Lee Chee Wei v Tan Hor Peow Victor and Others and Another Appeal
[2007] SGCA 22

Case Number : CA 88/2006, 91/2006

Decision Date : 16 April 2007

Tribunal/Court : Court of Appeal

Coram : Lee Seiu Kin J; Andrew Phang Boon Leong JA; V K Rajah JA

Counsel Name(s) : Tan Chee Meng SC, Philip Fong Yeng Fatt, Jenny Chang Man Phing and Adrian Wee Heng Yi (Harry Elias Partnership) for the appellant in Civil Appeal No 88 of 2006 and the respondent in Civil Appeal No 91 of 2006; Ng Lip Chih (Ng Lip Chih & Co) for the first respondent in Civil Appeal No 88 of 2006; The second respondent in Civil Appeal No 88 of 2006 in person; K Muralidharan Pillai, Harveen Singh and Sim Wei Na (Rajah & Tann) for the third respondent in Civil Appeal No 88 of 2006 and the appellant in Civil Appeal No 91 of 2006

Parties : Lee Chee Wei — Tan Hor Peow Victor; Yip Hwai Chong; Damien Ang Tse Aun

Civil Procedure – Bifurcation of proceedings into liability and assessment of damage phases – Importance of applying early – Either party can apply

Civil Procedure – Pleadings – Failure to expressly plead assessment of damages – Relevance of parties' conduct of case – Whether court has discretion to order assessment of damages

Contract – Contractual terms – Rules of construction – "Entire agreement" clauses – Application and effect of such clauses

Contract – Contractual terms – Rules of construction – When factual matrix may be relevant

Contract – Remedies – Damages – When damages awarded in lieu of specific performance

Contract – Remedies – Specific performance – Contract for sale of shares in company pursuing public listing – Whether specific performance appropriate remedy – Circumstances in which specific performance will be granted

16 April 2007 Judgment reserved.

V K Rajah JA (delivering the judgment of the court):

1 The present proceedings have arisen as a result of a purchaser's refusal to complete a share purchase. It has engendered a multitude of contractual issues ranging from the construction of a contract to the fashioning of an appropriate contractual remedy. From a broader perspective, these proceedings also illustrate the jurisprudential tensions that sometimes prevail between procedural and substantive justice: if the factual matrix should entail, as it does in the present case, that the "justice of the case" is at odds with the "conduct of the case", how should such a conflict be resolved so that a just outcome is ultimately ensured?

The facts

2 The circumstances are relatively straightforward and can be summarised within a brief compass. The plaintiff was the business development director of Distribution Management Solutions Pte Ltd ("DMS") and held 2.5% or 8,333,340 shares ("subject shares") in DMS. The subject shares constitute the subject matter of the present action. The first defendant was the chief executive officer ("CEO") and managing director of Accord Customer Care Solutions Ltd ("ACCS") and a director

as well as chairman of the board of directors of DMS. The second, third and fourth defendants were the CEO, chief financial officer and general manager of DMS respectively.

3 Prior to joining DMS, the plaintiff had owned three companies holding distribution rights to the telecommunication products of various established brands, including Nokia. His trials and tribulations commenced when he sold off his group of companies to DMS and joined DMS as an employee. He was induced by the first defendant to believe that he would assume an important business development role as well as profit substantially from the proposed listing of DMS. DMS became a subsidiary of ACCS, and steps were soon taken to prepare DMS for listing.

4 Soon after his companies were absorbed by the ACCS group, the relationship between the plaintiff and the second defendant began to fray. The plaintiff became deeply aggrieved as he felt he was being deliberately marginalised. He became, as he pithily expressed, an "executive officer with no executive powers". Matters came to a head when the plaintiff was abruptly transferred to another ACCS subsidiary, again without being accorded any meaningful substantive responsibilities. Having reached the end of his tether by this point, he resolved to leave the group and consulted the first defendant, who then agreed to find a mutually acceptable buyer for the subject shares.

5 Four further meetings followed to iron out the creases, culminating eventually in an undated share purchase agreement ("Agreement") executed between 17 and 20 February 2005, between the plaintiff and the fourth defendant, for the purchase of the subject shares. The purchase price for the plaintiff's shares was fixed at $4.5m. $750,000 was immediately paid to the plaintiff pursuant to the Agreement, leaving a balance of $3.75m to be settled on completion of the purchase. Although the fourth defendant was the only nominal purchaser of the shares in question, the initial payment was made to the plaintiff via a cheque from Invest Asia Holdings Ltd, an offshore company often engaged by the first defendant for his private business dealings. This cheque was handed to the plaintiff by the financial controller of ACCS, Kuan Chow King.

6 On 21 February 2005, the defendants' business difficulties dramatically spilled over into the public domain when Nokia Pte Ltd announced the termination of its contract with ACCS. Shortly thereafter, the Commercial Affairs Department of the Singapore Police Force ("CAD") began an investigation into the affairs of ACCS and some of its senior officers. These officers included the first, third and fourth defendants. On 1 March 2005, the plaintiff met the first defendant to enquire about the completion of the Agreement, but was abruptly informed that the latter had no money to pay for the subject shares. On 14 March 2005, the plaintiff again contacted the first and second defendants to enquire about the transaction's progress. Again, no satisfactory response was received. The defendants appeared to have lost all resolve and incentive to complete the purchase in light of the pressing problems threatening the very survival of the ACCS group of companies.

7 Following the CAD investigations, the listing plans of DMS had to be jettisoned. On 30 April 2005, the fourth defendant failed to turn up at the venue scheduled for completion. Despite two subsequent letters by the plaintiff, culminating in a letter of demand dated 12 May 2005, the fourth defendant failed to complete the transaction. The plaintiff then initiated proceedings against all four defendants for breach of the Agreement. The first, third and fourth defendants were subsequently charged with, *inter alia*, engaging in a conspiracy to cheat Nokia Pte Ltd by way of fictitious warranty repair claims as well as the falsification of documents generated by ACCS. All three defendants pleaded guilty and have been duly convicted and sentenced to lengthy terms of imprisonment.

The decision at first instance

8 At first instance, the plaintiff contended that the fourth defendant entered into the

Agreement for and on behalf of all the defendants, whom he alleged were the actual purchasers of the shares *qua* principals of the fourth defendant. He asserted that the defendants were all jointly and severally liable to him. The first, second and third defendants vigorously disputed this; whilst the fourth defendant insisted that he had signed the Agreement in a personal capacity for his own account. The trial judge found that the first and third defendants were the principal parties interested in the purchase of the plaintiff's shares and that the fourth defendant was "not the buyer he purported to be". Such a finding is not contested in this appeal.

9 The defendants initially relied on the following three grounds to argue that the plaintiff was not entitled to enforce the Agreement against them: (a) the failure to list DMS on the Main Board of the Singapore Exchange ("SGX"), an alleged contingent condition of the Agreement; (b) the failure to provide a resolution of the Board of Directors of DMS approving the registration of the transfer of the subject shares as required by the Agreement; and (c) that the failure to list DMS, as described in (a), frustrated the purpose of the Agreement.

