant. There is also a positive duty to review thoroughly an opponent's list, to consider whether there might be other relevant documents that have not been disclosed, and to make an inquiry about any such documents.

34 That is a correct summary of the position. Unfortunately, I was not left with the impression that this had been sufficiently applied by those having carriage of the bank's discovery obligations in this case, although in fairness, it may be noted that this could have been contributed to by the absence of pleadings as well as by an overly conservative view being taken of the requirements of banking secrecy.

35 Having said that, I am satisfied that YEC was not in fact disadvantaged as Mr Kumar, to his credit, did take this in his stride and was able to deal with the new information when it was made available to him.

Evidence

36 It will be noted from what I have already said that this was the latest in a series of actions arising out of this transaction. Some of the witnesses had given evidence in relation to these matters in previous suits. Mr Thio submitted for instance that I should regard Mr Seow's evidence with a special degree of caution given the unusual amount of experience he had having appeared as a witness in two earlier proceedings arising out of the same broad factual matrix.

37 As a result, the cross-examination at times involved comparing what the witness might have said in an earlier set of proceedings with what he had said in the affidavits of evidence-in-chief in these proceedings or in cross-examination before me. I did not always find this helpful in that even though the various proceedings arose out of the same broad factual matrix, the earlier proceedings involved causes of action different to that before me. The issues, the examining counsel, the ends of the cross-examiner, the framing of the questions might each have been somewhat different with the result that it was not always possible to arrive at a conclusion that the witness was being dishonest or untruthful just because what he said before me was capable of being construed as being different to what he had said in an earlier action. Nor is it necessarily appropriate to leave this on the basis that it was open to the witness to explain the apparent discrepancy because the nuances of the examiner on each occasion may not have been appreciated by the witness.

38 I make this by way of a general observation but, having said that, both Mr Kumar and Mr Thio were able to make inroads in cross-examination arising from certain discrepancies that in the end were fairly shown to be so.

39 I should make a couple of other general observations about how I approached the evidence. First, I think it is fair to say that the principal witnesses on either side, in particular Mr Tan and Mr Lek for the bank and Mr Seow and Mr Lim for YEC each reached the end of their cross-examination somewhat the worse for it. Not surprisingly, the focus of each party's closing submissions tended to be more on the seeming devastation wreaked on the other side's witnesses than on the strength of the evidence of its own witnesses. However, this must be seen in its proper perspective.

40 The witnesses in question were giving evidence on matters that had taken place as much as

eight years earlier. The fact that there had been several lawsuits in the intervening period could even have aggravated the problems of accurate recall especially on details as memories and recollections run one into the other. Moreover, as witnesses honestly try to reconstruct the events as they believed them to have taken place, there is sometimes a tendency to fill in gaps with what the witness considers would have happened and to gradually believe that that is what in fact happened. The evidence of Mr Lek in particular left a strong impression that he was prone to do this.

41 As a result, it is often not appropriate to treat the evidence of a witness on an all-or-nothing basis and it was certainly not appropriate to do so in this case. In weighing the evidence and in particular in considering apparent deficiencies in the evidence, it is vital to have regard to all these matters and decide whether the witness's evidence on a particular issue may be accepted even if the evidence of that same witness is not accepted for whatever reason on some other issues. Having said that, I think I should state that I was left with a more favourable overall impression of the evidence given by Mr Seow and Mr Lim than that given by Mr Tan and Mr Lek. This is elaborated on in the body of this judgment as I analyse the evidence.

42 Before leaving the issue of oral evidence, I should comment briefly on the effect and relevance of what is referred to as the rule in *Browne v Dunn* (1893) 6 R 67. *Browne v Dunn* is a case of some vintage and it lays down a rule of fairness. The effect of that rule is that where a submission is going to be made about a witness or the evidence given by the witness which is of such a nature and of such importance that it ought fairly to have been put to the witness to give him the opportunity to meet that submission, to counter it or to explain himself, then if it has not been so put, the party concerned will not be allowed to make that submission. It is not a rigid, technical rule. Nor is it necessarily satisfied by a formulaic recitation of a party's case to a witness, with an invitation merely to agree or disagree. In *Chan Emily v Kang Hock Chai Joachim* [2005] 2 SLR 236 at [15], Choo Han Teck J noted that the rule which is derived from a case more than a century old must be applied with due regard to the realities of modern litigation and in evaluating any given objection, consideration should be given to the totality of the evidence in the case. I think that is correct. In *Lo Sook Ling Adela v Au Mei Yin Christina* [2002] 1 SLR 408 the Court of Appeal noted (at [40]) that the rule is not rigid and does not require every point to be put to the witness but this would generally be required where the submission was "at the very heart of the matter". This was approved by the Court of Appeal in *Ong Jane Rebecca v Lim Lie Hoa* [2005] SGCA 4 at [49]–[50]. I approached the evidence and the submissions in this case in that light.

The period from February to September 1998

43 I now return to the facts. I have dealt with the period from February to September 1998 at [14] to [15] above. However, it is instructive here to interpose the first two of the bank's internal memoranda which I have mentioned previously.

44 As early as 26 February 1998 in an internal memorandum from Mr Tan's superior, Mr Wee Joo Yeow who was the bank's Executive Vice President, Corporate Banking, to the president of the bank, it was noted that:

(a) the situation of the BHL Group was serious; and

(b) Mr Lim should be impressed upon to have the BHL Group take immediate action, specifically including the sale of its 70% interest in Springleaf Tower, so as to be able to ride out the expected prolonged downturn in the property market.

45 This memorandum accompanied a detailed note prepared by Mr Lek and countersigned by

Mr Tan. That note included the observation that property prices were expected to slide by a further 15% at least. The note further observed that five of the BHL Group's seven on-going projects were no longer profitable, but that the "more critical issue facing the [BHL Group] now is insufficient sales to fund these projects to completion. With the construction loan already fully drawn in some cases, the [BHL Group] was unable to meet … development cost owing mainly to its suppliers and in-house contractor, Tuan Huat Construction Pte Ltd".

46 Although that relates to a different in-house contractor, the fact remains that by that early stage, the bank was already aware that the BHL Group was facing payment issues in relation to its suppliers and contractors and this was seen as a critical issue since it put in question the BHL Group's ability to finance its projects to completion. With specific reference to Springleaf Tower, the following points were noted:

(a) The projected sale price at that stage was $1,800 psf.

(b) The BHL Group was expected to fund its portion of the development cost in part with sale proceeds.

(c) However, at that stage there had been no sales and the construction loan was already drawn down. As such, it was noted that "the Group is in urgent need of additional funds" to meet its share of the remaining development cost of $131m.

(d) In view of this, it was recommended that the BHL Group would be required *inter alia* to sell nine office floors by 30 November 1998 at the rate of one per month.

47 The timing of this memorandum coincides with the already serious cash flow problems that were plaguing the progress of the work. At this time, YEC had been working on structural steelwork for about six months and its first progress payment claim was already almost three months overdue.

48 The next document in this period is dated in August 1998. On 19 August 1998, Mr Wee Joo Yeow in a memorandum to the president of the bank stated as follows:

> We may have to consider seriously the purchase of some floors of the Springleaf Tower so as to allow construction to proceed uninterrupted … The company may eventually be able to conclude the en bloc sale of the building to an investor, and the floors which we are buying could be included in the sale …

49 This was accompanied by a detailed note dated 18 August 1998 prepared by Mr Lek and countersigned by Mr Tan. It appears from handwritten annotations on that detailed note that the proposals for managing the situation were approved by the president and by the chairman of the bank subject to "the draw down being strictly managed".

50 Some of the key points in the detailed note included the following:

(a) The BHL Group needed to sell *inter alia*, its entire interest in Springleaf Tower in order "to fund its projects to completion", with any delay in this regard placing the entire BHL Group in "financial jeopardy".

(b) The expected surpluses from Springleaf Tower among others would no longer arise if "forced sale takes place under the present depressed market conditions. Accentuating the problem are subcontractors/suppliers who are now demanding payment as the [BHL Group] has

not been meeting its obligations due to insufficient sales … The [BHL Group]'s problem is severe and its viability is now questionable".

(c) In relation to Springleaf Tower, but for a small shop space of about 1,100 sq ft, there had been no sales at all.

(d) A sum of $6.5m in progress payments was owing to Tuan Kai which in turn was "financed by subcontractors/suppliers".

(e) The BHL Group needed to generate sale proceeds of $85m to complete the project. Depending on the achievable sale price, this would require the sale of between six and seven floors of space.

(f) The market value was thought to have declined to about $1,550 psf.

(g) The bank's break-even price was $1,500 psf but at $1,300 psf, the principal loan would be covered.

(h) Although the sales had to be generated immediately, there was a lack of demand for such space. The bank was requested to purchase the necessary floors to generate funding capability.

51 The timing of these memoranda coincides with a critical period in the progress of the work on site. As noted above, YEC was having serious cash flow problems on the site at this time as it had yet to receive full payment from Tuan Kai on its various outstanding progress claims. The bank was aware of the financial difficulties the BHL Group was facing at this time. It examined various options to address this. The sale of floors at Springleaf Tower was seen as critical to any solution. However, this was not without difficulty given the declining property market and, as a result, the bank itself considered purchasing some floors.

The period from October 1998 to March 1999

52 This was the most heavily contentious period at least in so far as the evidence before me was concerned. It was not disputed that the situation on site was rapidly becoming critical or that discussions were proceeding between YEC and STL/Tuan Kai. It was also not disputed that YEC stopped work at some point during this time. However, the real issue concerned the position and involvement of the bank. The central points of departure concerned the following:

(a) What was the essence of the discussion which took place between Mr Lim and certain representatives of the bank where the settlement of YEC's position was raised?

(b) What communications subsequently took place between the bank and Mr Seow?

The discussions between Mr Lim and representatives of the bank

53 It was not disputed that a discussion had taken place between Mr Lim and representatives of the bank sometime in the latter months of 1998.

54 It was also not disputed that at this meeting, the problems faced on the Springleaf Tower site were discussed. Mr Tan stated in his evidence that at one of their periodic meetings, Mr Lim first broached the idea of STL trying to pay YEC by selling a floor in the project "with a partial offset against the amounts owing by Tuan Kai to YEC". Mr Tan accepted that he was told that Tuan Kai was

having difficulties paying YEC.

55 According to Mr Tan, this discussion was rather "brief and cursory" with no discussion on "concrete figures" but he maintained it was presented as a partial set-off. Mr Tan stated that neither he nor Mr Wee Joo Yeow, who also was at that meeting, objected to this idea but they told Mr Lim to formalise the proposal with "facts and figures". He wanted a substantive written proposal from Mr Lim so he could get the approval of the bank's executive committee. Mr Tan's evidence was further to the following effect:

(a) By the later part of 1998, Mr Lek had obtained approximate figures that YEC would have to be paid around $9.3m for the works as a whole and this was to be offset against the purchase price of a floor. The arithmetic in Mr Tan's evidence does not quite add up based on the works being valued at $9.3m in the sense that he stated the cost of the floor was $13.96m but that YEC would only be required to pay $4.1m.

(b) This was incorporated in an internal memorandum prepared by Mr Lek dated 3 December 1998 (to which I turn shortly).

(c) There was no follow-up by STL or Mr Lim on this partial set-off idea and nothing more was heard until STL's solicitors wrote in January 2001 requesting a discharge and release of the mortgage in respect of the Unit.

56 Mr Tan was subjected to the most searching cross-examination by Mr Kumar and on the whole, I was left with the impression that there was an unsatisfactory economy in the candour with which Mr Tan gave this part of his evidence. I do not accept that the idea was presented as a partial set-off. I also do not accept that there was no follow up by STL or Mr Lim until January 2001. This was simply incorrect. I elaborate on these points below.

57 Mr Lim's evidence was that at this meeting (at which he thought Mr Lek also had been present) he had mentioned STL's intention to sell a unit to Yongnam by a "barter method". He stated that he had told the bank's representatives about Tuan Kai's indebtedness to YEC, and that YEC was willing to complete the structural steelworks in exchange for which YEC would get title to one of the floors. He further stated that he did not think the bank's officers immediately agreed but he believed they would have taken the proposal to the relevant people for approval.

58 Mr Lim did accept in cross-examination that no figures were discussed at this stage. Mr Lim also accepted that he could not recall who initiated this idea. At one stage, Mr Lim appeared to accept that the bank was left with the impression that if the value of YEC's works was less than the value of a floor based on $1,300 psf, then the bank would be paid the difference. However, taken as a whole, I understood the effect of his evidence to be that at least from his perspective, the proposal that was discussed was for YEC to complete the works and to take a floor in return. He thought the bank was receptive to this because of the criticality of these works to the completion of the project as a whole. On the other hand, Mr Lim accepted that the manner of the discussion and the level of generality at which it was conducted could have left the bank with a different impression. In particular, he accepted that the bank could have thought that it would get paid the amount by which the value of the Unit exceeded that of the work.

59 To the extent there are discrepancies between the versions of Mr Lim and Mr Tan as to what transpired at this meeting, I generally preferred Mr Lim's. I am satisfied that such a meeting did take place.

60 I am satisfied that the meeting took place around October 1998 even though none of the witnesses could date the meeting with any precision. There was no dispute that the idea of some form of exchange was discussed and it is significant here to have regard to a faxed memorandum from STL to YEC. This was faxed on 15 October 1998 and it sets out that:

(a) the estimated cost to complete the work including amounts then unpaid was $9.3m; and

(b) YEC should take one floor of the development at a price of $9.299m based on a sale price of $900 psf.

61 This came soon after Mr Seow on behalf of YEC had issued a demand for payment to Tuan Kai on 1 October 1998 and had threatened to stop work if this was not forthcoming. It seems probable therefore that the idea of the "work-for-Unit" exchange was born at this time. Although Mr Thio maintained that Mr Lim had not been able to link this memorandum with his discussion with the bank, I think it is significant that this appears to have been the first recorded articulation of the concept and given that both Mr Tan and Mr Lim confirmed that the idea was discussed at their meeting the probabilities are that the meeting took place soon after this and that the idea of such an arrangement was presented by Mr Lim at least in concept to the bank.

62 Mr Tan maintained that the proposal was presented as a partial set-off idea in the sense that the floor would be valued on the basis of a price of $1,300 psf and that the bank would be paid any amount by which that value exceeded YEC's works. I do not accept this. In my judgment, the discussion clearly contemplated that Yongnam would purchase a floor and pay for it in kind by carrying out the works. There are two aspects to this: the purchase price for the floor and the value of the contractor's works. As to the latter, I note that both witnesses accepted that there was no discussion on figures at that meeting and they left me with the impression that certainly nothing was said about the value of the contractor's work at that stage. In these circumstances, it seems improbable that they had descended to such a degree of specificity as to distinguish between types of set-off arrangements.

63 However, I am satisfied that very soon thereafter in the course of the many conversations that both the bank and Mr Lim accept did take place during that time, the bank's position, that the minimum price for the Unit would have to be based on a figure of $1,300 psf, was made known to Mr Lim who in turn conveyed this to Mr Seow. I arrive at this conclusion having regard to:

(a) the fact that as at August 1998, the bank was working on the basis of a projected market price of $1,550 psf and that its own breakeven price was somewhere between $1,300 psf and $1,500 psf depending on whether interest was included; and

(b) on 11 November 1998, in a letter sent by Mr Seow to his solicitors at that time, YWKP, he noted that although STL was willing to sell Yongnam "the property at a lower price in view of the special circumstance [*sic*], *he said that his partners and financier are unwilling to set a low selling price* as this would impact on their pricing for future sales" [emphasis added].

64 The latter is a document of some importance. Written, as it was, to Yongnam's own solicitors in the context of seeking their assistance with documenting some possible arrangements, one approaches it on the basis that it is likely to set out the precise position as Yongnam saw it, without embellishment or slant.

65 I return to this document later but I am satisfied from the evidence of the following:

(a) The initial idea mooted between STL and Yongnam was a set-off without any cash input from Yongnam as set out in the memorandum faxed on 15 October 1998.

(b) The meeting between Mr Lim and the bank's representatives took place soon after that.

(c) The idea of selling a floor to YEC against the value of its work was floated at this meeting. In my judgment, this was more likely floated by Mr Lim than by the bank given the view I have taken as how the idea came into being (see [60] and [61] above).

(d) The idea was endorsed by the bank given that by then, the bank viewed the situation of the BHL Group as severe and its continuing viability questionable. Mr Tan said the bank did not object to the idea but in my judgment the bank went further than that. The bank was aware by then that subcontractors were not being paid and it clearly contemplated that some floors had to be sold in order to generate funds to enable completion. Moreover, because of weak demand, the bank was itself already contemplating purchasing some floors (see [48] and [49] above). Therefore, the idea of a vital contractor completing its work and taking a floor in some sort of exchange would have been most attractive.

(e) Very soon thereafter Mr Lim was informed that the bank's minimum price was $1,300 psf. STL knew that this was some distance from what had earlier been discussed between STL and Yongnam.

(f) Mr Lim himself accepted that no final agreement was concluded at the meeting. However, I am satisfied that both parties did consider that they had an idea that could work to the benefit of all parties.

