

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1991] SGHC 27

Suit No 4739 of 1986

Between

Bestland Development Pte Ltd

... Plaintiff

And

Thasin Development Pte Ltd

... Defendant

GROUND OF DECISION

This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

Bestland Development Pte Ltd v Thasin Development Pte Ltd

[1991] SGHC 27

Suit No 4739 of 1986
Chao Hick Tin J
13 February 1991

1 **Judgment:**

2 Coram: Chao Hick Tin J

3 JUDGMENT

4 The plaintiffs, Bestland Development Pte Ltd (Bestland), were the developers of Urban Redevelopment Authority project located at 317 Outram Road. The project was originally known as the Outram Road Shopping Complex. It was later changed to the Hotel Nikko Shopping Centre. Still later, in or about May 1985, the name of the shopping centre was again changed to Glass Hotel Shopping Centre. Shop units in the shopping centre were offered for sale to the public. Bestland have since sold all their remaining interests in the hotel and shopping centre to a third party.

5 On or about 16 Mar 1984 the defendants entered into an agreement with Bestland (the Sale and Purchase Agreement) to purchase unit 01-13 of "the building known as or to be known as the Nikko Shopping Centre" at a price of \$570,477.60. The present dispute between Bestland and the defendants centres

on the question whether certain statements made by Bestland in their sales brochure and in newspaper advertisements constitute misrepresentations which induced the defendants to enter into the Agreement or are collateral warranties.

6 This action is instituted by Bestland because the defendants have refused to complete the sale and purchase unless certain discounts in the price are granted. Bestland are asking for specific performance of the contract; in the alternative for damages. The defendants' aver that in view of the misrepresentations they are entitled to rescind the contract. In the alternative, they aver that they are entitled to recover as damages the diminution in value of the shop unit caused by the misrepresentations or a breach of the collateral warranties or a breach of the duty of care. Bestland are now under liquidation.

7 In the second schedule to the Sale and Purchase Agreement, the project is described in these terms:-

8 "The development is a 27-storey building with 3 basements. It contains a first class hotel of approximately 509 rooms and suites with a full complement of excellent hotel facilities In addition, there are ancillary shopping facilities on 4 floors - on the 1st basement, 1st storey and 2nd storey over 180 units and on 3rd storey, a high quality department store."

9 The evidence shows that in 1982 Bestland advertised in the local Chinese and English presses of the sale of shop units in the Hotel Nikko Shopping Centre. The advertisements represented that the hotel was to be managed by Japan Airlines Development Company (JADC). Bestland also published a brochure wherein similar statements were made.

10 The defendants say that before they entered into the Sale and Purchase Agreement, they were aware of the statements made in the newspapers advertisements and in the brochure. The defendants' director, one Tang Tat Meng (Tang), told the court that the company decided to buy the shop unit because of what was stated: that the hotel would be managed by JADC. He said that was the main reason. Moreover, from conversation with the staff of Bestland he understood that the department store would also be managed by Japanese. The defendants planned to use the premises as a retail shop on Chinese handicraft and paintings.

11 The relevant statements in the brochure (AB 265-280) upon which the defendants based their complaint are these:-

12 "Japan Airlines Development Co Ltd will managed the Hotel Nikko Singapore. The shopping complex podium adjacent to the hotel tower will include a major department store"

13 "Furthermore, Hotel Nikko, the 27- storey deluxe hotel which will be managed by Japan Airlines Development will contribute to the steady influx of tourists with strong purchasing power. As Nikko Shopping Centre is an annex of an internationally managed deluxe class hotel, the value of your retail investment will no doubt increase."

14 In an advertisement in the Straits Times (AB 162) on 17 May 1982, the following were stated:- "Nikko Shopping Centre" "Hotel Management: Japan Airlines Development Co Ltd."

15 An advertisement in the Chinese press on 13 July 1982 (DB 23-25 and AB283) stated, inter alia, the following:-

16 "Invest in the Shopping complex of Japan Airlines Hotel - a hotel managed by Japan Airlines Co. In will certainly cause your investment to appreciate. There are a total of 510 rooms in the JAL Hotel.... As such it can attract tourists with good buying power to shop at the shopping complex of our hotel."

17 Tang said that these statements influenced him in the decision to purchase the unit. He explained that at that time he was also considering whether to purchase a unit at the "Delfi", Orchard Road, which is along the established tourist belt. However, he decided on Hotel Nikko Shopping Centre in reliance on the representation that JADC would manage the hotel and bring in Japanese tourists with purchasing power.