10 The trial judge rejected all three arguments and found that the first, third and fourth defendants had breached the Agreement. However, he disallowed the plaintiff's alternative claims for specific performance or damages in lieu of specific performance, ordering instead that nominal damages of $300 be paid to the plaintiff for breach of the Agreement. A counterclaim by the fourth defendant for the repayment of the sum of $750,000 paid as an initial deposit under the Agreement was also allowed on the basis that the plaintiff was not entitled to retain the money paid unless the Agreement expressly provided that it was paid as a non-refundable deposit or if the plaintiff had actually performed his part of the bargain.

Issues raised in the appeals

11 The plaintiff appeals against this Pyrrhic victory, while the fourth defendant on the other hand, cross-appeals against the finding of breach of contract. Although the various issues relating to the appeal and cross-appeal are in fact inextricably interwoven, for ease of reference and to facilitate a better understanding, they will be examined separately.

12 The legal issues arising in the plaintiff's appeal relate solely to the trial judge's refusal to grant the remedies sought by the plaintiff and may be summarised as follows:

(a) Whether specific performance of the sale and purchase agreement for shares in a public company should have been ordered.

(b) If not, whether damages in lieu of specific performance and the assessment thereof should have been granted.

(c) Whether the counterclaim for payment of the sum of $750,000 should have been allowed.

13 The legal issues arising in the fourth defendant's cross-appeal on liability relate mainly to the basis for the trial judge's rejection of the various defences relied on by the defendants and may be summarised as follows:

(a) Whether listing was a contingent condition of the Agreement, and the effect of non-fulfilment of the same.

(b) Whether the plaintiff had breached the contractual stipulation for the DMS directors'

resolution approving the transfer of the subject shares.

(c) Whether the failure to list DMS frustrated the Agreement.

We turn first to examine the fourth defendant's cross-appeal contesting liability before addressing the plaintiff's appeal.

The cross-appeal on liability

Whether listing was a contingent condition of the Agreement, and the effect of non-fulfilment of the same

14 The main stumbling block challenging the fourth defendant's first contention comes in the form of an express provision in the Agreement spelling out the parties' positions *if listing did not take place*. This is *prima facie* completely at variance with the contention that parties intended completion to be contingent on listing.

15 Clause 4.1 of the Agreement provides:

> The Completion Date for the sale and purchase of the Sale Shares shall be the earlier of (i) the listing and quotation of the Shares on the Singapore Exchange Securities Trading Pte Ltd ("SGX-ST") or other stock exchange acceptable to [the Defendants as] the Purchaser, and (ii) *30 April 2005 if such listing and quotation of the Shares has not taken place by 30 April 2005*, subject always to any moratorium (if any) that may be imposed by SGX-ST (or other relevant stock exchange), in which case the Completion Date shall be the earliest date permitted by such moratorium. [emphasis added]

16 The fourth defendant attempts to diminish, if not entirely eclipse, the clear intent and purport of this plainly worded provision; he implausibly alleges ambiguity in the Agreement and resorts to invoking as a construction aid the "factual matrix" *ie*, transcripts of the various negotiation meetings, loan agreement and share transfer form, as well as several key clauses which advert to listing, in a purported attempt to assist the Court in the "construction of the Agreement".

17 It is trite law that a condition precedent cannot be implied in the face of clear and express provisions to the contrary (*Yee Chee Pang v Wong Nam Sang Enterprise Sdn Bhd* [1988] 2 MLJ 57). Whether listing was or was not a contingent condition of the Agreement should primarily be determined by reference to the plain terms of the Agreement. We are of the view that the language used in cl 4.1 of the Agreement unequivocally denoted that completion was to take place on 30 April 2005, regardless of whether listing had occurred. Listing was not intended as a concurrent, subsequent or contingent condition in order for the Agreement to have contractual effect.

18 While both the discussions between the parties and the terms of the Agreement intimated that the parties anticipated listing to take place, such an expectation never formed the basis on which their understanding and agreement was founded.

19 The case law cited by the fourth defendant purportedly justifying recourse to the factual matrix for the purposes of construction does not by any stretch of the imagination afford an unqualified license to admit extrinsic subjective evidence (*Pacific Century Regional Development Ltd v Canadian Imperial Investment Pte Ltd* [2001] 2 SLR 443 at [20]). Whilst evidence of surrounding circumstances may generally be admissible to assist in the interpretation of a contract, such evidence will not be admissible if the effect of doing so would be to contravene the parol evidence rule which is

statutorily embodied within ss 93 and 94 of the Evidence Act (Cap 97, 1997 Rev Ed) ("Evidence Act") (see also *Tan Hock Keng v L and M Group Investments Ltd* [2002] 2 SLR 213 at [11]).

20 Suffice it to say that, if actual listing was as imperative an ingredient as it is now alleged, it would have been a simple and straightforward task for the defendants, who were ably represented by solicitors, to insert in the Agreement a "conditional upon listing" or "subject to listing" clause. The fact that the prospect of non-listing was more than a conceivable possibility and yet was not expressly excluded by the Agreement is most pertinent.

21 Parties often enter into contracts assuming the accrual of certain benefits upon the occurrence of certain events. These assumptions may be expressed or implied in the negotiation process leading up to and culminating in the final contract. Be that as it may, it is one thing to suggest that the court should contemplate the "factual matrix" in order to assist in the interpretation of a document, but entirely another to refer to extrinsic evidence in a contrived and misguided attempt to persuade the court to "infer" a contingent condition that is clearly inconsistent with the express terms of the contract. The issue at hand may be disposed of on this basis alone. However, for completeness, we should also address another pertinent feature of the Agreement, *ie*, its "entire agreement" clause, which reads as follows:

> 11.1 This Agreement sets forth the entire agreement and understanding between the Parties in connection with the matters dealt with and described herein.

Entire agreement clauses

22 A dilemma often prevails over the extent to which an entire agreement clause precludes recourse to the "factual matrix". It is a perennial issue whether the recorded agreement is exhaustive or whether it can be augmented by implicit or collateral undertakings. In light of the dearth of local case law, it might be apposite at this juncture to clarify the principles relating to this genre of clauses which are becoming increasingly prevalent in one form or another in modern contracts.

23 The starting point, for any discussion on this topic, has to be the prosaic but time-honoured rule of thumb that a written contract articulated in precise terms cannot be varied or qualified by extrinsic evidence. This so called "parol evidence rule" has been statutorily encapsulated in the Evidence Act and prohibits the admissibility of any extrinsic evidence seeking to prove that the intention of the parties was other than that appearing on the face of the document. It is also trite law that statements made in the course of negotiations for a contract may, if intended to be binding commitments, sometimes amount to a separate or collateral contract and be sued upon as such. Such "collateral agreements" have been portrayed, and are reflected in the Evidence Act, as exceptions to the parol evidence rule.

24 Within this framework, the pertinent issue is the extent to which an entire agreement clause precludes reliance on oral collateral contracts or pre-contractual representations alleged to have been made in the course of negotiations *ie*, the discussions in the context of this particular case.