(g) Contrary to what was suggested by Mr Tan, I do not accept that the discussion at that stage was conducted in terms of a partial set-off. Nor do I find that the understanding was that it was to involve no cash at all. I note in passing that Mr Kumar examined Mr Tan to great effect on the untenability of what he had said in an earlier suit as to the bank having been left with the impression it was to be a "small set-off" and what that meant given that Mr Tan also accepted that no numbers were discussed.

66 In my judgment, the meeting took place at a relatively early stage somewhere in the latter half of October or early part of November 1998 and Mr Lim's concern at that stage was to explore with the bank the viability of selling a floor to Yongnam by way of an exchange and he left that meeting satisfied that it would work out. However, even though STL had already discussed some numbers with Yongnam, in my judgment, those were not put before the bank at that meeting. But the bank was invited to indicate its expectations. Within a short time, STL was made aware of the bank's expectations as to the selling price and it was apparent that this was significantly higher than what had been discussed between STL and Yongnam. In my judgment, the bank, even at this stage, made it clear that it was unwilling to go below this minimum price.

Events after Mr Lim's meeting with the bank

67 I have already referred at [63] to the fax from Mr Seow to YWKP and I return to that document now.

68 The second paragraph of that fax goes on to state:

To address the developer's concern, we are proposing to set the selling price at an acceptable

level to them and obtain reductions in the form of interests [*sic*] rebate and stamp duty being absorbed by them. To facilitate discussions, we propose to present them a draft offer (from [STL] to Yongnam) so that [STL] is clearer on the scheme.

69 I find this extract read with the earlier extract from that document to be of assistance. It is apparent that by this date, as far as Mr Seow was concerned:

(a) Mr Lim had approached the bank with the idea first mooted in the note of 15 October 1998;

(b) the bank was unwilling to agree to the transaction going forward at a "low selling price";

(c) Yongnam was prepared to consider working with the constraints imposed upon STL by its "partners and financier" and to set the selling price at an acceptable level to them and to obtain reductions from that price through such things as rebates for interest and stamp duty etc; and

(d) YWKP was to work on documentation so as to facilitate discussions that Mr Seow intended to hold with STL to ensure that STL understood the scheme.

70 Thus, by this date, a potential divergence had begun to crystallise. The bank had a base price. As far as Yongnam was concerned, that price was being set not so much by reference to the prevailing market but rather by reference to the bank's interest in protecting against a slide in the price for future sales. Yongnam were willing to consider as one of its options, accommodating the bank's position by agreeing to a higher notional sale price but then having that reduced in fact by various deductions so that Yongnam would not be disadvantaged. After all the property market was weak and Yongnam saw itself as trying to make the best of a bad situation. I do not get the impression it was trying to cheat the bank. Rather, I saw Yongnam as trying to get the best deal for itself. Simply put, having been given the impression by STL that it could get the Unit in exchange for completing the work without having to make any cash payment (see [60] above), Yongnam was always going to resist moving away from that premise. I should clarify one point here. Mr Thio did submit that the notion that the bank's motivation was to avert a slide in prices was never put to the witnesses. I would first reiterate what I have said at [42] above. Further, I would say that this misses the point in this particular context because the relevance of what is set out in Mr Seow's note to YWKP is in showing how Yongnam saw the situation at that time.

71 Returning to the evidence, Mr Seow testified that sometime during this period, he had attempted to contact Mr Tan. He said that he knew Mr Tan from days when Yongnam had been a customer of the bank and he called to discuss the payment problems Yongnam faced. He further testified that he told Mr Tan that if Yongnam did not receive payment, it would have to stop work. He said a meeting was then arranged and during this meeting, Mr Tan suggested that Yongnam take a floor in lieu of payment and told him this would be a "win-win" solution for the benefit of all parties. Mr Tan also told him that if he did not agree to this, YEC could end up getting nothing. According to Mr Seow, he rejected this initially but finally agreed to consider it. He stated that while he was considering this with his colleagues, he learnt that the bank through a subsidiary was going ahead to purchase two floors in the project. He took comfort from all this and concluded that the bank was committed to completing the project and he then met Mr Lim to discuss the idea of an exchange.

72 Mr Seow accepted that Mr Lim did tell him that the bank's base price was $1,300 psf. He said that Mr Lim proposed the idea of a compensatory credit to make the difference between the estimated cost of completing the works (according to Mr Seow at that time, it was thought to be

around $11.2m including re-mobilisation costs and interest).

73 Mr Tan's evidence on this was quite different to Mr Seow's. He accepted that there had been a conversation between him and Mr Seow. In fact, he said he had some telephone conversations with Mr Seow concerning YEC's difficulties getting payment. However, he maintained that he did not encourage YEC in any way and "merely told [Mr] Seow to discuss YEC's payment problems with STL and Tuan Kai".

74 Mr Kumar submitted that such indifference on Mr Tan's part is incredible and I agree. Having regard to the concern with which the bank regarded the position at that time as seen in its internal memoranda and the matters I have set out above, I find it incredible and therefore do not accept that Mr Tan so lightly brushed Mr Seow off.

75 Equally, I do not accept either the chronology or some of the facts asserted by Mr Seow. I accept Mr Seow did call and discuss payment problems with Mr Tan. This much in any event was not disputed. In my judgment, such communication took place after 11 November 1998. I say this because from Mr Seow's fax of that date to YWKP, the clear impression I get is that the information he had at that point had come from STL and not through any direct communication with the bank. It therefore seems unlikely to me that his discussion with Mr Tan could have taken place before this. Rather, I think the discussion must have taken place sometime after Mr Seow had become aware of the potential divergence with the bank and it was initiated as part of his efforts to get an agreement on all sides.

76 I do not accept Mr Seow's suggestion that the idea first emanated from the bank. I have already traced the events and explained at [61] why I think it was presented by Mr Lim to the bank and I note Mr Lim did not expressly suggest otherwise. I also do not accept Mr Seow's suggestion that he only discussed this with Mr Lim after it was raised by Mr Tan. In my judgment, as I have said, the sequence of events was the other way round. However, I do accept that Mr Tan encouraged Mr Seow to go along with the set-off arrangement and suggested that it presented a mutually beneficial solution.

77 As to Mr Seow's evidence that Yongnam only reached a conclusion on this after learning that the bank was purchasing two floors, I think this is to be seen in the context of some other events that transpired at that time. First, it is apparent from the fax of 11 November 1998 that the exchange arrangement was one of the options Yongnam was already actively exploring at this stage. Secondly, as will shortly become apparent, the bank's management approved the purchase of two floors through its subsidiary on or about 26 December 1998. This could only have been communicated to STL a few days later. By that date, Yongnam was well advanced towards resolving its claims in this manner. However, as will be apparent from my findings below, it is true that Yongnam only finally committed to this transaction sometime after the bank's subsidiary had decided to take the two floors. On the other hand, it may also be noted that although it had approval, the bank's subsidiary did not finally act on this until about the time that Yongnam signed agreements with STL to settle its claims and to purchase the Unit, and was about to commence work on site.

78 In my judgment, having regard to the evidence of the witnesses as well as the tenor of the contemporaneous correspondence and documents (which I consider further below) there was a substantive discussion between Mr Tan and Mr Seow at which:

(a) they did discuss YEC's payment issues and in particular Mr Seow did raise the possibility that YEC might stop work if their payment issues were not resolved;

(b) the idea of Yongnam taking a floor was discussed. Mr Seow did convey some reluctance on Yongnam's part to this as it was not in keeping with Yongnam's principal business. However, I also consider that Mr Seow realised the predicament he was in. I am also satisfied that Mr Tan brought this home by reminding Mr Seow that Yongnam might end up getting nothing. I have already noted at [65(d)] that this was plainly something that would have been attractive to the bank and I am satisfied that Mr Tan did encourage Yongnam to go along with it and endorsed it as a "win-win" solution. In my judgment, given the fact that the bank itself was considering the possibility of purchasing some floors in order to generate funds to enable construction to proceed, it was bound to do this. However, for reasons which I shall set out shortly, I am also satisfied that Mr Tan did not intimate that the bank was agreeable to a pure barter arrangement.

79 The documents that come after this are especially instructive. The first of these is an internal memorandum of the bank dated 3 December 1998. This was a detailed note prepared by Mr Lek and countersigned by Mr Tan. As he had done with the previous memoranda, Mr Wee Joo Yeow also signed this one and it was sent to the president and to the chairman of the bank.

80 This is a significant document which reflects the fact that as far as the bank was concerned, the situation had reached a critical stage. Several options were examined in it. The following key points are noted in the memorandum:

(a) The BHL Group was technically insolvent and its viability was threatened by acute liquidity problems attributable to the poor response, *inter alia*, to Springleaf Tower.

(b) Due to insufficient funding, the curtain wall to encase the building had not proceeded as scheduled and this left the structural steel exposed to corrosion.

(c) As at the date of the memorandum, work on the site had come to a virtual standstill.

(d) Delays had afflicted the progress of the work due to inadequate funding and this in turn stemmed from the fact that it had not been possible to sell any of the office floors.

(e) In particular, a sum of $7m was owing to contractors with $4m of that due to YEC. As a result, YEC had withdrawn its workers and work on the project was already six months behind schedule.

(f) A sum of $9.3m would be needed for YEC to complete the steel superstructure including $4m which was unpaid as that date. To meet this, the BHL Group "with the consent of the Bank, has recently agreed to sell to Yongnam one office floor (10,333 sf) for $13.4m (at $1,300 psf) of which $9.3m would be offset against the amount payable to the contractor while the balance $4.1m would only be collectible on project completion".

(g) This sale would not enhance cash flow during construction.

(h) Three options were explored: to suspend the project; to "mothball" it by completing the structure, façade, roof and lifts so as to enable it to be marketed but leaving internal works to be done at a future point; or to complete the project. All these options were examined and the mothballing option was recommended. It was anticipated this would cost $63m of which STL's share was $44m. It was suggested that this would be funded as follows:

(i) $5.3m by YEC representing the remaining cost of erecting the steel superstructure. This was to be offset as to the sum of $9.3m representing past and future amounts due to

YEC against the purchase price of $13.4m with the balance of $4.1m collectible from YEC on completion;

(ii) $9m by Liang Court acquiring one floor for $14m with $9m being the BHL Group's share; and

(iii) $28m by the bank purchasing two floors.

(i) It was noted that re-mobilisation costs would have to be incurred.

(j) It was also noted that the BHL Group's liquidity problem was chronic and specifically that the problem of structural deterioration afflicting Springleaf Tower was attributable to the lack of adequate funding.

81 It is thus apparent that at some stage before 3 December 1998, YEC had stopped working on the site. The bank was patently concerned with the problem of the incomplete structure deteriorating and was actively considering possible approaches to get the work resumed.

82 On 8 December 1998, Mr Wee Joo Yeow wrote to the president and the chairman of the bank. The following points were noted in support of the recommendation that the bank purchase two floors of Springleaf Tower for $28m:

(a) From the bank's perspective, it was important that the BHL Group be able to recommence construction works at Springleaf Tower and "as an interim measure, to top up the building and protect the building structure";

(b) The bank's "best bet for some recovery of the present substantial shortfall in loan repayment by the [BHL Group] lies in sale of the Springleaf Tower …"; and

(c) The bank's break-even point for recovery of the outstandings (excluding interest) was a sale of the remaining floors at Springleaf Tower at a price of $1,300 psf.

83 This was supported by the president of the bank as being in the overall interests of the bank. On 26 December 1998, the chairman of the bank wrote to Mr Wee Joo Yeow stating that he was agreeable to the purchase of the two floors at $1,300 psf subject to certain conditions the most important of which were the following:

(a) that the proceeds of the sale were to be used only for the construction costs of the development; and

(b) that the group in consultation with the bank was to conclude further sales at not less than $1,300 psf to generate funds for full completion of the building.

84 During the same period, Yongnam had been exploring its own options. Mr Seow held meetings with Mr Lim and with representatives from YWKP on at least two occasions on 15 and 29 December 1998 and with Price Waterhouse, the international accounting firm, on 15 January 1999. Certain documents including a handwritten note of one of the meetings, some letters from YWKP and other minutes of these meetings reveal that by this stage, Yongnam and the BHL Group were plainly conscious of the fact that the value of the work done and to be done by Yongnam would not match the amount at which the bank wished the sale to be completed.

85 In approximate terms, the difference was initially quantified as being in the region of between

$3m and $4m. Some consideration was given to having that amount paid by STL instead of Tuan Kai or to treating it as interest payable on the overdue amounts. It was also suggested at one stage that the value of YEC's work be inflated but YWKP strongly advised against the adoption of any device that would present a misleading picture.

86 YWKP were especially concerned to ensure that these issues were dealt with quickly given their potential impact upon the planned listing of the holding company of the Yongnam Group. They were further concerned with Yongnam acquiring a large asset *ie* the Unit which it would not normally acquire as part of its usual business operations but balanced this against the greater adversity of having to write off a large debt due from Tuan Kai. They were also concerned to ensure that Yongnam not be implicated in any misrepresentation of the value of their work or the price it would in effect be paying for the Unit.

87 There are clear indications in these contemporaneous documents that STL was unwilling (or at least unable because of the bank's position) to conclude the sale at a price below of $1,300 psf even though Yongnam thought, based on the advice of its valuers, that the actual market price was between $1,000 psf and $1,053 psf. STL's unwillingness evidently related to the fact that the bank was purchasing two floors at $1,300 psf. Given this and the fact that the works were valued variously at between $9m and $11m, there clearly was a gap and the lawyers and accountants were consulted on such issues as how this could be presented, whether it would have implications on the impending listing, whether the difference might be taxable as an extraordinary gain and whether if this difference were treated as such a gain, it might be set aside as an undue preference in the event of STL's insolvency.

88 YWKP did advise Yongnam, among other things, that STL had to obtain the bank's consent to the settlement and its agreement to release its mortgage upon the set-off of the amounts owed to YEC against the purchase price of the Unit. This was obviously correct given YWKP's brief. However, at a subsequent meeting held on 15 January 1999 at which (according to the agreed chronology of events tendered by the parties at my request) YWKP was present, it was specifically noted that "STL will not show the [agreement] to the bank" and this referred to the settlement agreement that was about to be entered into. It also appears that this was the meeting at which the idea of describing the difference between the value of the work and the selling price of the Unit as a "credit or discount" originated. The essence of the idea was that the sale would be concluded at a price of $1,300 psf; the works would be valued at approximately $11m; and the difference would be met by an allowance for interest on the late payments to YEC and a credit.

89 An undated summary of a meeting apparently between YWKP and Yongnam explains this and I set out the material extracts as follows:

> Yongnam is in principle agreeable to the bank not seeing the settlement agreement ….
>
> …
>
> 2. even if the S&P agreement provides that a part only of the purchase price is to be paid, all the amount owing must still be deemed to be paid and the purchase price satisfied …
>
> the shortfall of S$2.7m was described as "compensation" so that the Bank would not know that Yongnam was getting a discount. Since the Bank is not seeing the Settlement Agreement, we would like to describe the S$2.7m as a discount or a credit in the settlement agreement (the S&P still states price at S$13.9m) cos [*sic*]:-

1. Yongnam wanted to be paid in cash but is now being asked to take an illiquid asset in payment – therefore the discount is being given to offset the illiquidity of the asset compared to being paid in cash.

2. the discount also reflects that STL and Yongnam are not in agreement over the purchase price. STL wants S$1,300 per sq ft but Yongnam feels that in this market the floor is really only worth about $1,050 per sq ft and are not willing to pay S$1,300.

1 and 2 will go into the agreement as reasons for the discount/credit being given.

…

90 Although the parties were not able to date this document I am satisfied that it came into being sometime between 15 January 1999 when at the meeting with Price Waterhouse and YWKP it was noted that the discrepancy should be described as a "credit or discount" and 13 February 1999 when the settlement agreement was signed.

91 From this brief review of the documents, the following facts may be noted:

(a) Yongnam was plainly looking to make the best of a bad situation. The idea of taking the Unit was not something that naturally commended itself to Yongnam but it was seen as preferable to writing off the substantial debt from Tuan Kai that was then outstanding.

(b) At the same time it was anxious not to have to pay any cash over the value of its work. As far as Yongnam was concerned, it was looking to conclude the transaction as a pure barter arrangement.

(c) However, Yongnam was aware that there would be difficulties concluding the transaction on the basis of a straightforward barter. Mr Seow was clearly aware (and he accepted as much) that STL was unwilling or unable to conclude the sale at a price less than $1,300 psf. He was further aware that the bank through a subsidiary was planning to acquire two floors at this price.

(d) It is apparent that instead of confronting the divergence directly, the position taken by STL with Yongnam's acquiescence was to bridge the gap through a variety of devices and eventually that which was settled upon was the idea of having a compensatory credit. In substance, this was nothing more than a discount from the stated price of $1,300 psf but dressed up so it would not appear as such.

(e) By the end of this period, Yongnam had agreed at least to go along with STL's position that it would not show the bank the settlement agreement that was about to be signed.