18 In November 1984 Tang read a report in a local newspaper which stated that JADC had terminated the contract to manage the Nikko Hotel because the owners "(had) failed to pay fees for pre-occupancy services for a considerable time." But he added that then he was not sure if there could be a resolution between Bestland and JADC.

19 However, what is extremely pertinent to note is that as late as on 1 Oct 1985, the defendants appeared to be totally unperturbed by the fact that JADC would no longer be managing the hotel as they wrote to Bestland as follows:-

20 "Please refer to this afternoon tele- conversation with your Mr Benny Lee (Legal Section). I am please to note that you have agreed to send me a letter confirming the following:

21 (1) Hotel will be open on 1 Dec 1985. (2) Pacific Hotels International will take over the management of the Hotel.

22 It will be appreciated if you could let me have the letter as soon as possible, so that I can forward it to my banker for information."

23 Then on 22 Sep 1986, a Protem Committee consisting of the purchasers of thirty-one units of the Shopping Centre wrote to Bestland complaining that the fall in the value of the shop units was due to the fact that JADC was not the manager of the hotel and a major department store was not operating in the shopping centre. They elaborated:-

24 "It is common knowledge that because of your warranty that JADC was to be the management of the abovementioned centre that we bought the shop units. It is well established fact that JADC has the expertise and track record to attract valuable Japanese tourists who have the highest purchasing power. JADC would also be in the position to project a strong and prestigious image with their worldwide network of Nikko Hotels chain."

25 The letter ended with the purchasers asking Bestland for a 25% rebate in the purchase price.

26 Bestland place considerable reliance on an exemption clause at the end of the brochure, which, however, appears in very small prints. The clause reads:-

27 "While every reasonable care has been taken in preparing this brochure, the developer cannot be held responsible for any inaccuracy in its contents. All plans, information and specifications are subject to changes without prior notice and subject to any amendment as may be required and approved by the relevant authorities and cannot form part of an offer or contract."

28 Bestland claim that this clause exempts them from liability for any mis-statement or inaccuracy in the brochure.

29 Tang admitted that he was aware of this exemption clause in the brochure. He said that from his knowledge and experience, this clause is confined to the lay-out plan of the project. It could have no application to a representation on the management of a hotel or the operation of a department store. He reiterated that the defendants are a development company and are aware of the purport of that clause.

30 In my judgment, I do not think the contention of the plaintiffs as to the scope of this exemption clause could be correct. That clause basically relieves the developer from liabilities in the event that for technical reasons it is necessary to alter the building plans or if the competent authorities should require the developer to make changes to the plans of the project. This clause could not be extended to cover a promise as to the management of the hotel. Neither could it be construed to mean that Bestland were given carte blanche to make whatever changes they wish. Such a consequence would be absurd. However, for the reasons which follow, I will not be relying on this clause to determine the respective positions of the parties.

31 On the pleadings and on the submissions, the issues that arise for consideration are these:-

32 (i) Do the statements complained of constitute representations? If so, are they false? (ii) Do the statements constitute a collateral contract or warranty by the plaintiffs? (iii) Was there negligence or breach of duty of care on the part of the plaintiffs when they made those statements? Was there a breach of duty on the part of the plaintiffs in the

33 course of their continued development and management of the hotel?

34 At the hearing before me, and in accordance with the principle laid down in *Johnson v. Agnew* < 1980 > AC 367, Bestland elected to pursue the remedy of specific performance. I do not think there is any doubt that a vendor of real property may ask for specific performance where the purchaser fails to complete in time: See 44 Halsbury's Law of England (4th Edition) para 414. On the pleadings the defendants have conceded that time is of the essence of the contract. In *Johnson v Agnew* Lord Wilberforce explain the legal position, as follows, at page 392:-

35 "First, in a contract for the sale of land, after time has been made or has become of the essence of the contract, if the purchaser fails to complete the vendor can either treat the purchaser as having repudiated the contract, accept the repudiation and proceed to claim damages for breach of the contract, both parties being discharged from further performance of the contract; or he may seek from the court an order for specific performance with damages for any loss arising from delay in performance. (Similar remedies are of course available to purchasers against vendors). This is simply the ordinary law of contract applied to contracts capable of specific performance. Secondly, the vendor may proceed by action for the above remedies (viz, specific performance or damages) in the alternative. At the trial he will, however, have to elect which remedy to pursue."