25 Entire agreement clauses appear as a smorgasbord of variously worded provisions. *The effect of each clause is essentially a matter of contractual interpretation and will necessarily depend upon its precise wording and context*. Generally, such clauses are conducive to certainty as they define and confine the parties' rights and obligations within the four corners of the written document thereby precluding any attempt to qualify or supplement the document by reference to pre-contractual representations.

26 The purpose and effect of an entire agreement clause were succinctly summarised by Gavin Lightman J with his customary clarity in *Inntrepreneur Pub Co v East Crown Ltd* [2000] 2 Lloyd's Rep 611 (at 614) as follows:

> The purpose of an entire agreement clause is to preclude a party to a written agreement from threshing through the undergrowth, and finding, in the course of negotiations, some (chance) remark or statement (often long-forgotten or difficult to recall or explain) upon which to found a claim, such as the present, to the existence of a collateral warranty. The entire agreement clause obviates the occasion for any such search and the peril to the contracting parties posed by the need which may arise in its absence to conduct such a search. *For such a clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere, and that, accordingly, any promises or assurances made in the course of the negotiations (which in the absence of such a clause, might have effect as a collateral warranty) shall have no contractual force, save in so far as they are reflected and given effect in that document*.
>
> … [T]he formula used is abbreviated to an acknowledgment by the parties that the agreement constitutes the entire agreement between them. That formula is, in my judgment, amply sufficient to constitute an agreement that the full contractual terms to which the parties agreed to bind themselves are to be found in the agreement and nowhere else. That can be the only purpose of the provision.
>
> [emphasis added]

27 From the freedom of contract perspective, Lightman J's *dictum* makes eminent sense, *a fortiori* in the context of parties who are commercial entities or knowledgeable businessmen who have negotiated the terms of their agreement with the benefit of legal advice. In *Sere Holdings Limited v Volkswagen Group United Kingdom Limited* [2004] EWHC 1551 (Ch), Mr Christopher Nugee QC, sitting as a deputy judge of the High Court, considered Lightman J's observations on the purpose and effect of an entire agreement clause, and perceptively concluded (at [22]):

> I can see no flaw in the reasoning. It is elementary that whether an agreement has legal effect is a matter of the intentions of the parties … . I can see no reason why parties who have in fact reached an agreement in precontractual negotiations that would otherwise constitute a collateral contract should not subsequently agree in their formal contract that any such collateral agreement should have no legal effect, or in other words should be treated as if the parties had not intended to create legal relations; and for the reasons given by Lightman J this is precisely what an entire agreement clause on its face does.

28 In *IBM Singapore Pte Ltd v UNIG Pte Ltd* [2003] SGHC 71, Tay Yong Kwang J held that such clauses effectively erased any legal consequences that might have ensued from prior discussions or negotiations and that "[t]he contractual relationship between the parties was now circumscribed by the signed agreements and those alone". This decision was subsequently upheld on appeal. Much earlier in *Chuan Hup Marine Ltd v Sembawang Engineering Pte Ltd* [1995] 2 SLR 629, Selvam J determined that a similarly worded clause excluded any implied term, collateral warranty and misrepresentation. That said, whether or not an entire agreement clause can purport to exclude a claim in misrepresentation remains a matter of some controversy (*cf Thomas Witter Ltd v TBP Industries Ltd* [1996] 2 All ER 573 ("*Thomas Witter*"); and see *Inntrepreneur Pub Co v East Crown Ltd* at 614 – "An entire agreement provision does not preclude a claim in misrepresentation, for the denial of contractual force cannot affect the status of a statement as a misrepresentation". As such an issue has not arisen in the instant appeal, a discussion of this controversy, intriguing as it may be,

is not warranted.

29 We note however that in the local context there is a yet another school of thought which appears to have adopted a rather contrary approach on the efficacy of such clauses. This merits further scrutiny as it may affect the conceptual clarity and certainty assumed by parties negotiating an entire agreement clause. In *Exklusiv Auto Services Pte Ltd v Chan Yong Chua Eric* [1996] 1 SLR 433, Rajendran J considered (at 439, [21]) the status of an entire agreement clause (which in that case provided that "[t]his agreement when made shall supersede all terms and conditions previously agreed upon whether in writing or otherwise and the terms of this agreement shall not be varied or changed except by agreement in writing …") and arrived at the following conclusion:

> In my view, the presence of exemption, limitation of liability or exclusion clauses (such as condition 5) do not have any special significance in considering the admissibility of oral evidence under the provisos to s 94. This is so for the simple reason that s 94 does not give any hallowed position to such clauses. *So long as the requirements of the provisoes to s 94 are complied with, oral evidence would be admissible whatever the written contract might provide*. [emphasis added]

30 With respect, we are unable to agree with these observations. There is certainly sometimes an inherent tension between the apparently uncomfortable co-existence of the statutorily encapsulated parol evidence rule and an entire agreement clause, which is primarily a creature of contract incorporated with the consent of the parties. Rajendran J's *dictum* therefore, appears to stem from what he perceived as an unresolved conflict as to whether an entire agreement clause contractually operates "to denude what would otherwise constitute a collateral warranty of legal effect" (*Inntrepreneur Pub Co v East Crown Ltd*) or whether it "renders inadmissible extrinsic evidence to prove terms other than those in the written contract, since the parties have by the clause expressed their intention that the document is to contain all the terms of the agreement" (*Chitty on Contracts* vol 1 (Sweet & Maxwell, 29th Ed, 2004) at para 12-104).

31 If one opts for the latter interpretation, then the entire agreement clause serves only to replicate the extrinsic (parol) evidence rule in a contractual form; such a formula would not preclude reliance on *exceptions* to the rule. Extrapolating from this, a collateral agreement which runs alongside the agreement neither contradicting nor varying it could be admissible in evidence. This possibly is what Rajendran J was alluding to.

32 The decision of the British Columbia Court of Appeal in *MacMillan v Kaiser Equipment Ltd* [2004] BCJ 969 (at [37]) provides considerable assistance in addressing and assessing the intricate relationship between such clauses and the parol evidence rule:

> Given the rule of construction that a court should strive to give effect to all the terms of an agreement, however, it is at least arguable that a provision such as [the entire agreement clause] must be intended to have a broader effect than the parol evidence rule would have by itself – otherwise, the clause would be redundant. Certainly the wording used here was not limited to "any agreement, representation or warranty that contradicts or varies" the terms of the written agreement – the clause stated that there were no collateral agreements between the parties, whether at variance with the written document or not. In practical terms, the obvious purpose of such a clause is to ensure that parties who have conducted oral negotiations, from which (as this case illustrates) misunderstandings might easily arise, will finally review and by execution confirm in writing the terms they have agreed upon. *It is a normal and in my view legitimate expectation in the commercial world that, absent fraud or some other vitiating element, provisions such as [the entire agreement clause] will generally be given effect to, so*

that prior discussions concerning the contract may not prevail over what has been acknowledged in writing to constitute the parties' "entire agreement". [emphasis added]