92 It is therefore apparent that Yongnam was aware and agreed to go along with the bank being kept in the dark at least in relation to this important detail. As far as Yongnam was concerned, this was ultimately something for STL to sort out with the bank. In my judgment, this puts paid to any notion that the bank at this stage was in fact aware of or agreed to an arrangement whereby Yongnam would acquire the Unit without having to make any payment. Mr Thio submitted that if indeed the bank had been aware of such an arrangement and had agreed to it, it would be inexplicable why there would have been any need for the full terms of the settlement to be concealed from the bank or for a compensatory credit to be introduced into the transaction. I accept this. The position from the bank's perspective was simply that:

(a) it was willing to have STL sell Yongnam the Unit at $1,300 psf;

(b) it was willing for the purchase price to be offset against the value of YEC's work;

(c) it did not imagine that either the sale price or the value of YEC's work would be manipulated by any device to present an appearance of equality between them;

(d) it understood at all times that the value of the work was less than the price of the unit; and

(e) it was willing for payment of the difference to be deferred until completion.

93 In my view, it is also telling that the bank's own internal memorandum dated 3 December 1998 reflected its understanding of the transaction as I have just set it out, in the sense that Yongnam would complete the work, take the Unit and upon completion, pay for the difference in cash. Clearly, the bank had this understanding by early December 1998. I have no reason at all to doubt that this in fact was what Mr Lek and Mr Tan at that stage believed the arrangement would be, since there was no other reason at that stage for them to put this down in an internal document that was contemporaneously created with no expectation of it becoming relevant in some future litigation. Moreover, this was noted not in a note to file prepared for forensic purposes but in a memorandum seeking approval for a particular course of action from the highest levels in the bank. I have no doubt therefore that this in fact was what the officers concerned believed and considered the position to be at that time.

94 I should just add that in so far as the actual figures contained in the bank's internal memorandum of 3 December 1998 are concerned, Mr Lek testified that he believed he obtained these from Mrs Lay Guan Smith, who was employed as STL's financial consultant. Mr Lek was cross-examined at some length by Mr Kumar on how he got these figures and I was left with an unfavourable impression of his evidence. Mr Lek could not in fact recall just how he got these figures and what they were intended to cover. It was certainly not evident if this was meant to be an estimate, a forecast or a fixed lump sum amount. Mr Tan did accept that the number could change but suggested that the bank's expectation was that it would be in the region of the amount set out in this memorandum. In my judgment, this was no more than a reasonable estimate. It accords with the fact that in the course of the discussions that I have found Mr Tan had with Mr Lim and Mr Seow there was no detailed discussion of such things as the value of the contractor's work. However, it is clear that *everybody* concerned had a sense that the price the bank wanted STL to sell the Unit at was more than the value of YEC's work. Mr Tan and Mr Lek wanted an estimate of the value of YEC's work so they could make a reasonable presentation to management and a reasonable estimate, which is what this was, was sufficient at that time. Mr Lek did confirm under cross-examination that he knew re-mobilisation costs would be incurred but then he said that he assumed these were already included in the numbers which he obtained for inclusion in his memorandum of 3 December 1998. Under further cross-examination, it emerged that he could not remember the basis upon which he could have made this assumption. Mr Kumar submitted that Mr Lek was really testifying to what he wanted to believe rather than what he in fact recalled and I did form the same impression.

95 In so far as Yongnam was leaving it to STL to bridge the gap between the bank's position and its own, Mr Kumar submitted that there was no reason for Mr Lim to have deceived the bank from the outset. I do not see that Mr Lim was setting out to deceive the bank from the outset. In my view, he had raised the matter in the manner I have set out at [60] to [65] above and found the bank very receptive. Subsequently, he realised there was a gap because of the bank's insistence on a minimum selling price of $1,300 psf. Thereafter, his attention switched to trying to please both sides by having

a base price of $1,300 psf at least for appearances and a lower price agreed in substance as between STL and Yongnam. This is perhaps most clearly seen in a file note of a conversation between YWKP, Yongnam's solicitors, and Ms Eva Kong of STL on 18 January 1999 in which it was noted as follows:

> Eva called to discuss draft #5 of the Settlement Agreement.
>
> She informed that her directors were not comfortable with the term "credit" and would like to revert to Draft #4 and the concept of compensation for loss of opportunity. Told her that the rationale for using either "credit" or "discount" was to avoid unnecessary tax. As discussed previously, we had come up with the concept of compensation because the Bank was initially supposed to approve the settlement agreement and therefore the settlement agreement could not reflect the discount being given to Yongnam. However, Yongnam will be paying about S$1m in taxes as a result and to solve STL's problem with the Bank. Since the Bank will not now be seeing the agreement, no reason not to set out clearly the position and avoid having to pay the S$1m taxes.
>
> She said that while they will not show the Bank the agreement, they still wanted to make sure that in case the Bank by chance gets hold of the agreement, the agreement will not expressly set out the discount. For this reason they are particularly uncomfortable with expressly stating that Yongnam feel the market price to be S$1,050 and therefore are getting a credit.

96 As against this, Mr Kumar's submissions focused on weaknesses in the evidence given by Mr Tan and Mr Lek on this issue. I do accept that Mr Lek's evidence was not reliable on several points. I have already commented on the fact that Mr Tan's evidence also was unsatisfactory in some respects. Mr Kumar further submitted that neither Mr Tan nor Mr Lek had said anything in their respective affidavits of some of these matters. Even so, the fact that I found the evidence of Mr Tan and Mr Lek unsatisfactory in some respects does not lead inevitably to the conclusion that I therefore had to accept the version of the facts put forward by Mr Seow and Mr Lim in its entirety which really was to the effect that the bank was made aware it was to be a pure barter arrangement. I simply do not see how this could be so in the light of what I have set out above.

97 The issue whether the bank was informed at that stage that the settlement was on the basis of a full set-off with no further payment being required of Yongnam, is a critical one. In my judgment, the fact that STL and Yongnam intended to settle the matter on the basis of a full set-off with no further payment by Yongnam was *not* brought home to the bank in clear and unequivocal terms.

98 I would note first that the statement in the bank's internal memorandum to the effect that STL had agreed to sell a floor to Yongnam "with the bank's consent" (see [80(f)] above) could only have referred to a planned sale since even on Mr Seow's evidence, Yongnam had not at that stage decided that it would purchase the Unit and the contemporaneous documents bear this out. However, this clearly records the bank's unequivocal endorsement of the arrangement along the lines set out there.

99 Mr Tan testified that such approval was subject to certain stipulations, in particular, a formal written proposal from STL and the bank's written approval. In my judgment, this was nothing more than a formality as was eventually accepted by the bank's witnesses. Such a formality would have little, if any, relevance to a claim founded on proprietary estoppel if the necessary elements are made out.

100 Mr Kumar relied on certain facts to submit that by mid-February when the bank was informed of the settlement, it had full and complete knowledge of what the arrangement actually was. In this

regard, Mr Kumar noted, among other things, that Mr Tan had said in his evidence-in-chief that there had been no follow up to the idea first raised by Mr Lim at his first meeting with the bank until January 2001 when STL's solicitors wrote to seek the release of the Unit. This was shown to be untrue since the bank's own records showed that the bank not only was aware of continuing discussions but had apparently consented to certain arrangements. Indeed, in a subsequent memorandum dated 27 July 1999 to which I turn shortly, it was specifically noted that Yongnam had signed a sale and purchase agreement.

101 Further, Mr Seow testified that a meeting was held sometime in early 1999 to inform the bank that a settlement had been reached and that it was on the basis of a full set-off of the purchase price of the Unit for the amounts due to YEC in respect of the works it had already done and was going to do with no further payment to be made by Yongnam. This also was the evidence of Mr Lim. However, it was denied by Mr Tan.

102 In my judgment, the bank was informed that a settlement was reached and it was only then that it in fact *knew* that a sale was about to be concluded between STL and Yongnam. I am satisfied this took place around the time the settlement agreement was reached in mid-February. However, for reasons which I set out in detail at [115] to [131] below, I am satisfied that the bank was not informed at this meeting that it was to be a pure barter arrangement with no further payments from Yongnam. Mr Thio pointed out that if the bank had been informed about the full details of the transaction and had consented to it then there would have been no need to conceal anything about the transaction from the bank. Yet this was not the way it transpired.

The period from April to July 1999

103 Mr Kumar then submitted that the bank was informed of the essence of the agreed arrangements and was later sent copies of the sales contracts by letters dated 17 March and 15 April 1999. Although Mr Tan and Mr Lek testified that they had not seen these letters, Mrs Lay Guan Smith testified that Mr Lim had instructed her to convey the arrangement to the bank and as far as she could recall, she had sent these letters pursuant to this instruction. I generally found Mrs Smith to be a credible witness although her recollection was somewhat hazy at points because of the considerable lapse of time. However, on this issue, I accept her testimony, although I consider the effect of this at [132] to [138] below.

104 I did find Mr Lek's evidence on this issue somewhat unsatisfactory. He testified in effect that the bank had no system to track receipt of documents and unless he saw it and recalled seeing it, he would proceed on the basis that it had never been received by the bank. In my view, there was an element of circularity in this which I could not accept. If the documents were sent in the ordinary course, as I accept they were, then it is improbable that not just one but both letters somehow never got to the bank.

105 This was coupled with a surprising lack of curiosity on the part of Mr Tan and Mr Lek even after they became aware that a sale and purchase agreement had been entered into by Yongnam. The agreements were executed on 31 March 1999. I am satisfied that the bank became aware of this fact contemporaneously and in my judgment, the probabilities are that the bank was monitoring this. Mr Kumar submitted that even though the chairman of the bank had approved the proposal for the bank to purchase two floors on 26 December 1998 (see [83] above) this was not in fact carried out until 13 April 1999 almost four months later and significantly, just a fortnight or so after the agreement for the sale of the Unit to Yongnam had been signed. This was not entirely correct. As pointed out by Mr Thio, the documents that were tendered indicated that the bank had in fact committed a substantial amount towards the option fee by 18 March 1999.

106 Even taking this date however, it comes a day after the first of the letters sent by Mrs Smith to the bank which made reference both to the imminent sale of two floors to the bank's subsidiary as well as to the fact that terms had been finalised with Yongnam on its purchase of the Unit. Mr Lek's evidence on this was that he did not know the reason for this timing and suggested it was all a mere coincidence. In my judgment, these coincidences point towards the fact that the bank was aware of Yongnam's impending purchase of the Unit and its intention then to go forward with the works and this awareness is only to be expected since these developments were an integral part of the plan as a whole.

107 The position is further clarified by Mr Lek's next internal memorandum which is dated 27 July 1999. That, again, was prepared by Mr Lek, countersigned by Mr Tan and Mr Wee Joo Yeow and submitted to the president and the chairman of the bank. That memorandum clearly shows that by that date:

(a) the bank's associate company had purchased two floors at Springleaf Tower;

(b) the bank was aware that YEC had purchased the 23rd floor (apparently for $13.96m of which as far as the bank was concerned $9.3m was to be set off against the amounts due to YEC for the construction work) and indeed that the sale and purchase agreements had been signed;

(c) the bank was aware that construction work had resumed in April 1999 following part-payment to contractors and suppliers; and

(d) the bank considered that Springleaf Tower was the bank's "best bet" for some recovery of the substantial exposure outstanding at that time.

108 Consistent with the view I have expressed at [105] and [106], the purchase by the bank's subsidiary and Yongnam's purchase are presented as a single development.

109 In my judgment, there is really no doubt that by July 1999 and indeed for some months before that, the bank was aware that Yongnam had entered into an agreement to purchase the Unit. The bank was content with this arrangement which as far as it was concerned was an implementation of a plan that had been proposed and approved by the bank in December 1998 (see further at [80] and [98] above). This makes it untenable for the bank to maintain that this arrangement was in any way subject to its formal consent or to a formal written proposal being submitted. The simple fact of the matter is that the bank knew Yongnam had signed the agreement to purchase the Unit and pursuant to this, had resumed work on the site and it was satisfied with these arrangements.

110 The critical question however is what did the bank understand to be the terms on which Yongnam was doing this as at July 1999. This was perhaps the high-water mark of Mr Kumar's case that the bank had full and complete knowledge and understanding of the arrangement that had in fact been entered into between STL and Yongnam and that it acquiesced in that arrangement. Some of the factors relied on by Mr Kumar occurred from February 1999 and for convenience, I analyse these points in detail here. Although Mr Kumar's submissions examined at great length the conduct of the bank in particular *subsequent* to the memorandum of July 1999, in my judgment, it is important first to understand what the mindset of the parties was as at July 1999 because that sheds light on the subsequent conduct.

111 It is noteworthy that in Mr Lek's memorandum of 27 July 1999, the position clearly reflected there at least as far as the bank was concerned, was as follows:

(a)	Balance amount due from sale of shop space	$ 1.068m
(b)	Balance amount due from sale of two floors to bank's subsidiary	$15.33m
(c)	Balance amount due from Yongnam after deducting $9.3m payable to it	$ 4.66m
		$21m (rounded)

112 Mr Thio submitted that given Mr Lim's close relationship with the most senior figures in the bank, it was most unlikely that Mr Lek and Mr Tan would knowingly misrepresent the position to their senior management. He therefore submitted that this pointed away from Mr Kumar's suggestion that the bank by this date knew that the arrangement with Yongnam was being entered into on the basis of a pure barter of the Unit for Yongnam's works. In my view, there is considerable force in this.

113 As against this, Mr Kumar's submission reduced to its essence came down to three principal points. First, he relied on the evidence of the discussions between Mr Lim, Mr Seow and Mr Tan to which I have briefly referred to at [102] above. Second, he relied on the letters which Mrs Smith had sent and which I have referred to at [103] above. Lastly, he relied on the subsequent conduct of the bank which I have only briefly alluded to so far. He submitted on this basis that at least by July 1999, the bank was aware it was to be a pure barter arrangement with no top-up payment from Yongnam.

114 In fairness, I should also state that he relied on unsatisfactory aspects of the evidence of Mr Lek and Mr Tan but I leave that to one side turning instead to the facts and evidence relied on by the plaintiffs.

115 I return now to each of the three points I have just referred to. First, I have already stated that in my judgment, there was some communication between Mr Lim, Mr Seow and Mr Tan sometime in mid-February 1999 (see [102] above).

116 It is useful here to set out what exactly was said by each of the witnesses on this point. Mr Seow accepted that he never informed Mr Tan about the compensatory credit. Nor apparently did Mr Lim. He further accepted there had been no discussion about or information provided as to the valuation of YEC's works or as to what amounts might be due for variations or re-mobilisation costs. He also accepted that he knew the bank had a security interest as mortgagor; that if YEC had pursued Tuan Kai to liquidation it might have ended up getting nothing; and that he never discussed the release of the bank's interest as mortgagee. He said he left this to STL as the bank's customer to sort out.

117 Yet, he maintained that the bank had agreed to a barter arrangement and when pressed by Mr Thio as to how Mr Tan signified this even though there had been no intimation of price or the credit, he responded that Mr Tan was happy that the project was going to move forward. It is clear

from the cross-examination of Mr Seow that according to him, all that was communicated to the bank was a settlement on the basis of a barter deal with no mention of price, of the release of the mortgage, or of the compensatory credit. He further confirmed that he never communicated his impression that the bank had agreed to the barter deal to YWKP. Mr Seow was unable to explain why in the proceedings against YWKP, he had not stated that he had obtained the bank's consent to the barter arrangement and when questioned could not give a satisfactory account for this. Mr Thio submitted that this pointed to a tendency on Mr Seow's part to tailor his evidence to suit the trial.

118 In an attempt to explain the evidence he had given in previous proceedings, Mr Seow ended up having to draw a distinction between obtaining oral and written consent. He had previously accepted under cross-examination in the proceedings against YWKP that the bank could not have been expected to give a proper consent without sight of the settlement agreement. Under cross-examination before me, he tried to distinguish this by saying that it related only to a formal written consent but that an oral consent could validly be obtained even without the bank seeing the settlement agreement. I was left with the impression that Mr Seow was trying to rationalise his evidence after the fact.

119 In my judgment, this was generally the most unsatisfactory aspect of Mr Seow's evidence. I had the distinct impression that he was straining to fall back on the slogan that Mr Tan was happy and approved of the arrangement (and for the avoidance of doubt, I am speaking here of the pure barter arrangement). However, he could not adequately explain how this could be taken at face value since the bank was not told of the details of the settlement, in particular of the compensatory credit and the real price at which the Unit was being purchased by Yongnam. At one point, he suggested that he expected STL to apprise the bank of the terms of the settlement but this was not only somewhat inconsistent with what he had said in the previous proceedings, but more importantly was untenable in the light of what was reflected in the contemporaneous documents.

120 Mr Lim's evidence was to the effect that at his first meeting with Mr Tan, the matter was discussed but he accepted that the bank could have been left with the impression that it involved Yongnam having to pay for the difference between the value of the work and of the Unit (see [58] above). He eventually confirmed that he never made known to the bank that there would be a compensatory credit. He testified that he had the impression that the bank was agreeable to Yongnam getting the Unit without making any further payment but not could not explain how he could or did in fact get such an impression.

121 He accepted that he did not want the bank to see either the settlement agreement between STL, Tuan Kai and YEC or the side letter from STL to YEC both of which are dated 13 February 1999 and which made express reference to the compensatory credit.