36 The fact that in an agreement there is an express provision empowering the vendor to forfeit a deposit or entitling the vendor to damages for non-completion does not preclude a claim for specific performance by the vendor - see 44 Halsbury's Law of England (4th Edition) para 416.

37 Misrepresentation

38 I will now turn to deal with the issue of misrepresentation. Perhaps I should first set out precisely the alleged misrepresentations. As pleaded, they are these:-

39 "3.1that Japan Airlines Development Co. Limited ("JADC") would manage the Hotel ("the Hotel") comprised in the Hotel and Shopping Centre; 3.2that the Hotel would be managed by JADC who were described as "renowned" in hotel management; 3.3that the Hotel would be a 27-storey deluxe hotel and would be managed by JADC and would "contribute to the steady influx of tourists with strong purchasing power" with the consequence that, as the Shopping Centre ("the Shopping Centre") comprised in the Hotel and Shopping Centre was to be "an annex of an internationally managed deluxe class hotel", the value of an investment in a shop unit within the shopping Centre would increase; 3.4that the Shopping Centre would have a major department store as an anchor tenant whose sophistication and size will appeal to both tourists and Singaporean shoppers; and 3.5that the Hotel and Shopping Centre would be named "the Nikko Hotel and Shopping Centre".

40 There can be no doubt that a purchaser may in equity rescind a contract for the sale and purchase of land on the ground of misrepresentation where a false statement of fact made by the vendor to the purchase induced the purchaser to enter into the contract.

41 The first question to determine is, are the alleged statements representations? To constitute a representation, a statement must relate to a matter of fact. It must be a matter of present or past fact: see 31 Halsbury's Law (4th Edition) para 1005. A distinction ought to be drawn between a representation of an existing fact and a promise to do something in the future. Furthermore, mere praise by a man of his own goods or undertaking is a matter

of puffing and pushing and does not amount to representation. However, a statement of opinion may in certain circumstances involve a statement of fact. This was explained by Bowen LJ in *Smith v. Land and House Property Corporation* (1884) 24 ChD 7 at 15 as follows:-

42 "..... it is often fallaciously assumed that a statement of opinion cannot involve the statement of a fact. In a case when the facts are equally well known to both parties, what one of them says to the other is frequently nothing but an expression of opinion. The statement of such opinion is in a sense a statement of fact, about the condition of the man's own mind, but only of an irrelevant fact for it is of no consequence what the opinion is. But if the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion."

43 In *Smith v Land and House Property Cooperation*, a tenant was described to be a "most desirable tenant". In fact, it was shown that he was far from it. This was how Bowen LJ put it when he held that the description went beyond a matter of opinion:- "I agree that it does not amount to a guarantee of payment of the rent, or a warranty that the tenant will pay it; but it is a statement which amounts to an assertion by the landlord that nothing has occurred to make the tenant an unsatisfactory tenant. That is a statement of fact. Can a tenant out of whom rent has to be squeezed be described as a desirable or satisfactory tenant? I think not"

44 The development on this aspect of the law is succinctly summarized in *Chitty on Contracts* (26th Edition) at para 414 as follows:-

45 "The traditional rule is that a representation must be a statement of fact, past or present, as distinct from a statement of opinion, or of intention, or of law. A mere statement of opinion, which proves to have been unfounded, will not be treated as a misrepresentation, nor will a simple statement of intention which is not put into effect; for as a general rule these cannot be regarded as representations of fact, except in so far as they show that the opinion or intention is held by the person expressing it. However, in certain circumstances a statement of opinion or of intention may be regarded as a statement of fact, and therefore as a ground for avoiding a contract if the statement is false. Thus, if it can be proved that the person who expressed the opinion did not hold it, or could not, as a reasonable man having his knowledge of the facts, honestly have held it, the statement may be regarded as a statement of fact. So where, at a sale of property, the vendor described the occupier as 'a most desirable tenant,' while in fact he knew that the rent was considerably in arrear, this was held to entitle the purchaser to rescind the contract. More recently, in *Brown v Raphael*, the purchaser of an absolute reversion in a trust fund expectant on the death of an annuitant was likewise held entitled to rescind: the particulars of the sale stated that estate duty would be payable on the death of the annuitant, "who is believed to have no aggregable estate"; the vendor's solicitors honestly believed this to be true but had no reasonable grounds for this belief. The Court of Appeal held that as the vendor was in a far stronger position than the purchaser to ascertain the facts, there must be implied a further representation that the former had reasonable grounds for his belief. If, on the other hand, it is clear that the person who expressed the opinion had no real way of knowing whether or not it was correct, no such implication can be made."