33 Significantly, the court concluded that whether one applies the wording of the entire agreement clause (an acknowledgment that no collateral agreements exist) or whether one applies the parol evidence rule (thereby disallowing proof of a collateral contract because such a result would contradict the clause), the collateral oral contract would not prevail, for to rule otherwise would "render entire agreement clauses meaningless and remove an important safeguard used in countless agreements". We fully support such a conclusion. Much in the same vein, McLachlin CJSC in *Power Consolidated (China) Pulp Inc v British Columbia Resources Investment Corp* (1988) 14 ACWS (3d) 11 when she referred to the intention of parties in formulating an entire evidence clause, incisively declared:

> That intention, as in all matters relating to contractual construction, must be determined objectively. Here the parties expressly agreed that the contract documents constituted the whole of their agreement. While in most cases such an agreement is only a presumption based on the parol evidence rule, in this case it has been made an express term of the contract. *A presumption can be rebutted; an express term of the contract, barring mistake or fraud, cannot*. [emphasis added]

34 A similar approach has also been adopted by the Malaysian courts in the context of a statutory evidential scheme analogous to that prevailing in Singapore. In *Master Strike Sdn Bhd v Sterling Heights Sdn Bhd* [2005] 3 MLJ 585, the Malaysian Court of Appeal endorsed Abdul Aziz J's views in *Macronet Sdn Bhd v RHB Bank Sdn Bhd* [2002] 3 MLJ 11 at 25, where the latter had determined that the entire agreement clause precluded any purported variation by oral agreement in the following terms:

> My opinion is simply this. The entire agreement clause was an agreement between the plaintiffs and the defendants. In agreeing to the clause, the parties must be presumed to have known of the existence of s 92 and of the exceptions in it and to have intended what the clause intended, that is to exclude any attempt to vary the agreement by an oral agreement or statement, which attempt can only be made through the exceptions in s 92. By agreeing, therefore, to the entire agreement clause, the plaintiffs agreed not to resort to any of the exceptions in s 92. They cannot, therefore, be allowed to prove the second pre-contractual representation or the Oral agreement and to rely on them.

35 Although these cases considered the purported effect of differently framed clauses, it can be cogently asserted that an appropriately worded provision would be acknowledged and upheld if it clearly purports to deprive any pre-contractual or collateral agreement of legal effect, whether from the perspective of evidential admissibility or contractual invalidation. Ultimately, whether the agreement in its final form is *intended* to constitute the entire agreement, thereby superseding and replacing all representations that might have inspired and culminated in such an agreement in the first place, but which were never actually incorporated in the written agreement, is a matter of construction. From a policy perspective, it should be reiterated that the courts will strive to give effect to the parties' *expressed* intent and their legitimate expectations. The courts seek to honour the legitimate expectations that the parties hold when they enter into a contract.

36 An entire agreement clause can therefore be viewed through a legal prism and construed as denuding a collateral warranty of legal effect ("the legal perspective") and/or by rendering inadmissible extrinsic evidence which reveals terms inconsistent with those in the written contract ("the evidential perspective"). In so far as the legal perspective is concerned, the effectiveness of

the clause may potentially be subject to the reasonableness requirements of s 11 of the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed) ("UCTA") (if applicable). For example, in *Thomas Witter*, Jacob J held that the clause in question failed to satisfy the requirement of reasonableness. It was observed that should parties intend to exclude liability for particular sorts of misrepresentations (see Misrepresentation Act (Cap 390, 1994 Rev Ed), s 3), the draftsman "cannot be mealy mouthed" but must clearly and explicitly make provision for such.

37 At this juncture, it should be cautioned and emphasised that the intent and purport of the clause, in certain contracts, may find itself subject to the strictures of the reasonableness test as provided for in the UCTA if the contract is embraced by it. Moreover, it is only when the nature of the liability which the clause is seeking to exclude or restrict has been ascertained that it is possible to inquire whether the term was a fair and reasonable one having regard to the circumstances which were or ought reasonably to have been in the contemplation of the parties when the contract was made: *Watford Electronics Limited v Sanderson CFL Limited* [2001] EWCA Civ 317.

38 Without prejudice to the generality of the guidelines contained in the Second Schedule to the UCTA, the degree of reasonableness of the entire agreement clause may then depend on, *inter alia*, (a) the relative equality of bargaining power between the parties; (b) whether a party received an inducement to agree to the term, or in accepting it has an opportunity of entering into a similar contract with other persons without having to accept a similar term; (c) whether the aggrieved party knew or ought reasonably to have known of the existence of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties); and (d) whether it was reasonable or practicable at the time of the contract to expect compliance with the clause.

39 In summary, entire agreement clauses perform a useful role as legitimate devices for the allocation of risk between the parties, subject to an overriding judicial right to police clauses which are oppressively employed against consumers or parties of unequal bargaining power. In jurisprudential terms, the objective is to strike a happy medium, ensuring on the one hand that a dominant bargaining position is not abused, while on the other hand preserving freedom of contract and the fair allocation of risk.

40 Returning now to the issue at hand in the present proceedings, counsel for the fourth defendant, Mr Pillai, attempted to ameliorate the effect of the entire agreement clause by relying on the decision of *John v Price Waterhouse* [2002] EWCA Civ 899. In that decision, Robert Walker LJ was of the view that a conventional entire agreement clause could not "affect the question whether some matter of fact (whether or not in documentary form) is admissible as an aid to the process of construing a contractual document".

41 Notwithstanding the often blurred boundaries between extrinsic evidence which "assists in the construction of a document" (which is permissible), and that which "adds to, varies or contradicts" the agreement (which is prohibited), we agree with Walker LJ that in so far as contracts are not interpreted in a vacuum, objective facts can potentially assist in the interpretation of ambiguous terms. Entire agreement clauses will usually not prevent a court from justifiably adopting a contextual approach in contract interpretation. Such clauses would have little bearing on textual or interpretative controversies as to the meaning of particular words or terms in contracts. Having said that, unless the contract is embraced by the UCTA, it would be theoretically possible for an entire agreement clause to expressly preclude any reference to the factual matrix as an interpretative tool.

42 We now turn to the fourth defendant's remaining contentions relating to the promissory condition and frustration of the Agreement. These can be summarily addressed and disposed of.

Whether the plaintiff had breached the contractual stipulation for the DMS directors' resolution approving the transfer of the subject shares

43 The alleged failure to provide the resolution is perhaps best understood by evaluating the events leading up to and culminating in the present action. As a consequence of the CAD investigations, and the withdrawal of the prospectus, the defendants appeared to have lost all desire to complete the Agreement. On the date of completion, the plaintiff waited at the completion venue for over two hours without any word whatsoever from any of the defendants. He had already executed both the transfer form for the subject shares in the fourth defendant's favour as well as his director's resignation letters required by the Agreement. The fourth defendant made no subsequent attempt whatsoever either to contact the plaintiff or to justify his failure to show up at the completion and ignored a letter of demand sent by the plaintiff on 12 May 2005.