122 He further accepted that if the bank had seen these documents, it would have known that the Unit was being sold at a price less than $1,300 psf and that this was contrary to its stated policy of having that as a minimum price. He also accepted that it was possible that without knowledge of the compensatory credit, the bank could have been left with the impression that it would get some money back but then he maintained that the bank agreed to a pure barter arrangement, although he eventually accepted any such agreement was imperfect to some extent since the bank had acted without full information. In the final analysis, given that the value of YEC's work was less than the bank's price for the sale of the Unit, the only way the bank could be taken to have agreed to a pure barter deal with no top-up payment was if the selling price for the Unit was discounted. However, both Mr Lim and Mr Seow accepted that the bank would not agree to this.

123 Finally, Mr Tan's evidence was that there was no follow-up after his first meeting with Mr Lim.

As I have noted above, this was plainly incorrect. Under cross-examination, he accepted that he did later learn about the sale to Yongnam. However, he professed a lack of curiosity to find out how or why Yongnam resumed works or to find out the terms upon which the Unit was sold. He confirmed that he made no enquiries and testified that he did not request a copy of the agreement even though he knew the terms of the sale could impact what the bank might eventually receive.

124 Mr Kumar asked him if this was the act of a prudent banker to which Mr Tan responded he expected STL to forward it to them. When Mr Kumar asked him why he had not asked for it if it was not indeed forthcoming as he suggested, Mr Tan could offer no meaningful explanation.

125 Dealing first with the evidence of Mr Seow and Mr Lim, I am satisfied that while they did have some communication with Mr Tan about the fact of the settlement, Mr Lim at least approached the meeting with a view to conveying to the bank no more than what he saw as the absolute minimum. In my judgment that would have extended to the fact of a settlement and of the fact that there would be a set-off but not to any unequivocal intimation that this was to be on the basis of a full barter arrangement. Given the bank's expectation in December 1998 that the value of the work was around $9.3m and its steadfast insistence upon a minimum sale price of $1,300 psf which its own subsidiary was paying, I am satisfied that the bank would not readily have consented to an arrangement that saw the value of the work being artificially increased by around 50% or the value of the Unit being correspondingly reduced. That this was of concern to STL is put beyond doubt by Mr Lim's evidence under cross-examination as well as the contemporaneous documents to which I have referred (see in particular [95] above).

126 This also accounts for the aspects of Mr Seow's evidence on this issue which I found unsatisfactory.

127 I am therefore satisfied that the details of the proposal presented were somewhat ambiguous and probably intentionally so in the sense that the bank was not told it was to be a complete barter arrangement; or that it was a partial barter arrangement; or that there was a compensatory credit; or what the real price was. It was told simply that STL and Yongnam were about to come to a settlement on the basis of a barter arrangement. This has relevance to the assessment of just what it was that the bank was endorsing or acquiescing in. If it was not made aware that it was a pure barter arrangement, then it simply cannot be said to have acquiesced in that.

128 Mr Lim, in my judgment, believed this enabled the transaction to go forward. This was of great importance to him. He accepted under cross-examination that he was hopeful in any event that if Yongnam went ahead with the project, it could be completed, units could be sold to generate cash flow and the bank could be paid off. At the same time, he realised that if he had put this forward explicitly to the bank, it might well have been rejected.

129 The bank on its part, assumed that the transaction it was presented with was proceeding on the basis of the understanding it had obtained in December 1998 and readily endorsed this.

130 Whether this was prudent or not is quite beside the point. The point comes down to this: as far as the bank was concerned, it held a paramount mortgage and this could only be overreached with its consent. The bank was willing, indeed eager, in the circumstances to go along with an arrangement that saw Yongnam taking a floor in return for completing the work and paying the difference.

131 Yongnam however never wanted to pay the difference. But it was no answer for Mr Seow to say that he was expecting Mr Lim to sort this out with the bank. Mr Seow maintained that STL was

the bank's customer after all but on the other hand, he knew that the bank had a paramount mortgage and since the deal between Yongnam and STL potentially impacted that, he could not reasonably impose more on the bank than it had been made aware of.

132 I turn to the letters that Mrs Smith sent to the bank. As I have said, I accept Mrs Smith's evidence that the letters were sent. The first of these is dated 17 March 1999 and the following paragraphs are of particular importance:

> We write to update you on the recent developments concerning the Springleaf Tower Project …
>
> …
>
> b) terms have been finalised with Yong Nam Engineering (or its nominated party) regarding their purchase of the 23rd floor for $1,300 psf. This purchase price will be offset against the payments due under the contract signed between Yong Nam Engineering and Tuan Kai Construction. We will shortly be providing more details to you on this matter under a separate letter.
>
> c) work at the site has already resumed this month, albeit on a small scale, and we expect to pick up the pace from Apr 99 onwards. We are targeting to obtain TOP by Dec 2000.

133 I note that this letter specifically represents that the agreement reached with Yongnam in respect of the purchase of the Unit was on the basis of a price of $1,300 psf. There is no reference to the value of YEC's work but there is a statement that this would be set off against payments due under the contract. Mr Thio submitted that even taken at face value, this was inconclusive in the sense that it could just as well have described a partial set-off transaction with the purchase price being offset by the work to the extent of the value of the work. In my view, Mr Thio is correct and it is consistent with STL's desire to avoid forcing the issue that there was some ambiguity in this formulation.

134 The second letter sent various documents to the bank including the sale and purchase agreement and the supplemental agreement (both dated 31 March 1999) but not including the settlement agreement or the side letter. The latter two documents did make reference to the compensatory credit. The documents that were apparently sent to the bank did not.

135 The sale and purchase agreement was a standard form agreement which gave no indication of the true nature of the transaction and noted only that the purchase price was $13,992.58 per square metre with an estimated total area of 998m^2.

136 The supplemental agreement contained the following provisions which are of interest:

> 3.1.3 By deleting Clause 5 of the Principal Agreement in toto and substituting it with the following:-
>
> 5.1 The Purchase Price shall be satisfied in accordance with the following Payment Schedule subject to any variation in accordance with clause 5.2:

1	Upon the signing of this Agreement	The amount of S$6,957,494.65
2	On or before 30th June 1999	The balance of S$7,007,105.35

5.2 Notwithstanding the Payment Schedule set out in Clause 5.1, the Purchaser shall be entitled to pay or procure the payment of the balance of S$7,007,105.35 in such portions and at such times as the Purchaser may decide in its sole and absolute discretion but in any event not later than 30th June 1999.

5.3.1 There are sums due and owing or which shall be due and owing by STL to the Purchaser (the "STL Obligations") of an aggregate amount no less than the Purchase Price.

5.3.2 The Vendor irrevocably authorises the Purchaser to apply part or all of such STL Obligations at any time and from time to time in or towards satisfaction of all or any part of the Purchase Price due to the Vendor under the Payment Schedule (the "Agreed Payment Arrangement") and the Vendor irrevocably undertakes to accept such application as satisfaction of the Purchase Price.

5.3.3 The Agreed Payment Arrangement is at the request of the Vendor and STL. …

3.1.6 By deleting Clause 8 of the Principal Agreement in toto and replacing it with the following:-

8.1 If the land on which the Unit is built is subject to an encumbrance, the Vendor shall procure that the mortgage (the "Mortgagee") shall release and discharge its mortgage over the Unit immediately upon the Purchase Price being fully paid and in any event by 30th June 1999.

8.2 The Vendor represents and warrants to the Purchaser that upon the release and discharge of the mortgage by the Mortgagee:-

8.2.1 the Unit shall be free and clear of all caveats, security interests, liens, encumbrances, pledges, defects in title, restrictions and other burdens save and except those which are or would be in favour of the Purchaser, its assignor or its mortgage;

8.2.2 the Vendor shall not create or suffer to subsist any mortgage, charge or suffer or subsist any mortgage, charge or other encumbrance whatsoever (whether fixed or floating) on the Unit or any part thereof;

8.2.3 the Vendor has not done or knowingly suffered or been party or privy to any deed or thing whereby the Vendor may be hindered or prohibited from transferring the Unit to the Purchaser.

137 Mr Kumar submitted that this would have made clear to the bank what the nature of the arrangement was. As against this, Mr Thio submitted first that it could easily have been missed unlike the way in which it was reflected in the settlement agreement and the side letter which were not shown to the bank for just that reason. Secondly, Mr Thio submitted that the statement in cl 5.3.1 above was simply inaccurate and misleading inasmuch as it gave the impression that Yongnam's works

would have a value equivalent to or greater than $13.9m when this was untrue. Thirdly, Mr Thio submitted that these were bilateral agreements and in particular, STL remained liable under them to procure a discharge of the mortgage. Thus, even if Mr Lek had received the documents, read them and understood them, Mr Thio submitted there was nothing there necessarily to drive him to the conclusion that Yongnam was proceeding on a basis different to the bank's position.

138 In my judgment, it is possible that someone reading the supplemental agreement *might* have understood the possibility that the parties were proceeding on the basis of a complete barter but I accept all three arguments Mr Thio made. Further, in my judgment, Mr Thio is right in his submission that this is consistent with Mr Lim's desire to disclose matters selectively to the bank.

139 As I have said, I am satisfied the documents were sent. Mr Kumar was not mounting a case that Mr Lek or Mr Tan did in fact see and understand the documents. Indeed, as he pointed out, he could not. I am not satisfied that Mr Lek or Mr Tan did see and understand from these documents at the time they were sent that Yongnam and STL had entered into an arrangement involving a pure barter. I base this ultimately on the following facts at least:

(a) The three arguments raised by Mr Thio that I have referred to at [137] above.

(b) The fact that in July 1999, in an internal memorandum to their superiors at the highest levels of the bank, Mr Lek and Mr Tan presented the transaction as one with a top-up payment to be made by Yongnam. See further my comments at [112] above.

(c) STL was specifically attempting to bridge a gap between the bank's and Yongnam's respective desired positions and steps had been taken to conceal certain explicit documents from the bank just so as to avoid the bank learning of the compensatory credit. Plainly STL was anticipating that the true nature of the agreement would be missed by those in the bank who received the sales contract. Yongnam was aware of this and it seems perverse for Yongnam to then maintain that the bank should be taken to have known and understood the details of the transaction in spite of STL's efforts to conceal them from the bank. See also my observations at [95] above.

(d) The lack of clarity with which the matter was presented to the bank as I have found at [125], [127], [128], [133] and [138] above;

(e) The terms of the letter of 17 March 1999 which could quite easily have been construed as pointing towards a partial barter arrangement.

(f) The lack of any specific intimation of how Yongnam's work were being valued.

(g) The fact that Mr Lek (as he accepted under cross-examination) made a number of assumptions in his discussions with STL's staff and in his words "trusted" that the agreements had been concluded in line with what he believed the position to be.

140 In my judgment therefore, until 27 July 1999, Mr Lek and Mr Tan remained unaware of the true nature of the arrangement that had been concluded between STL and Yongnam.

141 In that light, I turn to consider the events subsequent to this date.

The period after July 1999

142 YEC proceeded with its work and completed it in early 2000. Towards the end of 2000, Mr Lek sent a further memorandum to his superiors at the bank. This is dated 29 November 2000. It generally reviewed the outstanding amounts due from the BHL Group and recommended that steps be taken to sell as many of the completed projects as possible in an effort to reduce the debts.

143 On 9 January 2001, STL wrote to YDP confirming that the purchase price for the Unit had been fully paid and two days later, STL's solicitors, MOW, wrote to the bank's solicitors, TSMP, requesting the discharge and release of the paramount mortgage in respect of the Unit. TSMP responded on 15 January 2001 to say they were taking instructions. The bank in fact did not respond substantively to the request through its solicitors until 17 September 2001, about eight months and several reminders later. On that date, TSMP responded to MOW stating that the bank was not willing to execute the release. It was noted in that letter that the arrangement between Tuan Kai, STL and Yongnam as spelt out in a letter from STL dated 10 September 1999 for the purchase price to be offset against the monies due to Yongnam was not something the bank was party to.

144 In the period of eight months intervening between the date of the letter from MOW first requesting the release and the date of TSMP's response confirming that this would not be given, Mr Lek had prepared two more memoranda to his superiors at the bank. These were dated 21 March 2001 and 18 May 2001.

145 It cannot be disputed that the letter requesting the release of the Unit from the mortgage had occupied a significant part of Mr Tan's and Mr Lek's attention when they received it. They both deposed to having been taken by shock when they learnt of it. In a letter to TSMP dated 12 September 2001 conveying instructions on this issue, reference was made to "the numerous telephone conversations between our Mr Jimmy Lek and your Miss Melissa Tham on the same matter between January and March 2001". Yet despite this, there is a remarkable omission of any mention of this request in both these internal memoranda. It appears that during this long period, the only people aware of the problem on the bank's side were Mr Lek and Mr Tan. Indeed, in the second of the memoranda that I have referred to above (*ie*, dated 18 May 1999) there is a clear indication that some payments were expected to be received from Yongnam upon completion.

146 During this period, there were some other developments of interest. First, the bank lodged a set of caveats in May 2001 against a number of floors at Springleaf Tower but not in respect of the Unit. This was repeated on subsequent occasions when caveats were lodged to cover certain additional facilities granted to STL but the Unit was omitted on these occasions. Mr Lek was examined on this and could give no reasonable explanation. Second, a public announcement was made concerning the takeover of the Overseas Union Bank Ltd, which until then had been STL's financier, by United Overseas Bank Ltd.

147 Subsequently, when the bank did formally recall the facilities and asked STL to surrender the property, the Unit was omitted. This was on 20 August 2002 some months after TSMP's response.

148 Mr Kumar cross-examined Mr Tan and Mr Lek on these issues. That revealed certain disturbing gaps in the evidence these gentlemen gave. First, Mr Tan testified that the request for the release was shocking and an important matter but then he apparently left it to Mr Lek to investigate and pursue the matter. When questioned by Mr Kumar, he was unable to point to a single specific step he took to address the matter or even to follow up on it. He eventually confirmed that he could only recall one briefing he received from Mr Lek. He finally confirmed that he did not primarily manage this issue but left it to Mr Lek and did not do anything himself.

149 Mr Lek stated that when he received the request for the release, he checked the accounts to

see if Yongnam had paid an amount of around $4m. This would have been consistent with his understanding of the partial barter arrangement. However, as Mr Kumar noted, this showed that as far as Mr Lek was concerned, the bank regarded the rest of the purchase price as having been paid.

150 Mr Lek testified that when he saw there was no payment reflected there, he gave instructions to his solicitors to reject the request. However, this could not possibly have happened for some considerable time because there is no reason for TSMP not to have responded if they had received instructions. Yet they did not do so for eight months and in spite of several reminders. Moreover, it is evident from the passage in Mr Lek's letter to his solicitors that I have referred to at [145] above that he had had numerous conversations with his solicitors on this issue at least between January and March 1999. Mr Lek's attempt to deal with this by saying that he was relying on his lawyers to respond is plainly untenable in my view.

151 There is one exchange in particular which demonstrates the unsatisfactory nature of Mr Lek's evidence:

> Q: Did you recollect following up with your solicitors in relation to not sending a response?
>
> A: No.
>
> Q: Weren't you concerned to do so despite considering that you were in a state of shock over what you had discovered?
>
> A: Yes, I was in a state of shock but I also think that I'm a mortgagee so, you know …
>
> So if I don't want to discharge, you know, what can they do?
>
> Q: So it wasn't really important to you whether there was a response from your solicitors that when ---
>
> A: Not that. Sorry, counsel, I don't want to sound, you know, too casual, you know, but just that --- you see, I'm the mortgagee, you want something, okay. Okay, unless I prove otherwise, you know. I've given instruction. The lawyers should do their part, you know, and what --- subsequently what happened is not important. Important thing is at the point if I really, you forced my hand and I have to discharge, okay, then it requires my attention. Otherwise, instruction given to the counsel, the counsel should do their part. After that what happens, it is not material to me.
>
> Q: So, in other words, you didn't follow up on – with your solicitors about sending a response?
>
> A: No, I didn't, yah.

152 Mr Kumar submitted that this was untenable and for the reasons I have already mentioned at [149] and [150], I would agree with that.

153 On 18 July 2001, Mr Lek received a letter from Yongnam stating that the purchase price had been paid. The copy of the document tendered before me bore a handwritten note from Mr Lek to STL stating that the bank was unaware of any supplemental agreement and that it would not release the Unit. Mr Kumar challenged the authenticity of this annotation but I am not satisfied that it was fabricated by Mr Lek. In any event, nothing ultimately turns on this.

154 Mr Lek did state in his evidence-in-chief that in the aftermath of the letter from MOW in January 2001, the bank had become "increasingly uneasy" and therefore asked for copies of the sale and purchase agreements. His affidavit further stated that the sale and purchase agreement "which STL forwarded us in respect of the 23rd floor in or around July 2001 made no reference to any set-off on the purchase price". This suggested he had examined the documents at that time and formed a view, which in any event was untenable since he also accepted that he knew the standard form agreement would have been amended because of the unusual payment arrangement. Under cross-examination, he stated this was all said with the benefit of hindsight and was not testimony as to what his knowledge was at the material time. He said he did not "scrutinise" the agreement and indeed went as far as to say he did not even check the terms of the agreements. I found this surprising to say the least, given the "shocking" development which was what had apparently caused Mr Lek to ask for these documents in the first place.

155 There were several other aspects of the evidence of Mr Lek and Mr Tan on this which was unsatisfactory. There were also some inconsistencies between them in relation to such things as the degree to which Mr Lek briefed Mr Tan or the extent to which Mr Tan got involved in instructing the lawyers.