46 Counsel for Bestland has relied upon the decision in *Bisset v. Wilkinson* < 1927 > AC 177 to argue that the statements in the present case could not

amount to representations. There, the Privy Council held that a statement by a New Zealand farmer that an area of land "would carry 2,000 sheep" was only an expression of opinion. But a very crucial factor in this New Zealand case was that the land had never been used as a sheep farm. It was therefore clear that both parties were equally able to form an opinion as to its carrying capacity. I think in our case here a distinction should be drawn between statements like "JADC would manage the hotel" and statements like the hotel would "contribute to the steady influx of tourists with strong purchasing power". Only the latter type of statements come within *Bisset v Wilkinson*.

47 Two of the advertisements complained of were published in May and July 1982. There is no evidence as to the date on which the third advertisement (shown in DB26) was published. It may be reasonable to assume that it was also around that time in 1982. As regards the brochure, Tang could not recall exactly when he obtained it but he admitted that it was in 1982. That was also the time when the defendants became interested in the project though they did not decide to purchase the unit until early 1984.

48 Generally, it may be fair to say that the alleged statements appear to be couched in terms of promises, opinions or events which would occur in the future. But it would also be reasonable to say that implied in those statements are certain statements of fact - one that there existed some foundation for saying that JADC would manage the hotel and that Bestland were entitled to use the name "Nikko"; two, that the shopping centre had been designed and constructed in such a way that a space had been set aside for the operation of a major department store. In my judgment, the other matters stated are in truth just expressions of opinion or mere puffs. On the first point, I do not see any misrepresentation. At the time when the statements were made and also at the time when the defendants signed the Agreement there was in existence two

contracts between the plaintiffs and JADC for the latter to manage the hotel. That would be a complete answer: see *Hallows v. Fernie* (1868) 3 Ch App 467 at 472. There was no doubt that Bestland were then entitled to describe or name the hotel as "Nikko Hotel and Shopping Centre". On the second point, there is clearly a large area on the third level of the shopping centre which was designed specifically for a department store. In fact a subsidiary of Bestland had on 22 June 1983 entered into a contract with a Japanese company, who are experienced in the operation and management of department stores, for the latter to render consultancy services to the former to enable the former to establish and operate a department store at the shopping centre.

49 A more difficult aspect of the defendants' argument on misrepresentations is the assertion that the statements were false because "when the representations and warranties were made, the plaintiffs knew or ought to have known that JADC was not going to manage the Hotel, or at any rate that there was a significant risk that JADC would not manage the hotel." Further, the defendants contend that the plaintiffs knew or ought to have known that the name of the hotel would be changed and that there would not be a sophisticated and sizeable department store. To this argument, counsel for the plaintiffs first made a technical response. He submitted that the defendants have not pleaded a case based on absence of genuine belief in the statements or absence of adequate grounds for the statements. I do not think there is any merit in this objection. In my view paragraphs 6.2, 6.4 and 6.5 of the Defence cover these points.

50 I will now examine the evidence to see whether there is anything to sustain that contention. This contention, if it has any merit at all, would be in relation to the time the defendants signed the Sale and Purchase Agreement. Obviously at the time when the advertisements and brochures were published in mid 1982, there was nothing whatsoever to suggest that Bestland knew or

ought to have known that JADC was not going to manage the hotel. At that stage Bestland and JADC had just signed the two agreements. The defendants' case is based entirely on the fact that the management agreements between JADC and Bestland were terminated in November 1984. Tang told the court that he read the newspaper report of 13 Nov 1984 (DB 29) which stated that JADC "claimed today that it had terminated a contract to manage the Nikko Hotel in Singapore" because the owners had failed to pay fees for pre-occupancy services "for a considerable time". This is obviously hearsay evidence. Subsequently the claim of JADC against Bestland was submitted to arbitration and the appointment of an arbitrator was made on 4 Nov 1986. However, the parties eventually settled the matter and a consent award was made on 17 Mar 1989 under which Bestland were to pay the sums of US\$85,000 and S\$123,674.43 to JADC with interest at 6% from 4 Oct 1984; Bestland's counterclaim was dismissed and they were ordered to pay costs. There is no evidence before me to show how the two sums were arrived at. Neither was any witness called to establish for how long management fees had been outstanding from Bestland to JADC.