44 Whether or not there was a breach of the said promissory condition would depend on the contractual interpretation of cl 4.2 of the Agreement, the material portions of which read as follows:

> 4.2 On Completion, all (and not part only) of the following business shall be transacted:-
>
> (a) The Vendor shall deliver and shall procure and ensure there be delivered to the Purchaser in such form and upon such terms satisfactory to that Purchaser
>
> (i) if the listing and quotation referred to in Clause 4.1 has not occurred by Completion Date, a transfer form duly executed by the Vendor and completed in favour of that Purchaser in respect of 8,333,340 Sale Shares together with the share certificate(s) in respect thereof, and together with all such duly completed and executed documents as may be required for stamping of the transfer or as may be required by applicable law or regulations or as may be necessary, in connection with and to give effect to the said transfer, and resolutions of the board of directors of the Company approving the registration of the first-mentioned transfer …

45 At the outset, it should be noted that cl 4.2 of the Agreement imposes obligations only *upon completion*. We further noted that (a) DMS was, as at the date of completion, a public limited company which did not restrict the transfer of shares; (b) the board of directors of DMS was constituted by the first and third defendants, the first defendant's brother, (who made a subsequent offer for the plaintiff's shares) and three others (allegedly sleeping directors). The defendants were in *de facto* control of the board and could quite effortlessly have passed the requisite resolution; and (c) the Memorandum and Articles of Association of DMS provided that such a resolution could not be obtained without an executed transfer form and that literal adherence to the requirement for provision of the resolution *before* completion would lead to an absurd result, *ie*, the defendants could unilaterally prevent the Agreement from being implemented. In the circumstances, we are of the view that such a contention is entirely without merit.

Whether the failure to list DMS frustrated the Agreement

46 One can only conclude from the clear and precise wording of cl 4.1 that it both anticipated and provided for the failure to list. It expresses and manifests in no uncertain terms the agreed allocation of risk between the parties. We are satisfied that the failure to list cannot in such a factual matrix exempt the defendants from their obligation to purchase the shares. The defendants had contracted to acquire a specific number of shares in consideration for the payment of the purchase price by a certain date regardless of whether listing took place or not.

47 The effect of a possible failure to obtain listing by the completion date would surely have been duly considered by the parties. Having held executive positions and directorships in various companies, the defendants were more than adequately experienced and savvy and it would be ludicrous for them to insist that they had never properly contemplated the risk or the possibility of a failure to list DMS.

48 To establish that a frustrating event has occurred is always an uphill task, and rightly so, in order that legitimate commercial expectations may be preserved and protected. Parties to a contract can always guard against vagaries or unforeseen contingencies through express stipulation and should they voluntarily choose to accept and undertake an absolute and unconditional obligation, they forfeit the right to complain if events do not unfold as planned. Imprudent commercial bargains cannot be aborted or modified merely because of an adverse change of circumstances. It is critical at this juncture to reiterate that contrary to the fourth defendant's allegation, the Agreement is not being enforced according to a "strict legalistic interpretation of its terms"; rather, the court is holding the parties to their bargain and to the true tenor and spirit of their obligations as evinced by the clear intent and purport of the contract.

49 In light of the foregoing, we affirm the trial judge's finding of breach and accordingly dismiss the fourth defendant's cross-appeal with costs.

The plaintiff's appeal on remedies

50 Having considered and disposed of the various arguments challenging the trial judge's finding of liability, we now proceed to consider: (a) the trial judge's refusal to grant the plaintiff an order for specific performance or damages in lieu of specific performance; and (b) whether the defendant's counterclaim of $750,000 should have been granted.

51 As the main issues in this appeal relate to an exercise of discretion by the trial judge, it bears reiteration that an appellate court would normally only interfere with the exercise of judicial discretion where: (a) the trial judge was misguided with regard to the principles under which his discretion was to be exercised; (b) the trial judge took into account matters which he ought not to have or failed to take into account matters which he ought to have; or (c) the trial judge's decision was plainly wrong (*The Vishva Apurva* [1992] 2 SLR 175 at 181, [16]).

Whether specific performance of the sale and purchase agreement for shares in a public company should have been ordered

52 Simply put, specific performance is a decree of the court which compels the defendant personally to do what he promised to do (Jones & Goodhart, *Specific Performance* (Butterworths, 2nd Ed, 1996) ("Jones & Goodhart") at 1). The equitable remedy of specific performance sharply contrasts with the legal remedy of damages for breach of contract – where the court orders pecuniary compensation for failure to carry out the terms of the contract. The remedy of specific performance is both special and extraordinary in character and the court has the discretion either to grant it or to leave the parties to their rights at law. Such a discretion, however, must be exercised in a judicial manner, in accordance with "fixed rules and principles" (*Koek Tiang Kung v Antara Bumi Sdn Bhd* [2005] 4 MLJ 525 at [16]).

53 While the dominant principle is that equity will only grant specific performance "if under all the circumstances, it is just and equitable to do so" (*Stickney v Keeble* [1915] AC 386), factors affecting the court's discretion include considerations such as (a) whether damages would be an adequate remedy; and (b) whether the person against whom the relief of specific performance is being sought

would suffer substantial hardship (*Chua Kwok Fun Kevin v Etons Management Consultants Pte Ltd* [2000] 3 SLR 337 ("Chua Kwok Fun")).

54 At the outset, it should be clarified that the trial judge's concern that "the vendor's interest in a contract of sale was strictly monetary", should not *per se* preclude the grant of an order of specific performance. While a contract to transfer shares in a *publicly* listed company will generally not be specifically enforced, a contract to transfer shares in an unlisted company on the other hand can be specifically enforced at the suit of either purchaser or vendor (see *Jones & Goodhart* at 161–162). In *Pamaron Holdings Sdn Bhd v Ganda Holdings Bhd* [1988] 3 MLJ 346, it was unequivocally held (at [16]), that "a seller of shares not freely saleable in the open market is entitled to specific performance". Similarly, in *Duncruft v Albrecht* (1841) 12 Sim 189, the court decreed specific performance for the sale of shares which were limited in number and not always available in the open market.

55 While the subject matter of the contract may readily lend itself to an order of specific performance, the more pertinent issue in every case is whether specific performance constitutes the just and appropriate remedy in the circumstances.

56 The plaintiff's misgivings relating to damages as an appropriate remedy stem from the current depressed value of his shares, which he laments will lead to under-compensation. Such misgivings however confuse and conflate the *quantum* of damages with the *nature* of the remedy. Notwithstanding that "the quantum of damages seldom affects the right to specific performance" (*Chua Kwok Fun* at 339, [5]), we are persuaded, based on the facts, that damages *are* sufficient to restore the plaintiff to the position he would have enjoyed had the contract been performed. The plaintiff's interest as vendor was for payment of the purchase price of $4.5m in consideration for the transfer of the subject shares to the fourth defendant. A proper assessment and award of damages should duly compensate the defendant in relation to the fourth defendant's failure to complete the contract and to pay the balance purchase price of $3.75m. We also note in passing that the defendants are currently serving sentences in prison, thus rendering it quite impractical to grant and supervise an order for specific performance. In light of the general adequacy of damages and the various imponderables involved in this matter, we are compelled to affirm the trial judge's refusal to deny an order for specific performance.