156 Mr Kumar submitted that the unsatisfactory nature of this evidence pointed inexorably to the conclusion that the bank was aware all along that this was to be a pure barter arrangement with no top-up payment expected. He submitted in effect that this was the only explanation for the bank's confused and confusing reaction to the request for the release.

157 Mr Thio's response to this was that this was to be seen in the context of a period of high tension for the bank given the severe financial difficulties facing the BHL Group. Seen in that light, and given the huge discrepancy between what Mr Lek and Mr Tan apparently thought was the position with a partial set-off arrangement and that which STL was claiming, he submitted that it was not unreasonable for Mr Lek to gather information to make sense of this.

158 In my judgment, Mr Kumar did considerably damage the credibility of Mr Tan and Mr Lek. I found their evidence and attempts to explain this period of reticence unsatisfactory and contrived. However, that does not necessarily point to the conclusion that Mr Kumar urged upon me, namely that this was because they were aware that the arrangement was a pure barter arrangement. In my judgment, Mr Thio's submission as to what accounts for the bank's reaction during this period is closer to the mark.

159 In my judgment, the first time Mr Lek and Mr Tan in fact became aware that the arrangement between Yongnam and STL as documented in the sales contracts contemplated a full set-off was in January 2001. If, contrary to my finding, Mr Lek and Mr Tan had been aware that the arrangement was one involving a pure barter and had agreed or encouraged or acquiesced in this prior to January 2001 then upon receipt of the letter requesting the release they would not have been surprised. Indeed, they could not have failed to have anticipated that the day of reckoning would come when this would be raised. One would have expected them to have been prepared for it. Yet the most convincing evidence that they were stunned and taken aback by this was their extremely sluggish reaction to this new and startling development.

160 At some stage, shock seemingly gave way to ineptitude. I do not accept Mr Lek's evidence that throughout this long period, he never even looked at the agreements. At some stage during this period, he plainly learnt that there was a supplemental agreement causing him in his handwritten note dated 18 July 2001 to deny knowledge of it (see [153] above). In fact, Mr Lek specifically accepted he was told about this during his conversation with one of the staff of the BHL Group Mr Lee Kam

Seng on 18 July 2001. The numerous conversations he apparently had with his solicitors on this issue during this period is also consistent with the making of a shocking discovery. Mr Thio submitted that it was a period when Mr Lek was trying to make sense of what had happened but he stopped short of saying that the discoveries Mr Lek was making at this time would have been all the more disturbing when he finally found, as I am satisfied he did, that the terms of the sale and purchase agreement read with the supplemental agreement did contemplate the pure barter arrangement. As for Mr Tan, Mr Thio submitted that he had not seen these agreements until after the foreclosure proceedings in late 2002. I do not accept Mr Tan's evidence on this. It is inconceivable to me that Mr Lek would not have told him about this in 2001.

161 Mr Lek and Mr Tan accepted that they did not escalate the issue to the higher levels in the bank until much later. Indeed, in the two internal memoranda during this period, I have noted that Mr Lek and Mr Tan did not even make mention of this "shocking" development. In my judgment, this was an intentional omission as they struggled to find a way to manage the situation. The fact is that as early as July 1999, Mr Lek and Mr Tan had been aware that Yongnam had signed agreements to purchase the Unit. This was specifically noted in the internal memorandum dated 27 July 1999 (see [107] above). They had failed to scrutinise the agreements at that time and to discern the nature of the arrangement. In relation to his failure to ask for these agreements when he learnt of them in 1999, this was what Mr Lek said under cross-examination:

> Q: And do you recollect asking for a copy of the agreement?
>
> A: No.
>
> Q: You weren't interested?
>
> A: Not that I weren't interested. As I said --- well, I mean with hindsight I think I was a bit, what you call it, trusting. You know, so not that I wasn't interested but I trusted that it would be in order, yah.
>
> Q: It's not a matter of trust so much, Mr Lek, as you had made a specific recommendation to your executive committee, your chairman had agreed to that recommendation. An integral component of that recommendation was the funding to be provided by Yongnam. Didn't you think it was incumbent on you to find out what actually had happened in relation to the sale to Yongnam?
>
> A: No.

162 Mr Lek's and Mr Tan's decision in 2001 to manage the situation without raising it to the higher levels in the bank is to be seen in the light of these facts. Under cross-examination, Mr Lek said this when asked why he had not alerted management earlier:

> What I actually meant is that when I think it is not within my control anymore, I can't manage this thing, you know. It looks like, you know, we are not making any headway, you know. This become, you know, an issue which potentially there may be a fallout, you know. So that --- these are situations where I need to alert them and to give them the background, yah.

163 Bank managers are expected to be careful, even meticulous. Trusting a customer who was in acute financial distress was not what Mr Lek's superiors would have expected of him in the circumstances and in short, his own evidence was that he resisted escalating it until he felt it was no longer within his control or his ability to manage the situation. I should add that my conclusion in the

foregoing paragraphs does not depend upon finding that Mr Lek had seen or known about the two letters sent by Mrs Smith in 1999 in particular that dated 15 April 1999. It could not be disputed however that by July 1999, they knew such agreements were in existence and by 2001, in my judgment, they knew that if they had checked the agreements in 1999 they could have discovered the nature of the arrangement between STL and Yongnam (see my observations at [154] and [159]–[162] above). Obviously if either of them had seen the letters sent by Mrs Smith, then one can imagine those concerns and fears being heightened further. Mr Thio submitted that any suggestion that Mr Tan and Mr Lek had discovered their error in January 2001 when the discharge was requested and then not knowing how to explain this, acted opportunistically and misrepresented the position to their new bosses was never put to the witnesses. I reiterate what I have said at [42] above. Moreover, I would also observe that the suggestion is especially unfounded there here. By way of example, the following exchange between Mr Kumar and Mr Tan is instructive:

> Q: Yes, but I think you are senior management and it's new management, and …
>
> A: I concede that it was overly optimistic.
>
> Q: No, it's not about your optimism that I am concerned with, it's of your opportunism that I am concerned with. I mean either you expected to collect 4 million or you expected to collect the full value of the unit. How could you adopt a medium position between these two figures without a certain basis? All the memos up to now talk about 4 million. Now suddenly you are raising the expectations of your management to a collection of between 4 to 13 million. Was this some misguided attempt to impress your new management?
>
> A: I concede that it's wrong.

164 In any case, this is all consistent with the last factual development which I should make reference to. On 26 November 2001, Mr Lek submitted his next memorandum to his superiors at the bank and for the first time, mentioned the request for the release. This is how Mr Lek presented it:

> However, our eventual loss on this project may be much lower due to the following reasons: …
>
> * The balance sale proceeds collectible of $31.7 million exclude $13 million due from Yongnam, the steel superstructure contractor for the project. The contractor had bought one office floor from the group for $13 million of which $9 million was to be offset against the amount owing by the group, leaving $4 million payable by the contractor. However, the contractor recently wrote to the Bank requesting for discharge of its office floor from the Bank's paramount mortgage on the grounds that the purchase had been paid in full after accounting for variation works of $4 million. As the sale and purchase agreement (which has been assigned to the Bank) does not provide for any offset arrangement, we have responded to Yongnam via our solicitor that no discharge shall be granted until 90% of the purchase price (as prescribed by the Controller of Housing for commercial properties) is paid. Since then, Yongnam has not responded to dispute the Bank's position. We thus expect additional collection of between $4 million to $13 million from Yongnam.

165 The suggestion that there might be a possibility of an additional collection of between $4m and $13m is contrary to the position that had been reflected consistently in the bank's internal documents over a period of almost two years beginning in December 1999. Mr Kumar cross-examined Mr Tan and Mr Lek on this. It may be noted that by this stage, on any basis, Mr Lek and Mr Tan would have been aware that the difference between the valuation of Yongnam's works as originally contemplated and as it was eventually presented stemmed not just from variations but also from the

compensatory credit since this was specifically noted and articulated in a letter dated 10 September 2001 from STL to the bank. Mr Tan said he left it to Mr Lek to ascertain the figures. Mr Lek on his part, testified that he wished to spare his management the details. Mr Kumar submitted that both officers were careless in the way they presented the information to their management. In my judgment, it was less a question of being careless than it was of managing the uncomfortable situation they were in (see [159]–[163] above).

166 The reference to the sale and purchase agreement not reflecting a set-off arrangement also reflect some liberties being taken with the facts that were being reported since by this date, not only have I found that Mr Lek was aware of this, but it was expressly spelt out in STL's letter of 10 September 2001 to which I have referred that the terms of payment had been amended. Moreover, both Mr Lek and Mr Tan accepted that they knew this would have been the case given that the payment arrangements were not the usual ones. Mr Lek could not satisfactorily account for this.

167 Lastly, Mr Kumar submitted that the position reflected in this memorandum to the effect that the bank might be able to recover more than $4m was opportunistic. He criticised the bank for not taking a principled stand.

168 In my judgment, the position taken by Mr Tan and Mr Lek was opportunistic and Mr Tan finally accepted that it was wrong to have presented this to the bank's management.

169 The position crystallised there. The bank subsequently filed an application in court to foreclose on the mortgage and this eventually led to these proceedings with Yongnam resting its claim for relief upon the doctrine of proprietary estoppel.

Proprietary estoppel – the law

170 It is settled law that to successfully found an estoppel, three elements must be shown. These are a representation on the part of the party against whom the estoppel is sought to be raised, and reliance and detriment on the part of the party seeking to raise the estoppel. In relation to an estoppel concerning land, Prof Tan Sook Yee in *Principles of Singapore Land Law* (Butterworths Asia, 2nd Ed, 2001) ("*Singapore Land Law*") succinctly summarises the position thus at 97–98.

> The principle of proprietary estoppel may be summed up as follows: where an owner of land permits the claimant to have, or encourages him in his belief that he has, some right or interest in the land, and the claimant acts on this belief to his detriment then the owner of the land cannot insist on his strict legal rights if that would be inconsistent with the claimant's belief. The claimant may have an equity based on estoppel. The connection with constructive trusts imposed to prevent fraud or unconscionable dealings is evident, as both doctrines deal with unconscionable behaviour. But although the source is unconscionable behaviour and the requirements seem almost the same, there are differences. For a start, the constructive trust in this context is based either on an intention to create a trust, but the formalities are not complied with, or on a common intention that the other party is to have an interest in the property, which is acted upon to the detriment of the alleged beneficiary. In either case there is an intention that the other party is to have an equitable interest in the land. In proprietary estoppel, the main emphasis is that the landowner has to have acted in an unconscionable manner taking the entire set of circumstances into account. There is no clear intention that the other party is to have an equitable interest in the land. The other important difference lies in the remedies. In a constructive trust the beneficiary claims, and if his claim is successful, he has an equitable interest in the property. While in a case where proprietary estoppel has been successful the relief

is at the discretion of the court.

171 It is evident that the principle that underlies the remedy is unconscionability. The question in each case is whether the party against whom the estoppel is raised said or did something that led the claimant to take a certain course of action in circumstances that render it unconscionable not to estop the former party from resiling from his earlier position. The point is well made by Lord Denning MR in *Crabb v Arun DC* [1976] Ch 179 at 187–188 where he stated:

> The basis of this proprietary estoppel – as indeed of promissory estoppel – is the interposition of equity. Equity comes in, true to form, to mitigate the rigours of strict law … it will prevent a person from insisting on his strict legal rights – whether arising under a contract, or on his title deeds, or by statute – when it would be inequitable for him to do, having regard to the dealings which have taken place between the parties.

172 This is a point of some importance in the present case. The examination of witnesses as well as the submissions tended at times to focus for instance upon the fact that Yongnam's legitimate contractual expectation was that STL was to procure the release of the mortgage. This may be of interest, but it is not directly relevant to a cause of action founded on estoppel. Had STL in fact procured the bank's written consent to a full barter arrangement or if STL had in fact procured the release of the Unit from the mortgage, then STL's contractual obligations owed to Yongnam would have been fulfilled and there would have been no issue of estoppel.

173 The real inquiry for me is whether there was something in all the circumstances which rendered it unconscionable to permit the bank to exercise its rights as mortgagee without any regard to Yongnam's claimed interest. In considering this, it is relevant to examine *all* the circumstances of the case, although these are considered by reference to the three elements of representation, reliance and detriment.

174 In *Ramsden v Dyson* (1866) LR 1 HL 129, Lord Kingsdown thought (at 170) the principle arose when:

> … a man, under a verbal agreement with a landlord for a certain interest in land or what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land …

175 It is evident here that the idea of a "representation" was always fairly broad covering the range from an agreement to an expectation that was created or encouraged by the party being estopped.

176 In *Willmott v Barber* (1880) 15 Ch D 96 ("*Willmott*"), Fry J sought to provide some structure to the analysis by postulating "five *probanda*" that had to be found in order to raise an estoppel. Fry J said as follows at 105–106:

> In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights.

> Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but, in my judgment, nothing short of this will do.

177 The problem with this analysis is that it attempts to constrain unduly a principle that ultimately rests upon the conscience and which therefore calls for a significant degree of flexibility. Whatever may be said about the utility of applying such a framework to cases that rest upon the existence of a mistake on the part of one party, it may not be readily applicable in cases where the doctrine is invoked not on the basis of a mistake but simply because there is an element of encouragement or acquiescence or perhaps a common expectation which might just as well give rise to iniquity. This was recognised by Oliver J (as he then was) in *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133 ("*Taylor Fashions*"). In *Taylor Fashions*, Oliver J noted as follows at 148:

> I am not at all convinced that it is desirable or possible to lay down hard and fast rules which seek to dictate, in every combination of circumstances, the considerations which will persuade the court that a departure by the acquiescing party from the previously supposed state of law or fact is so unconscionable that a court of equity will interfere. Nor, in my judgment, do the authorities support so inflexible an approach …

and at 151–152:

> [T]he more recent cases indicate, in my judgment, that the application of the *Ramsden v Dyson* principle – whether you call it proprietary estoppel, estoppel by acquiescence, or estoppel by encouragement is really immaterial – requires a very much broader approach which is directed rather at ascertaining whether, in particular individual circumstances, *it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment* than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick of unconscionable behaviour.
>
> [emphasis added]

178 Prof Tan in *Singapore Land Law* describes the approach taken by Oliver J in *Taylor Fashions* as the preferred one and she cites at 99 *In re Basham, decd* [1986] 1 WLR 1498 at 1508–1509, *Wayling v Jones* (1993) 69 P & CR 170 and *Gillett v Holt* [2001] Ch 210; [2000] 3 WLR 815 in support of this. Reference is also made to *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84 ("*Amalgamated Investment*"), *Habib Bank Ltd v Habib Bank Zurich AG* [1981] 1 WLR 1265; [1981] 2 All ER 650 and *Walton Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; (1988) 62 AJLR 110.

179 However, again as noted by Prof Tan in *Singapore Land Law*, at 100 this time, it does not follow that this broader approach will permit the doctrine to be invoked where the party acts to his detriment merely in the *hope* that he will be given an interest in the land: see the decision of the Privy Council in *Attorney-General of Hong Kong v Humphreys Estate (Queen's Gardens) Ltd* [1987] AC 114.

180 A threshold question that arises is the extent to which *Taylor Fashions* represents the law in Singapore. There is a very helpful conspectus of the case law decided up to 2000 in *Singapore Land Law* at 101–102. Prof Tan concludes that even though *Willmott* ([176] *supra*) was referred to and applied in some of these cases, the concern in all the cases is to ensure that unconscionable behaviour is prevented having regard to the entire factual matrix and this is consistent with the approach articulated in *Taylor Fashions*.

181 In my judgment, that is correct. I would note first that *Taylor Fashions* has been followed in our courts – see the decision of Belinda Ang Saw Ean JC (as she then was) in *Lemon Grass Pte Ltd v Peranakan Place Complex Pte Ltd* [2002] 4 SLR 439 at [134]. It was also referred to in the judgment of Chao Hick Tin J (as he then was) in *Lim Ah Mee v Summerview Developments Pte Ltd* [1998] SGHC 87 at [82]. In *Bank of China v Yong Tze Enterprise (Pte) Ltd* [2005] 2 SLR 761, Belinda Ang Saw Ean J followed the decision of the English Court of Appeal in *Gillett v Holt* ([178] *supra*). That was a case which approved *Taylor Fashions*, the court citing one commentator that had described it as "a watershed in the development of proprietary estoppel" and holding that the proper approach to the inquiry is to undertake a broad inquiry as to whether it was unconscionable in all the circumstances for the representor to resile from the representation.

182 In the present case, Mr Kumar reviewed a number of local decisions and submitted that these did not mandate the conclusion that the court was bound to apply the rigid framework specified in *Willmott*. Indeed, he noted that *Willmott* was not cited at all in some cases (see *eg*, the decisions of the Court of Appeal in *Goh Swee Fang v Tiah Juah Kim* [1994] 3 SLR 881 and *Tan Bee Giok v Loh Kum Yong* [1997] 1 SLR 153) and in others where it was cited, the analysis was not conducted on the basis of the five *probanda* (see *LS Investment Pte Ltd v Majlis Ugama Islam Singapura* [1998] 3 SLR 754 ("*LS Investment*") and *Keppel TatLee Bank Ltd v Teck Koon Investment Pte Ltd* [2000] 2 SLR 366 ("*Teck Koon Investment*"). Mr Kumar noted that the last case in fact cited *Taylor Fashions* in support of the proposition that "[t]here will not be an estoppel by acquiescence unless the party estopped is aware of his own rights and of the innocent party's mistaken belief" (see *Teck Koon Investment* at [27]) when that is in fact contrary to what was held in *Taylor Fashions*.