51 It will be recalled that the defendants entered into the Sale and Purchase Agreement on 16 March 1984. Mr Lawrence Wee (PW1) said that the debenture holders of Bestland and the official liquidator consented to the compromise because of consideration of costs. Whatever it is, in my view, the burden lies on the defendants to show that in March 1984 there were facts upon which the court could reasonably conclude or draw an inference that Bestland knew or ought to have known that JADC was not going to manage the hotel or that there was a significant risk that JADC would not do so. There is no evidence of that at all. Even assuming it was true that in March 1984 Bestland had not paid to JADC its fees for some months, that did not per se suggest that Bestland were insolvent

or that the management arrangements would be likely to be terminated. There could be so many reasons why fees were withheld. Even Tang himself said that the reason why in November 1984 he took no action was because he thought the differences between Bestland and JADC could perhaps be resolved. The defendants should have sought and called evidence on that. The fact that there was a termination of the management agreements in November 1984, followed by arbitration and a consent award, do not necessarily suggest that anything serious or significant had in fact occurred before March 1984 which rendered the statements false or likely to be false. It should not at all be surprising that in business, fortune or events could turn quite significantly in a matter of months particularly at a time when recession was imminent. The burden is on the defendants to prove what they allege. They have failed to discharge that burden.

52 The plaintiffs have also argued that even if misrepresentations were proven, the defendants have by their conduct shown that they had not seriously relied on the statements. The plaintiffs said that the defendants had purchased the unit based on their own independent assessment; they were themselves developers. They took considerable time in deciding on the purchase. Bestland have also submitted that by their very conduct the defendants have affirmed the contract after becoming aware of the misrepresentations. In view of my finding above that there was no misrepresentation there is really no need for me to go into these aspects. Suffice it for me to say that having regard to the circumstances/factors discussed later under the second question on collateral warranty there appear to be considerable merits in these points, particularly the point that the defendants could not really have relied on the alleged misrepresentations. Viewing the facts as a whole I find that he could not have relied too much on the alleged misrepresentations. Here you have a man (Tang) who alleges that he relied very much on the statements that the hotel would be

managed by JADC without which he would not have bought the unit. He read about the statements some eighteen months before. Yet when he decided to buy the unit in March 1984, he did not seek specific reconfirmation of the same. When it was announced that JADC had terminated the management arrangement, he took no action. About six months' later when he was notified that the name of the hotel and shopping centre would be changed to Glass Hotel Shopping Centre, he made no protest. And a further five months later, he seemed very happy to write to Bestland asking them to confirm that Pacific Hotels International would be taking over the management of the hotel from JADC. When Tang was cross-examined whether he informed his solicitors that he relied on the statements in making the purchase he was extremely evasive. I have no doubt and I do so find that he did not inform his solicitors. More will be said on these matters later.

53 Collateral Warranty

54 The next issue is whether the statement that the hotel would be managed by JADC amounts to a collateral warranty; similarly as regards the statement that there would be a major department store in the shopping centre. As stated above, whereas a representation usually concerns a past or present fact, a warranty can just be a promise which is to be fulfilled in the future. A representation which induces a person to enter into a contract and if not fulfilled renders the representator liable in damages. In *Dick Bentley Productions Ltd v. Harold Smith (Motors) Ltd* < 1965 > 1 WLR 623 at 627 Denning MR said:- "Looking at the cases once more, as we have done so often, it seems to me that if a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act upon it, and actually inducing him to act upon it by entering into the contract that is prima facie ground for inferring that it was intended as a warranty".

55 The defendants contend that the statements that the hotel would be managed by JADC and that there would be a high quality department store in the shopping centre have all the characteristics of a collateral warranty.