Whether damages in lieu of specific performance and the assessment thereof should have been granted

57 The next and perhaps most pertinent issue is the trial judge's refusal to grant the plaintiff damages in lieu of specific performance. The trial judge felt that the plaintiff ought to have reasonably anticipated that the damages claimed would have to be quantified should his prayer for specific performance fail. He noted that the crucial words "to be assessed" were not pleaded and that no application had been made to effect an amendment although the plaintiff had been amply alerted to and apprised of the paucity of evidence in relation to the market value of the subject shares. Having considered the question of prejudice to the defendants, the trial judge observed that it would be difficult and inconvenient for the defendants to prepare their case while in incarceration. In such circumstances, he refused either to make an order for damages to be assessed or to grant the plaintiff leave to adduce fresh evidence in respect of damages as it was "far too late to do so".

58 By way of clarification, it bears mention that the trial judge had in the course of the hearing on 28 June 2006, directed that the parties address him on the issue as to whether, should he not be inclined to order specific performance but be minded instead to award damages, he would be entitled to do so only on the basis that claims were particularised and proved. After considering the parties'

contentions, he directed them to submit on the following day whether he was entitled to order a separate assessment of damages in the absence of an express pleading. Written submissions were subsequently filed by both parties on 30 June 2006.

59 It should be pointed out that the trial judge did not reject the plaintiff's claim simply by dint of a technical defect in the pleading, but because of a perceived lack of diligence by the plaintiff in presenting his claim. Indeed, the defendants boldly and blatantly asserted that the plaintiff had *elected* to pursue specific performance to the exclusion of any remedy for damages. It was in such a context that the trial judge determined that he should exercise his discretion against the plaintiff so that the latter would be precluded from back-pedalling and reconfiguring his case so as to pursue damages as an alternative remedy.

60 The defendants now attempt to bolster and beef up the trial judge's refusal to grant an assessment of damages by pointedly denouncing the plaintiff's conduct of his case and, in particular, the effect of the alleged cumulative failure to (a) plead for damages "to be assessed"; (b) amend his pleadings to ask for damages to be assessed; (c) apply to bifurcate the hearings on liability and damages; and (d) adduce evidence on damages. Each of these complaints needs to be meticulously scrutinised.

The plaintiff's conduct of his case

61 It is hornbook law that the function of pleadings is to give fair notice of the case which has to be met and to define the issues which the court will have to decide on so as to resolve the matters in dispute between the parties (*Joo Leong Timber Merchant v Dr Jaswant Singh a/l Jagat Singh* [2003] 5 MLJ 116). In relation to the pleading of damages, the case of *Perestrello E Companhia Limitada v United Paint Co Ltd* [1969] 1 WLR 570 establishes that "[t]here is plenty of authority for the proposition that a plaintiff need not plead general damage" (see at 579), but cautions that if a plaintiff has suffered damages of a kind which is not the necessary and immediate consequence of the wrongful act, he must warn the defendant in his pleadings so as to put "the defendants on their guard and tell them what they have to meet when the case comes on for trial". In addition, the limits of this requirement are not dictated by any preconceived notions of what constitutes general or special damage but by the circumstances of the particular case as "[t]he question to be decided does not depend on words, but is one of substance" (*Ratcliffe v Evans* [1892] 2 QB 524 at 529).

62 Returning to the facts, the plaintiff pleaded for "damages in lieu of specific performance" and thus amply satisfied the requirement of fair warning. Given that such a claim was not in any way sprung upon the defendants, the failure to plead the words "to be assessed" should not be construed as prejudicial just because precise notice of the case to be met was lacking. Contrary to the impression created by the trial judge, it seems to us that the words "to be assessed" are in effect superfluous given that any claim for damages must necessarily be assessed (unless otherwise agreed) whether it involves a simple uncontroversial line item or multiple items. It follows that a failure to apply for an amendment to include the words "to be assessed" should not *per se* impair the discretion to order an assessment of damages.

63 In *Lim Eng Kay v Jaafar bin Mohamed Said* [1982] 2 MLJ 156, the court awarded special damages notwithstanding that they had been incorrectly pleaded as general damages, amply illustrating the pragmatic judicial approach that eschews refusal of a claim purely on account of a technical error of pleading. As aptly noted by Lai Kew Chai J, in *Lea Tool & Moulding Industries Pte Ltd v CGU International Insurance plc* [2001] 1 SLR 413 at [16], "our procedural laws are ultimately handmaidens to help us achieve the ultimate and only objective of achieving justice as best we can in every case [and should] not [be] permitted to rule us to such an extent that injustice is done". In

Chwee Kin Keong v Digilandmall.com Pte Ltd [2004] 2 SLR 594 (at [85]) the court observed:

> Rules of court which are meant to facilitate the conduct of proceedings invariably encapsulate concepts of procedural fairplay. They are not mechanical rules to be applied in a vacuum, devoid of a contextual setting.

64 As a matter of procedural propriety, any of the parties could have applied prior to the trial for a bifurcation of the hearing on liability and damages pursuant to O 33 r 2 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). Such an application will inevitably succeed if the circumstances render it just and convenient to so order (*Polskie Towarzystwo Handlu Zagranicznego Dla Elektrotechniki "Elecktrim" Spolka Z Ograniczona Odpowiadziolnoscia v Electric Furnace Co Ltd* [1956]1 WLR 562 ("Polskie")). Based on the facts of the instant case, the question of damages is somewhat controversial requiring expert evidence on the valuation of shares, and incorporating potentially complex issues such as the date on which damages ought to be assessed. It cannot be gainsaid that substantial costs and time would have been saved if the liability issues had been resolved first, as a negative finding on this critical question alone would have rendered otiose any need to adduce evidence on damages. The conduct of the trial should have been divided into liability first followed by the assessment of damages and should essentially have been one where the issues "directed to be tried first will, when decided one way or the other, really be likely to dispose of the case" (*Polskie* at 566). While the option of applying for bifurcation is admittedly no longer available when the actual trial has ended, the fact remains that the plaintiff would have readily been granted a bifurcation order, had he applied for it at the appropriate juncture.

65 In accordance with the well established legal proposition that a plaintiff can only be awarded damages if such damages have been proved, a court should award only nominal damages if adequate evidence of damages has not been properly adduced: *McGregor on Damages* (Sweet & Maxwell, 17th Ed, 2003) at 10-003 to 10-005. However, it must be emphasised that the present case involves the refusal to complete a sale and purchase of shares for the princely consideration of $4.5m. This is anything but small change. In addition, the failure to adduce evidence on damages has to be viewed in the context of (a) the elections made by the plaintiff in the conduct of his trial; (b) his preferred claim for specific performance; and (c) his genuine expectation that the court would legitimately in the absence of specific performance make an order for the assessment of damages.