183 In *Somerset* ([23] *supra*) which was one of the previous cases arising out of the same factual matrix as I am concerned with, the Court of Appeal made reference to the relevant extract from *Willmott* but did not analyse the facts on that basis. However, what that case does appear to hold is that there must be some contact between the representor and the representee in order to give rise to an estoppel. In this respect, the Court of Appeal followed the decision of the English Court of Appeal in *Orion Finance Limited v J D Williams & Company Limited* [1997] EWCA Civ 1 ("*Orion Finance*").

184 I think it is useful briefly to explore the limits of this principle. *Orion Finance* was a case where the defendants who were lessees of computer equipment had received a notice of assignment from the assignor who was the lessor. The lease permitted the lessor to assign the lease with the prior consent of the lessee but no such consent was sought or given. The defendant challenged the assignment as against the plaintiffs who were the assignees. The issue was whether the assignment was valid.

185 The court found for the defendant on various grounds but on the issue of contact between the parties, Evans LJ who gave the judgment of the court said as follows:

> Mr Martin's submission breaks new ground. He submits that on receiving the notice of assignment from Atlantic, the assignor, the defendants came under a duty to communicate with Orion, the assignee, because they would have realised that Orion mistakenly believed that the assignment

was valid. *There was no direct communication between the defendants and Orion and the submission comes close to suggesting that a party can be estopped as the result of failing to act as a volunteer; but Mr Martin does not take it so far. His primary submission is that notice of the assignment placed the defendants under a duty to the purported assignee.* A response to Atlantic, from whom the notice was received, would not be enough.

I do not find this convincing. In my judgment, if any estoppel is to arise as the result of failing to respond to a communication, then it can only be alleged by the person from whom the communication was received. I therefore would reject the primary submission.

[emphasis added]

186 In my judgment, the real holding of the court in *Orion Finance* on this point was a development of the principle that silence cannot constitute a representation in the absence of a duty to speak; and Evans LJ was really making the point that it would not be sensible to find a duty to speak or to respond on the part of the party sought to be estopped in favour of the claimant where it was raised in relation to a communication that was not even from the claimant and where there had been no prior contact at all between the claimant and the party sought to be estopped.

187 Similarly, in *Somerset*, the defendant had communicated its position to STL but not to Yongnam, which was the plaintiff there. In that context, the court referred to *Orion Finance* (including the passage I have cited above) and noted that there was no relevant contact between the plaintiff and the defendant. On those facts, no estoppel was found.

188 However, I do not understand it to be a rigid requirement in every case that in order to found a representation, there must be direct contact between the parties in relation to the making of the representation. I note that the judgment of the Court of Appeal in *Somerset* was delivered by Chao Hick Tin JA (as he then was) and the same judge had also delivered the judgment of the Court of Appeal in *United Overseas Bank Ltd v Bank of China* [2006] 1 SLR 57 where he stated as follows at [19]:

Therefore, the first question to consider was whether KPB did make a representation to UOB. It was clear that the 1996 letter was addressed not to UOB but to the developer, YTE. However, it did not mean that for a person to be able to rely upon a representation, the representation must be made directly by the representor to the representee. *Spencer Bower* states at pp 135–136, para VI.2.1:

> The onus is on the estoppel raiser to show that the representation was made to him, or else that he is entitled to raise the estoppel as representative of the representee, where, at the date when the estoppel is raised, the representee has died, or has come under any disability. A representee may, of course, receive a representation by an agent, or a partner, but the principal must still (if he is to raise an estoppel) show that he was, by himself or his agent, actually or presumptively intended to act on it. Furthermore, *a representee includes not only any person to whom, or to whose agent, the representation was directly and immediately made, but also any person to whose notice the representation was intended to, and did in fact, come. Such intention may be shown to have been expressed by the representor, when making the representation, in the form of a request or authority to pass it on; or such intention may be inferred from the representor's proved or presumed knowledge that the representation was of such character that in the ordinary course of business, it would naturally and properly be transmitted to the representee.*

[emphasis added]

189 It is apparent from this that a representation may be found even if it is not made directly by the representor to the representee.

190 Returning to the threshold question, Mr Thio in fact accepted that *Taylor Fashions* sets out the governing principle in cases of proprietary estoppel. He submitted the following distillation of the applicable principles:

(a) There must be some sort of representation. This can take the form of express statements or conduct which would come within the "encouragement" type of cases. Or it can take the form of a party silently standing by and this would capture "the acquiescence" type of cases.

(b) There must be some form of reliance which is part of the chain of causation.

(c) There must be some form of detriment which is caused by the representation and the reliance.

(d) There must ultimately be some conduct or behaviour which impacts the court's conscience or merits its disapproval. In this regard, he referred to the *dicta* of Scarman LJ (as he then was) in *Crabb v Arun DC* ([171] *supra*) at 195 where he noted:

> The court therefore cannot find an equity unless it is prepared to go so far as to say that it would be unconscionable and unjust to allow the defendants to set up their undoubted rights against the claim being made by the plaintiff.

191 While I found this set of propositions helpful, in my judgment it needs some refinement and explanation. First, I do not think it is correct to approach the requirement of unconscionability as a separate element. On the contrary, it is the overarching inquiry. The court will only be moved to raise the estoppel if it is satisfied that it would be unconscionable not to do so.

192 In the context of proprietary estoppel, where the plaintiff seeks in effect to obtain an equitable remedy that gives him some right or interest in land, the inquiry as to whether there has been unconscionability is undertaken within a framework that examines three elements which must be found to be satisfied. These three elements are ultimately directed at showing that something for which the defendant is responsible has caused or contributed to the plaintiff adopting a certain course of action such that it would be unconscionable to permit the defendant to act in accordance with his strict legal rights and indifferent to the plaintiff's plight.

Representation

193 As to the first element, although the term "representation" is used, Mr Thio is correct that this can be found in a variety of circumstances. Without attempting to set out an exhausting list of rules, I think the following principles are well founded on the authorities.

194 First, there is no need to find an express representation. Conduct, including silence, can give rise to an implied representation. Where silence is relied upon, it will normally be necessary to show that the silence was maintained in circumstances where the court considers that the party in question ought to have spoken – *Fook Gee Finance Co Ltd v Liu Cho Chit* [1998] 2 SLR 121 ("*Fook Gee Finance*") at [36]–[37].

195 Mr Thio submitted in reliance upon a passage from *Spencer Bower's The Law Relating to Estoppel by Representation* (LexisNexis UK, 4th Ed, 2004) ("*Spencer Bower*") that such a duty may arise out of "the relationship between the parties, such as a fiduciary relationship on a contract *uberrimae fides*, but otherwise, there cannot be a general duty to speak out in order to protect a legal right of which the owner is unaware" (see *Spencer Bower* at 334).

196 In my judgment, this passage was not meant to and should not be construed restrictively as though the circumstances in which a duty to speak might be found is to be confined within a closed class. In *Fook Gee Finance* the Court of Appeal relied on the case of *Greenwood v Martins Bank, Limited* [1933] AC 51 where a customer of a bank failed to inform the bank that forged cheques were being drawn on the account even though he knew this was so. That was not a case of a contract *uberrimae fides* or of one involving a fiduciary relationship and yet the House of Lords found that there was a duty to speak.

197 Secondly, in the "acquiescence" cases, it must be shown that the party sought to be estopped was aware that the innocent party was in fact doing the thing which the former is said to have acquiesced in. Mr Thio submitted that the true principle is narrower than that which I have just stated. He submitted that the principle is that it must be shown that the party sought to be estopped was *aware the innocent party was acting on a mistaken belief*. He relied upon two cases. First, he relied on the decision of the Court of Appeal in *LS Investment* ([182] *supra*) where Chao Hick Tin J (as he then was) said as follows at [40]:

> The appellant's counsel's submission on each of the above three heads of estoppel is based essentially on acquiescence and thus the question of the knowledge of the Majlis, as to the sale to the appellant and the application to court under s 59 of the Trustees Act, is critical. *You cannot acquiesce to something you do not know. So the question is, is there any evidence of such knowledge. The Majlis clearly deposed that it did not know of the proposed sale by the trustees to the appellant and of the application in OS 849/93 to obtain the sanction of court for the sale. It also did not know of the works being carried out to the property.* [emphasis added]

198 In my judgment, this passage supports the principle I have set out above but not the narrower proposition that Mr Thio submitted. It is self-evidently correct that one cannot acquiesce in a state of affairs one is unaware of. But that has nothing necessarily to do with knowledge that such a state of affairs was proceeding on the basis of a mistaken perception of one's rights.

199 Mr Thio also relied on the decision of the High Court in *Teck Koon Investment* where at [27] the court noted as follows:

> As regards estoppel by acquiescence, at law, it has to be shown that the party estopped simply stood by knowing full well that an innocent party was labouring under a mistake as to his rights. There will not be an estoppel by acquiescence unless the party estopped is aware of his own rights and of the innocent party's mistaken belief (*Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] 1 QB 133; *Willmott v Barber* (1880) 15 Ch D 96). The requirement of knowledge was recently endorsed by our Court of Appeal in *LS Investment Pte Ltd v Majlis Ugama Islam Singapura* [1998] 3 SLR 754 where it was stated in the context of proprietary estoppel that "one could not acquiesce to something not known" (per Chao Hick Tin J).

200 It is evident that the court in *Teck Koon Investment* was going no further than *LS Investment* and this is confirmed indeed by the fact that the court applied *Taylor Fashions*. In the latter case, this precise issue was raised. Oliver J first noted as follows (at 143–144):

> The starting point of both Mr. Scott's and Mr. Essayan's arguments on estoppel is the same and was expressed by Mr. Essayan in the following proposition: if A under an expectation created or encouraged by B that A shall have a certain interest in land, thereafter, on the faith of such expectation and with the knowledge of B and without objection by him, acts to his detriment in connection with such land, a Court of Equity will compel B to give effect to such expectation. This is a formulation which Mr. Millett accepts but subject to one important qualification, namely that at the time when he created and encouraged the expectation and (I think that he would also say) at the time when he permitted the detriment to be incurred (if those two points of time are different) B not only knows of A's expectation but must be aware of his true rights and that he was under no existing obligation to grant the interest.
>
> This is the principal point on which the parties divide. Mr. Scott and Mr. Essayan contend that what the court has to look at in relation to the party alleged to be estopped is only his conduct and its result, and not – or, at any rate, not necessarily – his state of mind. It then has to ask whether what that party is now seeking to do is unconscionable. Mr. Millet contends that it is an essential feature of this particular equitable doctrine that the party alleged to be estopped must, before the assertion of his strict rights can be considered unconscionable, be aware both of what his strict rights were and of the fact that the other party is acting in the belief that they will not be enforced against him.

201 Oliver J then examined the authorities including *Willmott* ([176] *supra*) which suggests such knowledge is necessary before expressing the conclusion in terms I have set out at [177] above. He then proceeded to note (at 152):

> So regarded, knowledge of the true position by the party alleged to be estopped becomes merely one of the relevant factors – it may even be a determining factor in certain cases, – in the overall inquiry. This approach, so it seems to me, appears very clearly from the authorities to which I am about to refer …
>
> …
>
> An even more striking example is *ER Ives Investment Ltd v High* [1967] 2 QB 379. Here again, there does not appear to have been any question of the persons who had acquiesced in the defendant's expenditure having known that his belief that he had an enforceable right of way was mistaken. Indeed, at the stage when the expenditure took place, both sides seem to have shared the belief that the agreement between them created effective rights. Nevertheless the successor in title to the acquiescing party was held to be estopped. Lord Denning MR, at 394–395:
>
> > The right arises out of the expense incurred by Mr. High in building his garage, as it is now, with access only over the yard: and the Wrights standing by and acquiescing in it, knowing that he believed he had a right of way over the yard. By so doing the Wrights created in Mr. High's mind a reasonable expectation that his access over the yard would not be disturbed. That gives rise to an 'equity arising out of acquiescence.'

202 The reference to the judgment of Lord Denning MR in *ER Ives Investment Ltd v High* [1967] 2 QB 379 neatly demonstrates the limits of the principle. Hence, in my judgment, the element of knowledge is satisfied as long as it can be shown that the party sought to be estopped was aware that the innocent party was doing that which the former is said to have acquiesced in.

203 Before leaving this, I refer also to the following short passage from *Spencer Bower* at 335–336 where the editors after citing some passages from *Taylor Fashions* including those cited above

say:

> So long as this approach is intended to be a principled approach, it is submitted, it is correct and appropriate in rejecting a formulaic approach, because it is inappropriate for the court to try to fit each case 'within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour'. But if it is intended to deny the relevance of any general principles, it is unjustifiable. *In context, what is unconscionable or unfair is that the legal owner, intending, or giving the appearance of intending to do so, has induced the other party by a representation that he has acquired, or will acquire, an interest in property, to act in such a way that he will be worst off if the legal owner resiles from the representation than if the representation had not been made, in which case he would not have acted as he did.* [emphasis added]

204 I think that is a correct statement of the essence of the doctrine. After the conclusion of the arguments in this case, I became aware of two recent English decisions on the issue. The first is the decision of the English Court of Appeal in *Cobbe v Yeoman's Row Management Ltd* [2006] 1 WLR 2964 and the observations of Mummery LJ at [46], [50], [51] and [52] in particular are helpful. The second is the decision of the Privy Council in *Blue Haven Enterprises Ltd v Tully* [2006] UKPC 17 which also considers this issue. I found the following observations of Lord Scott of Foscote (who delivered the judgment of the Board) at [23]–[24] to be of assistance:

> Oliver J's concentration on unconscionable behaviour on the part of the defendant rather than on the *Willmott v Barber* five *probanda* was implicitly approved by Lord Templeman in giving the judgment of the Privy Council in *Attorney General of Hong Kong v Humphrey's Estate (Queen's Gardens) Ltd* [1987] AC 114, 123 and is referred to in *Snell's Equity*, 31st ed (2005), para 10.16 as "the most important authoritative modern statement of the doctrine". Their Lordships are of the same opinion. Fry J's five *probanda* remain a highly convenient and authoritative yardstick for identifying the presence, or absence, of unconscionable behaviour on the part of a defendant sufficient to require an equitable remedy, but they are not necessarily determinative.
>
> Oliver J's reference to "proprietary estoppel, estoppel by acquiescence, estoppel by encouragement" might appear to suggest that in every case the claim must be based on some species of misrepresentation made by the defendant. But Oliver J's key that unlocks the door to the equitable remedy is unconscionable behaviour and although it might be difficult to fashion the key without a representation by the defendant it would not, in principle, necessarily be impossible to do so. Enrichment of A brought about by improvements to A's property made by B otherwise than pursuant to some representation, express or implied, by acquiescence or by encouragement, for which A is responsible would not usually entitle B to an equitable remedy. But the reason would be that A's behaviour in refusing to pay for improvements that he had not asked for or encouraged could not, without more, be described as unconscionable.

205 Finally, in relation to the issue of representation, the representee is a person to whom a representation is made whether directly or through an agent or an intermediary and includes a person to whose notice the representation was intended to and did come, such intention being express or inferred (see [188] above).

Reliance

206 As to the second element, namely reliance, Mr Thio submitted this was largely an issue of fact. He accepted that reliance could be partial in the sense that reliance on one factor would not preclude reliance on some other factor. This was recognised in the judgment of Robert Goff J (as he

then was) in *Amalgamated Investment* ([178] *supra*) at 104–105 where he suggested that the real question was whether the conduct in question was "influenced" by the encouragement or representation. Mr Thio submitted however that the party seeking to invoke the doctrine had to show that his reliance upon the representation was reasonable in the circumstances and he relied on *United Overseas Bank v Bank of China* (at [188] *supra*) in support of this.

207 Mr Thio further accepted on the authority of *Greasley v Cooke* [1980] 3 All ER 710 and *In Re Basham, decd* ([178] *supra*) that where it may be inferred from the circumstances that the party seeking to raise the estoppel had acted upon the representation then the burden of proof shifted to the other party to show that there was no reliance in fact.

208 In relation to the latter point, the point simply is that once the claimant establishes the relevant representation and a change of position which is capable of causal relation to it, the burden shifts to the other party to establish that the claimant did not rely on the representation. This was stated by John McGhee in *Snell's Equity* (Sweet & Maxwell, 31st Ed, 2005) as follows at 278:

> Once it is shown that O gave assurances or other encouragement to A, and A suffers detriment, it will be readily inferred that the detriment was suffered as a result of the encouragement: the evidential burden is then on O to show that A's conduct was not induced by the assurances.

209 In my judgment, Mr Thio's submissions with respect to the element of reliance with the comments I have noted above fairly reflect the principles relevant to the facts I need to consider in this case.

210 Lastly, with respect to detriment, Mr Thio's did not dispute that detriment existed in this case if the other elements were found and I therefore do not need to deal with that.