56 There cannot be any doubt that in appropriate circumstances there could be a contract which accompanies a sale of real property and yet be separate from it: see *Ersine v Adeane* L.R. 8Ch 756 and *Jameson v Kinmell Bay land Co* < 1931 > TLR 593. The traditional view appears to be that such collateral contracts must be rare as they were viewed with suspicion by the law: per Lord Moulton in *Heilbut Symons & Co v Buckleton* < 1913 > AC 30 at 47. That may not be the correct view now: per Denning MR in *J Evans & Sons (Portsmouth) Ltd v Andrea Merzario Ltd* < 1976 > 1WLR 1078 at 1081 where he said "much of what was said in that case (i.e., *Heilbut Symons*) is entirely out of date." In order that there could be a collateral warranty, either both parties or at least one of them must have intended that that warranty should have binding effect: Chitty on Contracts (1989 Ed) Vol 1 para 773. Such intention can only be deduced from the totality of the evidence. As was stated in *Oscar Chess Ltd v Williams* < 1957 > 1 All Er 325 at 328 (per Denning LJ) "The question whether a warranty was intended depends on the conduct of the parties, on their words and behaviour rather than on their thoughts." As such, it will be necessary to examine closely the facts and the conduct of the parties.

57 Tang said that he was induced by the statements in the advertisements and the brochure to buy the unit. It is no doubt true that when one examines the advertisements, a great deal of emphasis was placed on the claim that JADC would be managing the hotel. But it is also clear that much emphasis was placed on the design of the building and its location.

58 The defendants were aware of the termination of the management agreements between JADC and Bestland in November 1984. Yet no protest or objection was raised by the defendants. Although Tang explained that he thought there could perhaps be some solution between Bestland and JADC, if in fact there was such a collateral warranty, one would reasonably expect the defendants to register their protest or express their concern straight away - there was none whatsoever.

59 On 30 Jan 1985 Bestland gave notice to the defendants to take possession and to make progress payment. A copy of the temporary occupation licence was also enclosed. The defendants' solicitors requested for a certified copy of the TOL. There was no mention of a breach of warranty.

60 On 4 May 1985 Bestland's solicitors wrote to the defendants' solicitors notifying them that the name would be changed from "Nikko Hotel Shopping Centre" to "Glass Hotel Shopping Centre". There was not a whimper from the defendants to the change. At that point it would have been abundantly clear to the defendants that the break between Bestland and JADC was final. In the meantime Bestland kept sending debit notes to the defendants regarding the outstanding progress payments due, together with interest. Yet, again, not a word.

61 As mentioned before, it is significant that on 1 Oct 1985 the defendants wrote to Bestland asking for confirmation that the hotel would be opened on 1 Dec 1985 and that the management of the hotel would be undertaken by Pacific Hotels International. Surely if management of the hotel by JADC meant so much to the defendants and if the pull-out by JADC from the management of the hotel constituted a breach of collateral warranty, the defendants would have screamed and not write so gratefully as they had done.

62 On 4 Dec 1985 Bestland demanded progress payment from the defendants. The defendants' solicitors responded to say that they would revert after taking their clients' instructions. On 28 Feb 1986, Bestland lodged the Notice of Transfer of the property with the Chief Assessor and a copy was forwarded to the defendants' solicitors. On 10 Mar 1986, Bestland again demanded payment of the outstanding progress payments. There was total silence to the foregoing.

63 On 28 Apr 1986 Bestland gave notice to complete, with the completion account, to the defendants' solicitors. There was again no reply thereto. It was only on 22 Sep 1986 that the Protem Committee sent out its letter. It should be noted that at all relevant times the defendants were represented by solicitors.

64 There is another aspect of the case which I ought to allude to. As stated above, the defendants saw the advertisements placed by Bestland in the media more than one and a half years' ago before the defendants decided to buy the property. The defendants had also obtained the brochure at about that time. If the question of the management of the hotel by JADC was so crucial to the defendants' decision and bearing in mind the time lapse, I would have expected the defendants to obtain specific confirmation of the same in writing. Tang's evidence on this aspect does not show that he placed much importance on it. His evidence indicate that he merely made a general inquiry with the staff at the office of Bestland. He never specifically asked the staff of Bestland anything on the management of the hotel; neither did he enquire if there was any change to the arrangements with JADC. If it was something so very important to him and which was to form a collateral warranty, one would have expected him to raise and emphasise it. Tang is after all a man of business for some considerable period of time. He could not have failed to realize that the sort of management arrangements entered into between Bestland and JADC would be for a specified

period, though it could be renewed. He could not realistically expect the arrangement to be for an indefinite period with no provision for termination.