Damages in lieu of specific performance

66 The landmark decision in *Johnson v Agnew* [1980] AC 367, established that in so far as contracts capable of being specifically performed are concerned, the law does not require the innocent party at the time of breach to accept the repudiation and treat the contract as discharged. On the contrary, he is permitted to pursue his remedy of seeking an order for specific performance, either as an exclusive remedy or as an alternative to damages. However, should he opt for it as an alternative remedy, he is required at the trial to irrevocably elect which of the two remedies to pursue.

67 This principle is illustrated in the recent case of *Maxisegar Sdn Bhd v Silver Concept Sdn Bhd* [2005] 5 MLJ 1, where the vendor sought an order for specific performance or, alternatively, damages in lieu of specific performance for the breach of a contract to complete a sale and purchase of land. The vendor had all along maintained its claim for specific performance right up to the conclusion of the trial. Although the court decided at the end of trial not to grant the order of specific performance, it was held that a party's claim for specific performance of the agreement together with a further or alternative claim of damages for breach of contract was a perfectly conventional claim and that there was no inconsistency in the vendor maintaining a claim for specific performance while

also seeking damages for the breach of contract in lieu of specific performance.

68 The defendants grudgingly concede that the plaintiff was indeed entitled to pursue alternative cases based on specific performance of the Agreement and damages for breach of the Agreement up to the trial. Nonetheless, they allege that the plaintiff had by his conduct at trial "abandoned his claim for damages" and "spurned the availability of damages" and should as, such be denied a "second bite of the cherry". With respect, we are unable to agree.

69 On the contrary, the following observations made in the New Zealand case of *Souster v Epsom Plumbing Contractors Ltd* [1974] 2 NZLR 515 at 521 are as instructive as they are compelling:

> Where a party seeks a decree of specific performance, he is in fact approbating the contract and seeking damages as an alternative remedy. With perfect consistency such a plaintiff is entitled to maintain at the hearing of the action that the contract is on foot (and it does remain on foot until the moment when specific performance is refused and damages are awarded instead)… [I]f the damages are to be regarded as damages for the loss of a bargain brought to an end by the action of the court in refusing specific performance there is only one time at which they should be determined, and that is when the bargain for which they are intended as compensation is brought to an end. Until the contract is brought to an end by the action of the court, the contract remains on foot.

70 Having "brought the contract to an end" by refusing specific performance, it was perfectly legitimate for the trial judge to have ordered damages to be assessed in lieu of specific performance, despite the failure to adduce evidence on damages at the trial. (*Toh Tiong Huat v PM Gunasaykaran (personal representative of the estate of Mayandi s/o Sinnathevar deceased)* [1996] 1 SLR 384 ("Toh Tiong Huat"); *Ho Kian Siang v Ong Cheng Hoo* [2000] 4 SLR 376). It is pertinent that although the plaintiff in *Toh Tiong Huat* had not even pleaded his claim for damages, the court nevertheless had no hesitation in awarding damages to be assessed in lieu of specific performance.

71 The plaintiff's unwavering focus on his preferred remedy of specific performance as opposed to damages was in this case an unfortunate and largely irrelevant distraction. Be that as it may, it is inconceivable that counsel for the plaintiff would have consciously elected to abandon a claim for damages without any appreciation or belief that the claim for specific performance would be granted. We are satisfied that the plaintiff's failure to amend his pleadings to allow for damages to be assessed despite the various "warnings" is consistent with his genuine but mistaken assumption that the court could and would order an assessment of damages, in the event that specific performance was refused. It is difficult to fathom how an inclusion of the formula "to be assessed" would have afforded any meaningful forewarning in terms of the case the defendants would have to meet. In any event, the plaintiff can reasonably be deemed to have elected for damages on 30 June 2006 before the conclusion of the hearing, when he eventually and duly filed his written submissions on damages.

72 In addition, we note that in the interests of saving time and costs, it was eminently reasonable, in these proceedings, for the plaintiff to have focused first and foremost on establishing the questions of agency, liability and the preferred remedy of specific performance rather than that of damages. The specific resolution of any one of these issues could have rendered the latter otiose. While his failure to adduce evidence on damages may, on hindsight, not have been the most prudent course of action, it was not in any way *mala fide* or calculated to gain any undue advantage. It defies both fairness and logic to assert that the plaintiff in the present case is precluded from claiming damages even though he had specifically pleaded for it, simply because of the defendants' inchoate presumption that evidence on damages would be led at the same trial.

73 The merits of the case must be fairly assessed. The plaintiff had timeously put forward both claims in one and the same cause of action, and had, as he was perfectly entitled to, focused on the claim for specific performance at the trial. Unfortunately, he unwittingly assumed that the issue of damages would be dealt with at a later stage in terms of a separate assessment should his claim for specific performance be rejected; he therefore neglected to adduce the appropriate evidence on damages.

74 The defendants' protestations that they expected the question of liability and damages to be determined at the same trial should not detract from the crux of the matter. Even in the absence of the words "to be assessed", the court's power to award and assess damages in lieu of specific performance cannot be seriously disputed. The pertinent question at this stage is whether the court should exercise such a power, with all due consideration to any alleged prejudice that might arise.

Prejudice to the defendants

75 In this regard, the trial judge was of the view that the facts did not merit the exercise of such discretion due to (a) the prospect of added costs; and (b) prejudice caused by the difficulty of managing the conduct of the case from prison. These concerns, which admittedly strike a chord at first blush, need to be carefully weighed and assessed against the consequences of depriving the plaintiff of *any* meaningful remedy for the blatant breach of a substantial contract.

76 First, the defendants have suffered no prejudice that cannot be adequately compensated by costs. In this regard, *McDonald's Hamburgers Limited v Burgerking (UK) Limited* [1987] FSR 112, a decision of the English Court of Appeal, which was endorsed in *Fraser & Neave Ltd v Yeo Hiap Seng Ltd* [1988] SLR 96 (at 101, [25]), established the sound proposition that "[i]f the party concerned has an arguable case for claiming damages, the court would, as a matter of justice, make an order for an inquiry to enable that party to pursue it. The inquiry would of course be at that party's risk as to costs."

77 Secondly, the ascertainment of damages is an exercise to establish a question of fact, *ie*, what loss and damage have been sustained by the plaintiff and to award him any such damages computed according to these principles (*Hong Fok Realty Pte Ltd v Bima Investment Pte Ltd* [1993] 1 SLR 73 at 280, [26]). The burden of proving damages lies incontrovertibly with the plaintiff. Damages are not awarded simply because a party casually alludes to them in a court of law. The loss must be shown to have actually occurred and to be legitimately recoverable in law before any award can be made. (*Penang Port Commission v Kanawangi s/o Sepurumaniam* [1996] 3 MLJ 427 at 435). In addition, the defendants would be amply accorded the opportunity to hire experts of their own choosing and to fully explore and adduce evidence on the issue of damages. In the midst of the assessment, it might even emerge that there is no valid claim for damages or that some heads of claim are not recoverable as a matter of law. The point remains that any assessment of damages will be determined in accordance with established principles of law and objective evidence adduced by both parties. It seems somewhat tenuous for the defendants to argue that despite the prospect of being properly compensated by costs, such an assessment should not take place, simply because they expected damages to be resolved in the course of the trial.