Proprietary estoppel – the facts

211 In the light of these principles, I turn to the facts of this case. I have already set out my material findings at [43] to [169] above. Without wishing to further lengthen this judgment, I set out for easy reference, a summary of what are perhaps the key findings of fact:

(a) As early as February 1998, the bank was aware that the BHL Group had problems meeting its payment obligations to its suppliers and contractors. With specific reference to Springleaf Tower, the bank was aware that sales were needed to generate funds. With no sales and the construction loan already drawn down the BHL Group urgently needed additional funds. The bank expected that this would come from the sale of nine floors by the end of 1998 (see [44]–[46] above).

(b) By August 1998, the bank considered the financial difficulties facing the BHL Group to be severe and its viability questionable. In respect of Springleaf Tower, it also knew that a sum of around $6.5m was due to Tuan Kai and in turn to its subcontractors. The sale of floors at Springleaf Tower was seen as critical to any solution and given the weak property market, the bank itself was considering purchasing some floors (see [50]–[51] above).

(c) Sometime on or about 15 October 1998, STL proposed to YEC that in return for YEC completing its works for an estimated value of $9.3m (including sums then unpaid) YEC could take a floor at Springleaf Tower for a corresponding amount based on a price of $900 psf (see [60] above).

(d) Soon after this, Mr Lim met the bank's representatives including Mr Tan. Mr Lim conveyed to the bank the proposal that Yongnam purchase a floor and pay for it in kind by carrying out the works. Nothing was said at that meeting about the value to be ascribed to the contractor's works. But soon after that meeting, the bank did inform Mr Lim that the minimum price for any sale of the Unit to Yongnam had to be computed based on a figure of $1,300 psf. This was duly conveyed by Mr Lim to Mr Seow (see [61]–[63] above).

(e) The bank endorsed the proposal on this basis (see [65] and [66] above).

(f) Yongnam realised that the bank's expectation of a minimum sale price of $1,300 psf gave rise to a large potential gap between the cost of the Unit and the value of YEC's work. It thought the price was being set by the bank to protect against a slide in price. It accordingly suggested to STL that the bank's price be agreed to notionally but that this be reduced in substance by deductions (see [70] above).

(g) At some point, after 11 November 1998, Mr Seow did have a discussion with Mr Tan on YEC's payment issues. The idea of Yongnam taking a floor was discussed and endorsed by Mr Tan as a "win-win" solution. Mr Tan in fact encouraged Yongnam to go along with this. However, in my judgment, Mr Tan was still approaching this on the basis set out at (d) above (see [75], [76] and [78] above).

(h) At about this time, the bank was informed that the estimate of YEC's cost to complete the works was about $9.3m. This was no more than a reasonable estimate. By this stage, the bank was aware that work on Springleaf Tower had ceased and was genuinely concerned with the risk of the exposed structural steel deteriorating. The bank was agreeable to a floor being sold to YEC on the basis of the sale price it had previously indicated and having this offset against the value of YEC's works. The bank also decided to purchase two floors itself. It saw this, together with YEC's purchase on the aforesaid basis, as part of the overall plan to finance the resumption and progress of the project (see [80]–[83] and [94] above).

(i) Yongnam however, remained anxious to conclude the purchase of the Unit on the basis of a pure barter arrangement. To bridge the gap, STL decided with Yongnam's acquiescence to conclude the sale to Yongnam at the price set by the bank; and to have the difference made up *inter alia* by a compensatory credit which in substance was a discount. It was further agreed that this detail would be kept from the bank. This was not something to be condoned. As far as the bank was concerned, it was willing to have STL sell Yongnam the Unit at $1,300 psf and to allow Yongnam to offset the real value of YEC's works against the purchase price. The bank did not know of the discount. It believed that the value of YEC's work was less than the price of the Unit and that the difference would be paid by Yongnam but it was willing for payment of the difference to be deferred until completion (see [91], [92] and [95] above).

(j) Sometime before mid-February 1999, STL and YEC met with the bank and informed Mr Tan that a settlement was about to be reached on the basis of the Unit being sold by STL to Yongnam. At this meeting, Mr Tan was informed of the fact of the settlement and that there would be a set-off. He was not told it would be a complete barter arrangement, or a partial barter arrangement, or that there would be a compensatory credit, or that the real sale price of the Unit was nett of the discount that was in fact being extended (see [102], [125] and [127] above).

(k) Mr Tan assumed that the transaction was proceeding on the basis of the understanding it had as at December 1998 and readily endorsed this (see [129] and [130] above).

(l) Shortly after this, STL, on Mr Lim's instructions, sent a note to the bank describing the settlement and later enclosing the sales contracts but not the settlement agreement or the side letter (see [103], [132], [133] and [134] above).

(m) Neither Mr Tan nor Mr Lek saw and understood from these documents that Yongnam and STL had entered into a transaction that involved a pure barter arrangement (see [137]–[139] above).

(n) By June 1999, the bank was specifically aware that the sale and purchase agreements for the Unit had been signed with a sale price of $13.96m against which YEC's work was to be set off. The bank thought this work was valued at $9.3m. The bank was aware construction had resumed and was happy with the arrangement as it considered Springleaf Tower to be its best bet for some recovery (see [107]–[109] above).

(o) Mr Tan and Mr Lek first became aware of the fact that the arrangement reflected in the sales contracts between STL and YEC was a pure barter arrangement in January 2001. Their conduct subsequent to that discovery left much to be desired (see [159]–[168] above).

(p) Throughout these various stages, when the bank endorsed the set-off proposal in its first discussion with Mr Lim at (e) above, and again in its discussions with Mr Seow at (g) above, when it indicated its assent to the settlement at (k) above, and when it specifically became aware of the fact that the sales contracts had been executed on the basis that there would be a set-off at (n) above, there is no doubt at all that the bank knew and understood that Yongnam was expecting to acquire the Unit free of the mortgage as would be the case with any ordinary purchaser. The bank clearly knew and understood that Yongnam intended and expected to get the Unit. Throughout the course of the discussions from October 1998 to the middle of 1999, the bank went along with this. It was only at a very late stage after the work had been done that it took the position that its interests as mortgagee should override Yongnam's.

212 In that light, I turn to consider the application of the legal principles as I have set them out above. In so far as the first element is concerned, I am satisfied that there was a representation on the part of the bank. That representation is found in the bank's endorsement and encouragement of the settlement between Yongnam and STL on the basis of a barter exchange that I have referred to above. However, I am satisfied that at all material times, the bank was under the impression that the arrangement contemplated:

(a) that Yongnam was in substance and truth purchasing the Unit at a price of $1,300 psf;

(b) that the price payable for the Unit would be offset against the value of the work to be done by YEC to bring it to completion and the amounts outstanding and already due to YEC at that time; and

(c) that Yongnam would pay the difference between (a) and (b) upon completion of the project.

213 In my judgment, that remained the bank's understanding of the position until January 2001. During that period, it encouraged Yongnam in the manner and respects I have alluded to (see [211(p)] above). Further it acquiesced in this arrangement when it affirmatively learnt first, that STL was about to enter and then that it already had entered into a formal contract to sell the Unit to Yongnam but took no steps to assert its position that Yongnam could not set off the purchase price at least to the extent of the value of its works even though it knew this was the basis on which

Yongnam and STL were proceeding. Further, I am satisfied that at all material times, the bank intended that STL should convey its satisfaction with this arrangement to Yongnam since it also intended that YEC should resume work on this basis and it later knew it was proceeding accordingly. In my view, there was nothing equivocal about the bank's endorsement or encouragement of the arrangement as the bank understood it (and as I have set out at [92] and [212] above). What was equivocal was STL's disclosures to the bank as to how it eventually concluded the agreement with Yongnam on terms that went beyond this (see, *eg*, [127], [131] and [139] above). To the extent the bank was unaware of the further aspects of the arrangement then I would hold it did not endorse or encourage those aspects or acquiesce in them.

214 I am further satisfied that Yongnam relied upon the representation to the extent I have found it, in the sense that this was a significant factor that influenced its decision to resume work and complete its scope of work. It is evident from the minutes of meetings and the correspondence between Yongnam and YWKP and also involving STL that Yongnam was fully alive to the fact that the bank had a paramount mortgage and to that extent held the trump cards. Mr Seow testified that it was inconceivable after having stopped work because of the failure of Tuan Kai to pay for the work, that YEC would have resumed the work but for the fact that it thought that the bank was onside and I accept that this was so. It is plain from the contemporaneous documents that Yongnam knew that STL could not agree to terms or to a price without the bank's approval. If Yongnam was indifferent to the bank's position then there was no need to engage in the extensive discussions that plainly took place between December 1998 and March 1999 as attempts were made to bridge the gap between the bank's position and Yongnam's.

215 It is true that the way in which this was eventually resolved by STL with Yongnam going along, left much to be desired but this does not displace the fact that it was not indifferent to the bank's position and plainly was influenced by the fact that the bank did endorse this as a desirable solution that worked to the benefit of all parties.

216 Mr Thio submitted that Yongnam in fact relied on matters other than the bank's representation. In particular, he submitted that Yongnam relied on the BHL Group surviving the crises; on YWKP successfully documenting an arrangement whereby Yongnam would have obtained good title upon completing their work; on their own commercial judgment; and on the bank supporting the BHL Group. He pointed to the fact that Yongnam had entered into a settlement agreement with STL to which the bank was not party and indeed which was actively kept out of the bank's knowledge. This was the arrangement that YWKP was advising Yongnam on. Under that arrangement, it was for STL to procure a discharge of the mortgage from the bank. All this, Mr Thio submitted, showed that Yongnam was not relying on the bank.

217 With respect to Mr Thio's very able argument, in my judgment, this misses the point. At bottom, it comes down to this: Yongnam agreed to an arrangement whereby it was to purchase the Unit and to offset the value of its work against the purchase price. At all times, Yongnam knew it was dealing with a mortgagor that was in acute financial distress. Without the endorsement of the mortgagee, this was a non-starter. Yongnam clearly believed the bank was onside and I am satisfied that in fact the bank was, but only to the extent I have set out at [212] above.

218 When the idea was first broached between Mr Lim and Mr Seow, the expectation was that the two sides of the equation would cancel each other out. However it was soon learnt that the bank's expectations did not permit this. Yongnam knew that. On the facts as I have found them, there was never a representation from the bank that it would accept a pure barter exchange and Yongnam could not reasonably have relied upon this. On the other hand, Mr Seow and Yongnam remained unhappy to pay a sum of money beyond the value of their works to complete the purchase.

Yongnam may have relied upon Mr Lim, YWKP, the survival of BHL Group and its commercial judgment to get the deal done without its having to pay any money, *ie*, to secure an improvement of the arrangement which it knew the bank endorsed. However, it is untenable to contemplate that any of this could have happened if Yongnam did not also rely upon the fact that the bank endorsed the concept of a barter of YEC's work for the Unit in the first place.

219 Accordingly, in my view, there was reliance by Yongnam on the bank's representation.

220 Mr Thio accepted that Yongnam did suffer detriment in YEC resuming work on the project. However, he argued that this was not caused by the bank. The real issue is whether YEC recommenced work in reliance upon the representation of the bank. As I have found that to be the case and as Mr Thio accepted that such recommencement did cause Yongnam detriment, this does not need to be examined further.

Does an equity arise in Yongnam's favour?

221 Mr Thio then submitted that the bank had not acted unconscionably at the material time. He pointed to the bank's patience with Mr Lim and STL and to its attempt to help Mr Lim and STL by having its subsidiary purchase some floors in the development. Again, in my view, this misses the point. The issue is not whether the bank acted unconscionably at the material time. Rather, it is whether it would be unconscionable to allow the bank to resile from a position that it had encouraged Yongnam to believe and on which Yongnam had relied to its detriment. The answer to that, on the face of it, is yes.

222 Mr Thio, at least tentatively, accepted that it would have been unconscionable for the bank to refuse to accept the sum of $4m and give up the Unit had this been Yongnam's request in July 2002. He submitted however that this no longer held true because:

(a) Yongnam sued Liang Court/STL for the full purchase price of the Unit and obtained a money judgment against STL in default of appearance and as this amounted to an election of a monetary remedy the bank was thereafter entitled to initiate foreclosure proceedings which they did; and

(b) Yongnam and STL had agreed to give the bank a less-than-accurate picture of the set-off arrangement as finalised between them.

223 He submitted that by reason of these factors, the circumstances had changed and it would not be unconscionable for the bank now to assert its full proprietary interest and rights to the Unit. He submitted that the bank cannot now consider whether it would have agreed to a full barter arrangement without payment and since the bank's opportunity to consider this at the relevant time was lost due to STL's and Yongnam's lack of candour, the loss should lie where it falls.

224 The argument raises two distinct issues which I consider separately. The first is the principle that he who comes to equity must come with clean hands.

225 It is true that a plaintiff in equity must approach the court with clean hands but this does not mean he must be blameless in all ways. Firstly, the undesirable behaviour in question must involve more than general depravity. "[I]t must have an immediate and necessary relation to the equity sued for; it must be a depravity in a legal as well as in a moral sense": see *Dering v Earl of Winchelsea* [1775–1802] All ER Rep 140. This principle was similarly followed in *Moody v Cox* [1917] 2 Ch 71 where it was held by Warrington LJ at 85:

> [I]n order to prevent a man coming for relief in connection with a transaction so tainted it must be shown that the taint has a necessary and essential relation to the contract which is sued upon, and it is not enough to say in general that the man is not coming with clean hands when the relief he seeks is not based on the contract which was obtained by fraud, but is to have the contract annulled on a ground which exists quite independently of the fact that a bribe has been given and received.

226 Moreover, the principle has lost some of its vitality over time. The position is set out thus in *Halsbury's Laws of Singapore* vol 9(2) (LexisNexis, 2003) at para 110.016:

> The maxim has been relaxed over time and is no longer strictly enforced. The question is whether in all the circumstances it would be a travesty of justice to assist the plaintiff given his blameworthy participation or role in the transaction. The whole circumstances must be taken into account having regard to the relief sought, for the relative blameworthiness only emerges after a complete and exhaustive scrutiny and relief which is less drastic need not be defeated by conduct that is less opprobrious. It has been said that the 'the conduct complained of must have an immediate and necessary relation to the equity sued for' and 'it must be a depravity in the legal as well as moral sense'.

227 In my judgment, the facts of the present case are to be seen in the following context. Yongnam's conduct was certainly unsatisfactory but it was unwise more than it was duplicitous. Yongnam itself regarded the bank's price as having been set at too high a level. Moreover, it believed the bank was motivated by the desire to prevent a further fall in the market. It was STL that primarily wanted to manage the bank and to try to bridge the gap between what Yongnam wanted and what the bank was prepared to allow. Yongnam did go along with this but it does not seem to me to be the case that this should displace entirely its entitlement to *any* relief.

228 Secondly, the element of misconduct that the bank is relying on is the attempt by Yongnam to secure for itself a better deal than the bank had indicated it was willing to agree to at that time. In my judgment, while this might well foreclose any claim for relief that contemplated allowing the Unit to be acquired on the basis of a pure barter arrangement, it has no material application to the situation where the relief, if any, takes the form in essence of permitting a partial set-off in line with the position that the bank understood. In my view, this is the appropriate way of considering the matter "in the round" as was held to be appropriate in *Gillett v Holt* ([178] *supra*).

229 Thirdly, in my judgment, the conduct of the plaintiff and indeed of the defendant for that matter are all part of the matrix of facts that the court should take into account in shaping the appropriate remedy once it is satisfied that there is an equity to be satisfied. I return to the conduct of the parties a little later. However, I do not see the principle providing a basis for denying Yongnam some form of relief in the circumstances.

230 The second issue is a procedural one that relates to the significance if any to be attached to the fact that Yongnam did enter a monetary judgment against STL at one point and to the foreclosure proceedings that were then initiated by the bank.

231 The facts relevant to this may be stated briefly as follows:

(a) On 27 June 2002, YDP commenced Suit No 747 of 2002 ("Suit 747/2002") against STL and Liang Court claiming a refund of the purchase price of the Unit and, in the alternative, an order that they procure the release of the mortgage over the Unit. Shortly after this, on 17 July 2002 YDP entered judgment against STL in default of the latter's appearance for, among other

things, the sum of $13,964,600.00.

(b) The defendant's application for foreclosure was made on 28 October 2002 and the foreclosure order was made on 22 November 2002. This was not served on Yongnam or on Hong Leong. At that time, YDP did have a judgment in default of appearance against STL, as noted above, but it was still pursuing its claim for remedies including an order that the mortgage be discharged, against Liang Court.

(c) YDP later applied to amend its claim in Suit 747/2002 and on 15 January 2003 obtained an order in terms of its application. The amended statement of claim was filed on 22 January 2003 and in it YDP's claim was amended to one for specific performance with the other reliefs claimed in the alternative.

(d) On the first day of the trial in Suit 747/2002, that is 23 June 2003, YDP's counsel indicated that he would be seeking leave to set aside the monetary judgment obtained in default of appearance against STL and this was in fact applied for and granted on the following day, 24 June 2003. The trial was then adjourned. Subsequently, on 1 September 2003, a judgment in default of defence was entered against STL and this was a judgment for specific performance.