78 The defendants were left in no doubt as to the peculiarities of the claim under this head and would have grasped quite precisely the exigencies of the case they had to meet. Since there is no evidence to show that they were either taken by surprise or labouring under any delusion stemming from any failure on the plaintiff's part to plead any particulars of the claim, it would not be right for the defendants to challenge or oppose an assessment of damages purely on the basis of possible prejudice arising from imprisonment. Incarceration was in any event, entirely self-induced and a

natural culmination of their criminal acts.

79 It must not be overlooked that specific performance was denied on the basis that damages would be an adequate remedy (albeit in law). Therefore the defendants should not be allowed to rely on their own breach. Any hardship arising from imprisonment had already been factored into a refusal to order specific performance and should not prevail as an overriding consideration to further deprive the plaintiff of another remedy legitimately due to him. To do so would be tantamount to allowing the defendants to profit from their own wrongdoing. Surely, we cannot be expected to sanction this.

Judicial discretion

80 Having duly considered the plaintiff's conduct of the trial, which admittedly leaves much to be desired, we are nonetheless of the view that an assessment of damages in lieu of specific performance is appropriate in the circumstances. We are not persuaded that such an assessment would prejudice the defendants to an extent that cannot be adequately compensated by costs.

81 The following observation by Bowen LJ in *Cropper v Smith* (1884) 26 Ch D 700 at 710–711, (albeit in the context of the amendment of pleadings), is apposite:

> I think it is a well established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights … *I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy*, and I do not regard such amendment as a matter of favour or of grace. … It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right. [emphasis added]

82 We are fully in agreement with Bowen LJ. The rules of court practice and procedure exist to provide a convenient framework to facilitate dispute resolution and to serve the ultimate and overriding objective of justice. Such an objective must never be eclipsed by blind or pretended fealty to rules of procedure. On the other hand, a pragmatic approach governed by justice as its overarching aim should not be viewed as a charter to ignore procedural requirements. In the ultimate analysis, each case involving procedural lapses or mishaps must be assessed in its proper factual matrix and calibrated by reference to the paramount rationale of dispensing even handed justice.

Whether the counterclaim for payment of the sum of $750,000 should have been allowed

83 The law relating to deposits in a sale and purchase contract and its recoverability has been considered in some depth in *Triangle Auto Pte Ltd v Zheng Zi Construction Pte Ltd* [2001] 1 SLR 370 which held (at [9]) as follows:

> A deposit in a sale and purchase contract, if nothing more is said about it, is a security for damages for breach of contract. If the seller has not suffered any damage he must return it to the depositor. If, however, the contract provides that the deposit is to be forfeited to the seller upon breach by the purchaser, and provided the amount of deposit is customary or moderate, the seller is entitled to retain it even if he suffered no loss.

84 The invariable judicial approach to forfeitable deposits at common law is that the deposit will

be forfeited to the payee upon the discharge of the contract on the default of the payer, irrespective of whether it would have been deemed part-payment had the contract been completed. The payer cannot insist on abandoning the contract and yet expect to recover the deposit as this would enable him to take advantage of his own wrong (*Howe v Smith* (1884) 27 Ch D 89 at 98). An advance payment, on the other hand, does not fall within the category of forfeitable deposits and is neither designed nor intended to secure performance (*Lim Lay Bee v Allgreen Properties Ltd* [1999] 1 SLR 471 ("*Lim Lay Bee*")). This is underscored by the premise that the vendor is already amply protected by the recovery of damages he has sustained (*Dies v British and International Mining and Finance Corporation Limited* [1939] 1 KB 724).

85 Whether the sum of $750,000 is recoverable by the party in default if the contract is discharged by reason of his breach therefore depends upon the construction of the contract. The object that the parties had in mind must be ascertained (*Mayson v Clouet* [1924] AC 980). In the absence of any specific provision, recoverability of the $750,000 hinges on the nature of the payment (*ie*, whether payment is construed as a deposit entitling forfeiture upon default, or as an advance payment, which is returnable) as evinced by the intention of the parties expressed in the Agreement.

86 References to the nature of the payment in the contract are essential in construing the effect and consequences of the payment. Based on the facts, there is nothing in the Agreement providing for forfeiture upon breach, and it is therefore necessary to examine the contract in its entirety to ascertain the parties' intention.

87 The pertinent clauses of the Agreement are set out *in seriatim* as follows:

> 3.1 The Consideration for the sale of the Sale Shares by the Vendor to the Purchaser shall be $0.54 per Sale Share, being an aggregate amount of $4,500,000, to be paid in *installments* in accordance with Clause 3.2 and Clause 4.7.
>
> 3.2 On the date hereof, the Purchaser shall pay to the Vendor the sum of $750,000 by way of telegraphic transfer, cheque, cashier's order or such other forms of payment as the Parties may agree.
>
> …
>
> 4.7 Upon the successful sale and transfer of the Sale Shares, the Purchaser shall pay to the Vendor the sum of $3,750,000 by way of telegraphic transfer, cheque, cashier's order or such other forms of payment as the Parties may agree.
>
> [emphasis added]

88 These clauses stipulate that the purchase price is to be paid by multiple instalments in a specified manner and characterise the payment of $750,000 as an "installment" in contradistinction to a deposit, thereby branding it as an advance payment. The Court of Appeal in *Lim Lay Bee*, construed a similarly worded clause as part payment towards the purchase price. We have arrived at a similar conclusion. We also note that in any event, plaintiff's counsel has in the course of this appeal candidly but measuredly acknowledged in response to a query from this court that the sum of $750,000 was "likely" to have been intended as an advance payment.

89 Notwithstanding that the sum of $750,000 was an advance payment which is *prima facie* immediately repayable, we decline to order its return pending the assessment of damages in lieu of specific performance. Such an assessment should include an account of what is due to or owed by

the parties after the damages have been ascertained. The difference between the assessed damages and the sum of $750,000 is to be (a) refunded if the assessed damages amounts to less than $750,000 (with the matter referred to the trial judge for further enquiry regarding the proprietorship of the balance); or (b) paid to the plaintiff if the assessed damages exceeds $750,000, (with the plaintiff offsetting the $750,000 it now retains against the assessed damages) as the case may be.

Conclusion

90 We accordingly allow the plaintiff's appeal and direct that there be an assessment of damages before the trial judge, subject to an account being drawn up for the retention or repayment of the $750,000 or any part thereof.

91 In light of the plaintiff's erratic conduct of the trial, which contributed in no small measure to the main appeal, we are of the view that the plaintiff should only receive half of the taxed costs for the assessment of damages. We make no order as to the costs of the plaintiff's appeal even though he has succeeded. The cross-appeal on liability is dismissed with costs to the plaintiff. The costs orders by the trial judge in the proceedings below are upheld.