(e) The bank's contention is that at the time the foreclosure application was made, YDP had elected to pursue a remedy in damages with the consequence that whatever rights it had to the Unit were merged in the judgment in default of appearance it entered against STL and that therefore YDP should be taken to have given up any proprietary interest in the Unit. The bank therefore contends it was entitled to proceed with the foreclosure proceedings without serving the application on YDP. Mr Thio submitted this was not a deliberate effort to omit Yongnam or for that matter Hong Leong from the proceedings.

232 In my judgment, the bank's contention fails. The bank's position on merger and election is derivative of STL's position. In so far as STL was concerned, the judgment in default of appearance was not a judgment entered after a hearing on the merits but one entered following its failure to enter an appearance as required under the applicable rules of the court. That was liable to be set aside on application and indeed it was set aside and judgment was later entered but for a different remedy, specific performance. In the circumstances, I do not accept that Yongnam had irrevocably elected to forgo any proprietary interest in the Unit.

233 Mr Kumar further submitted that there had been no detrimental reliance to preclude Yongnam from changing its initial election and that indeed is patently so as YDP was with leave of court permitted to set aside the judgment entered initially.

234 Mr Kumar submitted that the position was even further removed where the bank was concerned. The bank was not party to Suit 747/2002 and has steadfastly contended that it is not bound by findings in that suit that the sale and purchase agreements were sent to the bank in mid-April 1999 and that it encouraged Yongnam to enter into the barter arrangement. In those circumstances, Mr Kumar submitted that it could not legitimately take advantage of an event in Suit 747/2002 which in any case was later reversed upon Yongnam's application to the court. Mr Kumar further submitted that there was no evidence that the bank in fact relied on judgment having been entered by Yongnam in default of STL's appearance, in not serving the foreclosure proceedings on Yongnam or Hong Leong.

235 In my judgment, Mr Kumar is right on these submissions. Aside from this, the fact is that at the time the foreclosure proceedings were initiated, there remained caveats lodged by Hong Leong

and by YDP against the Unit. Furthermore, to the extent the bank was aware at the time of the foreclosure proceedings being initiated that judgment in default of appearance had been entered against STL by YDP, it must also have known that YDP was maintaining its claim to the other reliefs including specific performance against Liang Court.

236 Mr Thio submits that as a matter of law YDP was not entitled to do both, but this is beside the point. The question is was there any basis upon which the bank could reasonably have believed that Yongnam (and through it Hong Leong) had completely abandoned any claim to any proprietary interest in the Unit in these circumstances. I think the answer to that when seen in its totality is plainly not.

237 Mr Menon for Hong Leong also relied on s 76 of the Land Titles Act (Cap 157, 2004 Rev Ed) which provides:

> **76.—**(1) …
>
> (2) Where the court has made an order for foreclosure upon an application made by a mortgagee of registered land, the mortgagee in whose favour the foreclosure order is made shall lodge an application in the approved form together with an office copy of the Court order with the Registrar for the purpose of registering the court order under this Part.
>
> (3) The registrar upon being satisfied that the court order is in order for registration shall register the order by entering a memorial of the court order in the relevant folio.
>
> (4) The court order when so entered in the land-register shall have the effect of vesting in the applicant mortgagee all the estate and interest of the mortgagor in the land referred to in the court order freed from all right and equity of redemption on the part of the mortgagor, and freed and discharged from all liability on account of any mortgage, charge or other interest, registered subsequently thereto *except* such leases or *other interests as may be binding on the applicant mortgagee*.
>
> [emphasis added]

238 He submitted that the emphasised portion of that section, which is apparently unique to our legislation, was designed to protect certain interests from the draconian effects of a foreclosure order. In the present case, he submitted that certainly at the time of the foreclosure proceedings, Yongnam on any basis had an equitable interest in the property *qua* a purchaser that had paid at least a portion of the price: see *Bestland Development Pte Ltd v Udomkunnatum* [1997] 2 SLR 42. He therefore submitted that the foreclosure proceedings were fatally flawed in having been initiated and concluded without notice having been given to Yongnam and Hong Leong. Nor were these interests disclosed to the court in those proceedings as they should have been: see *Chee Pok Choy v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346. In my judgment, this is correct and for the reasons I have given, I do not think that this was displaced simply because judgment for a monetary sum had been entered against STL in default of appearance. I accordingly consider that the foreclosure order is liable to be set aside at least in so far as the interests of YDP and Hong Leong are concerned. However, subject to hearing the parties on the precise form of the orders I should make, I consider it may not in fact be necessary to set aside the foreclosure order for the reasons I have set out at [252] below.

239 In my judgment, there is an equity to be satisfied in favour of Yongnam and I turn finally to consider how that should be done in the present case.

The remedy

240 It is helpful to begin with the decision of the English Court of Appeal in *Jennings v Rice* [2003] 1 P & CR 100 which was a case that principally concerned the satisfaction of the equity once it was found to arise. The question was whether the court should address the claimant's expectation or whether it should be directed to losses or detriment the claimant sustained as a result of his reliance upon the representation. The court held in effect that upon the equity arising, its value and how it should be satisfied was a matter for the court's discretion in the light of all the circumstances including the claimant's expectation and the detriment he suffered. The court's task was seen as being to do justice in all the circumstances and to ensure that there was an element of proportionality between the expectation, the detriment and the remedy.

241 Some passages from the two judgments delivered in that case are instructive. I begin with the following passage from the judgment of Aldous LJ at [21]:

> There can be no doubt that reliance and detriment are two of the requirements of proprietary estoppel and that the basis of the estoppel is, as Lord Denning MR said in *Crabb*'s case, the interposition of equity: thus the requirement of unconscionability. If the conscience of the court is involved, it would be odd that the amount of the award should be set rigidly at the sum expected by the claimant.

242 He then reviewed a long line of authorities before expressing his conclusions as follows at [36]–[38]:

> Both the result and the reasoning of the judgment in *Campbell*'s case are inconsistent with Mr Warner's submission. *There is a clear line of authority from at least* Crabb*'s case to the present day which establishes that once the elements of proprietary estoppel are established an equity arises. The value of that equity will depend upon all the circumstances including the expectation and the detriment. The task of the court is to do justice. The most essential requirement is that there must be proportionality between the expectation and the detriment.*
>
> *…*
>
> *The judge was right to conclude that the award must be proportionate. He took into account the relevant factors as placed before him, namely the expectation, the detriment, the position of Mr Jennings and the amount available. His conclusion was the result of a judgment to which he was entitled to come.*
>
> [emphasis added]

243 In my judgment, that is an admirably lucid and clear articulation of the relevant principle. It is similarly reflected in certain passages from the judgment of Robert Walker LJ in the same case.

244 I refer first to what was said by Robert Walker LJ at [47] in relation to the difficulty presented by cases where the expectations may be somewhat uncertain:

> *If the claimant's expectations are uncertain (as will be the case with many honest claimants) then their specific vindication cannot be the appropriate test.* A similar problem arises if the court, although satisfied that the claimant has a genuine claim, is not satisfied that the high level of the claimant's expectations is fairly derived from his deceased patron's assurances, which may have justified only a lower level of expectation. *In such cases the court may still take the*

claimant's expectations (or the upper end of any range of expectations) as a starting point, but unless constrained by authority I would regard it as no more than a starting point. [emphasis added]

245 He further explained the underlying basis upon which the courts have fashioned statements of the applicable principle as follows at [49]:

It is no coincidence that these statements of principle refer to satisfying the equity (rather than satisfying, or vindicating, the claimant's expectations). The equity arises not from the claimant's expectations alone, but from the combination of expectations, detrimental reliance, and the unconscionableness of allowing the benefactor (or the deceased benefactor's estate) to go back on the assurances.

246 Finally, the following extracts at [50]–[52] are instructive:

But if the claimant's expectations are uncertain, or extravagant, or out of all proportion to the detriment which the claimant has suffered, the court can and should recognise that the claimant's equity should be satisfied in another (and generally more limited) way.

But that does not mean that the court should in such a case abandon expectations completely, and look to the detriment suffered by the claimant as defining the appropriate measure of relief. Indeed in many cases the detriment may be even more difficult to quantify, in financial terms, than the claimant's expectations. Detriment can be quantified with reasonable precision if it consists solely of expenditure on improvements to another person's house, and in some cases of that sort an equitable charge for the expenditure may be sufficient to satisfy the equity …

It would be unwise to attempt any comprehensive enumeration of the factors relevant to the exercise of the court's discretion, or to suggest any hierarchy of factors. In my view they include, but are not limited to … (misconduct of the claimant … particularly oppressive conduct on the part of the defendant …). To these can safely be added: the court's recognition that it cannot compel people who have fallen out to live peaceably together, so that there may be a need for a clean break; alterations in the benefactor's assets and circumstances … No doubt there are many other factors which it may be right for the court to take into account in particular factual situations.

247 The approach taken in *Jennings v Rice* towards fashioning an adequate but proportionate remedy is consistent with that taken in particular by Mason CJ in the Australian High Court decision in *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394. Mason CJ noted as follows at 413:

[T]here must be a proportionality between the remedy and the detriment which is its purpose to avoid. It would be wholly inequitable and unjust to insist upon a disproportionate making good of the relevant assumption.

248 This was followed by our Court of Appeal in *LS Investment*. However, it is important to note that proportionality is but one element, albeit a critical one, to be considered in fashioning the appropriate remedy. The court may consider all the relevant circumstances including the expectations, the detriment, avoiding injustice to others (see, *eg*, *Giumelli v Giumelli* (1999) 196 CLR 101) and the conduct of the parties. Prof Tan Sook Yee in *Singapore Land Law* puts it thus at 104:

The courts respond to the equity when it is raised, by taking into account all the surrounding circumstances, the conduct and the expectation of the parties.

249 The key to this response is flexibility so as to ensure that the remedy is appropriate to the equity in each case. It may involve giving effect to the common expectation as was the case in *Lim Teng Huan v Ang Swee Chuan* [1992] 1 WLR 113; or limiting the relief so as to preserve a degree of proportionality between the detriment and the relief as was the case in *Gillett v Holt* ([178] *supra*); or to award monetary relief as was the case locally in *Khew Ah Bah v Hong Ah Mye* [1969-1971] SLR 494 and in Australia in *Giumelli v Giumelli* ([248] *supra*). It may even be found that the equity had been satisfied by enjoyment and was therefore exhausted as was the case in *Sledmore v Dalby* (1996) 72 P & CR 196.

250 How then is the equity to be satisfied in this case in the light of the principles I have referred to? In my judgment, the relevant facts are these:

(a) The expectation that Yongnam could reasonably rely on in the circumstances is one limited to the expectation that against the cost of acquiring the Unit at a price of $1,300 psf it would be allowed to set-off the value of all it did to complete its works under its contracts as well as the amounts then outstanding.

(b) On the basis of the facts as I have found them, Yongnam was not fairly entitled to rely upon any expectation for the creation of which the bank can be held responsible, that it would be entitled to offset the entire purchase price against the value of its work without any further cash payment. I note in passing that the same approach was taken by Robert Walker LJ in *Jennings v Rice* ([240] *supra*) at [47] (see [244] above).

(c) As far as the expectation set out at (a) above is concerned, the bank was not only prepared to agree to such a transaction, it was eager for this to happen having regard to the state of affairs at the material time. Reference may be made here, *inter alia*, to what I have noted above at [80(a)]–[80(e)], [80(h)], [82(a)] and [82(b)].

(d) Although the bank was initially under the impression that the anticipated total value of YEC's work (including unpaid amounts then outstanding) was in the order of $9.3m, this was no more than a reasonable estimate (see [94] above). The bank's principal pre-occupation was with ensuring that Yongnam paid at least $1,300 psf for the Unit and it was agreeable to this being set off against the actual value of YEC's work. In this context, there is no principled basis upon which the real value including for such things as required re-mobilisation costs and variations which the bank anticipated would have to be incurred (see [80(i)] and [94] above) could have been excluded from this. However, the position is quite different with respect to Yongnam's claims for interest or damages or a compensatory credit which was never within the contemplation of the bank having regard to what had been discussed with it.

(e) In the course of the cross-examination of Mr Lek and Mr Tan, they were asked if they understood the said sum of $9.3m to be a fixed lump sum or if there was to be an allowance for changes in price. Their evidence, in line with the fact that there was never an exhaustive discussion as far as the value of YEC's work is concerned, was to the effect that legitimate changes in the price (albeit within a limited range) might not have been out of order. This accords with my assessment that the bank's concern was to ensure its price was met and it was willing to have the real value of YEC's work offset against this. It also accords with what was expressly set out in STL's letter of 17 March 1999 which I have found was sent to the bank. Mr Thio submitted there was a duty on Yongnam to keep the bank informed if its costs exceeded the estimate of $9.3m. In my judgment, this does not follow. First, the bank was not doing any special favour to Yongnam. There was considerable benefit in this arrangement to the bank also. Second, the bank never made any attempt to get a fixed number for YEC to complete the work.

It was content with an estimate though it knew that could change. Third, in line with my findings above, the bank's real interest was to secure its desired purchase price for the Unit and permit the real value of YEC's work to be offset against this.

(f) Yongnam's decision to acquiesce in STL's attempts to conceal from the bank the full facts of the settlement arrangements reached between STL and Yongnam was unwise and unsatisfactory. However, that is not directly material where one is concerned with fashioning a remedy to satisfy an equity which arises only from an expectation as well as a representation that is limited in effect to a partial barter arrangement.

(g) In so far as Yongnam and STL were seeking to arrive at a resolution which in effect sought more from the bank than it had been willing to yield, it was incumbent upon them to raise that explicitly with the bank and seek its consent. As far as the bank was concerned, it was entitled to rely upon the fact that it remained the paramount mortgagee. It was not for the bank to go looking for clues that might have suggested that STL and Yongnam had an agreement that was other than the arrangement with which the bank had gone along.

(h) In the settlement agreement that was entered into between Yongnam and STL, the value of YEC's works was reflected as $11,020,572.91 with additional sums of $2,730,112.20 and $213,914.89 being added to this to reflect the compensatory credit and interest charges allegedly payable to Yongnam. In my judgment, the remedy to be ordered cannot extend to the compensatory credit or interest or taxes or other elements because these were not reflective of the arrangement that was encouraged, endorsed or acquiesced in by the bank. It therefore follows in my judgment that the maximum permissible value to be attributed to YEC's work is $11,020,572.91.

(i) Mr Tan's and Mr Lek's response on behalf of the bank to the request for the release of the mortgage was not satisfactory. There was no legitimate basis for the bank at that time to have resiled from the arrangement at least as it understood it to be. Its conduct is to be seen in the light of the fact that in 2001, it could not even rely upon the monetary judgment entered by Yongnam against STL almost two years later, or the misguided efforts of STL and Yongnam to conceal the details of their settlement since it did not even know about this. By then, the bank had already received the benefit of YEC's works having been done and Yongnam had suffered further detriment represented by the increase in amounts it had expended in completing the work and for which it had not received payment. However, there is no basis to order any compensation in favour of Yongnam by way of damages because the bank was entitled not to discharge the mortgage on the basis requested by Yongnam.

251 Taking all of these facts into account, in my judgment, the equity would be satisfied by an order along the following lines:

(a) In the absence of agreement between Yongnam and the bank within a period of 60 days from the date on which the precise form of the orders arising from this judgment is settled, an inquiry should be made as to the actual value of YEC's work including any variations, computed in accordance with the construction contract and including a fair allowance for its re-mobilisation costs, such amount in the aggregate being not less than $9.3m and not exceeding $11,020,572.91 in any event.

(b) Upon Yongnam paying the difference between the value of the Unit computed on the basis of a price of $1,300 psf and the value of YEC's works as determined under (a) above, the bank should take all necessary steps to enable the entire interest it now has in the Unit to be

transferred to YEC or its nominee free of all other interests including the equity of redemption, and subject only to the interest of Hong Leong as the equitable mortgagee of Yongnam's interest.

252 In my judgment, an order to this effect would be in line with the legitimate expectations of all the parties at the material time and there is due proportionality between the detriment suffered by Yongnam and the benefit to the bank on the one hand, and on the other hand, the expectation that would be fulfilled by this. This, it appears, also renders it unnecessary to actually set aside the foreclosure order for two reasons. Firstly, it seems to me that the emphasised portion of s 76 of the Land Titles Act ([237] *supra*) is wide enough to sustain a finding that notwithstanding the foreclosure order, the bank as mortgagee remains bound by the interest which I have found exists in the present circumstances since this is an interest that affects the mortgagee directly. Secondly, and in any event, given the width of the court's discretion to fashion a suitable remedy in such circumstances and given the nature of the order that I have indicated I consider appropriate, if the bank were to transfer its interest in the Unit to Yongnam in the manner I have indicated then this would render it unnecessary to set aside the foreclosure order.

253 However, as this was not precisely the order sought in the action, I propose to hear the parties on the precise form of the orders that should be made in order to achieve the ends I have described at [251] above. I will also hear the parties on any ancillary orders that may be required arising from this judgment.

254 It follows from this that the bank's counterclaims for declarations that their interest in the Unit has priority over that of the plaintiffs and that they were entitled to foreclose on the Unit and for compensation all fail.

255 I will hear the parties on costs.

256 Finally, I would like to place on record my appreciation to each of the counsel who appeared before me in this matter. Considerable efforts were put into the arguments, the examination of the witnesses and the closing submissions and I was most grateful for all the assistance I received in this matter.