65 Also from Tang's evidence it is clear, and I find that he never even told his then solicitors, M/s S M Wong and Lim, that he had relied on the statements in the advertisement and the brochure about JADC management or that Bestland had broken their promise or warranty.

66 Having reviewed all the foregoing, I find that the conduct of Tang/defendants is entirely inconsistent with the assertion the defendants now make that there was a collateral warranty and that Bestland had breached that. It is true that the defendants withheld payments since early 1985. But they did not explain themselves at all. It might well be, as contended by counsel for Bestland, that the defendants stopped payment so that they need not take possession and start a business in the midst of a recession. By 1985 there was clearly a recession in Singapore. On the defence evidence it is clear that from late 1984 Tang had been in touch with the other purchasers of units in the shopping centre. This was obviously with the hope that through sheer numbers they would be in a better position to bargain with the developers for concessions. If, in his mind, Bestland had been in breach of their collateral warranty, I would have expected Tang to mention it at the first available opportunity. No cogent reason was given why that was not done. A reference to this could not possibly have jeopardised any united stand which could be taken with the other purchasers. We have here the evidence of Danny Foo (DW4) who told the court that the idea of collective action was mooted in Nov 1984, that is, as soon as the news appeared in the media that JADC had terminated the management arrangements.

67 Accordingly, I find that it was never in Tang's mind that Bestland had given a collateral warranty. He realized that the statements relate to business arrangements which could be altered. He admitted such arrangements could be changed. He stopped payment from early 1985 hoping to muster enough support from other purchasers to take a united stand. He must have thought that with more people on his side he would be in a better position to negotiate with the developers. He could not have been terribly successful as it was only some twenty-two months later that the purchasers of thirty-one units could agree to the Protem Committee writing to the developers. I find that the question of a breach of warranty was something mooted during the numerous meetings held collectively or separately between the various purchasers. Interestingly, Tang said that at the meeting of the Protem Committee, there was no mention of rescission. If the statement on the management of the hotel by JADC was the thing which induced the defendants to purchase the unit, rescission should have been one of the options discussed.

68 There is another difficulty in the way of the argument based on collateral warranty. What would be the duration of the promise that JADC would manage the hotel? Common sense would tell us that this could not possibly continue forever or be co-terminus with the 99-year lease to be granted to the purchasers. Presumably, for this reason, Tang had to admit that if JADC were to manage the hotel for even a short period and were thereafter to stop, there would not be any breach of collateral warranty on the part of Bestland. I think his answer would have been the same if a department store were to be established for a year or two and then were to close. I would imagine that if the defendants were to request for an express warranty on it for an indefinite period they would have been told that there were agreements in existence between Bestland and JADC. Bestland might also say that they expect the arrangements to continue for as

long as both parties were satisfied with it. But I do not foresee that Bestland would give an indefinite warranty or even any warranty at all, other than perhaps some general assurances.

69 Finally, I ought to refer to the Australian case *Shepperd v Ryde Municipal Council* < 1952 > 26ALJ 95 which is strongly relied upon by the defendants. There, the purchaser was offered a dwelling which was found to be opposite two areas designated for parks. During a discussion with the housing officer of the Municipal Council the purchaser spoke of the attraction the parks meant for him and the officer pointed on the plan to the two pieces of land and said that they would both be park areas. A few days later the purchaser informed the officer that he would buy the premises, again mentioning the parks. A sale and purchase contract was subsequently entered into between the parties. Some two months later the Municipal Council decided to change the plans and wanted to build on the two areas earmarked for parks. The purchaser immediately instituted proceedings and asked for an interlocutory injunction. The Australian High Court, reversing a decision of the Supreme Court of New South Wales, granted the interlocutory injunction. While there are some similarities between *Shepperd* and our present case, three important differences stand out. First, *Shepperd* was a decision on interlocutory relief where all that needed to be shown was a *prima facie* case of a collateral warranty. Second, the purchaser there repeatedly mentioned of the importance of the parks to him. Third, the purchaser in *Shepperd* went to court for relief as soon as he realized that the plan reserving the two areas for the parks had been altered. Here, the defendants did not raise the plea of collateral warranty until some 22 months later.

70 Negligent mis-statements

71 There remains the third issue which I have identified above. However, in view of my determination on the first two issues, I do not think there is any merit in the third which basically raises principles enunciated in those line of cases like *Hedley Byrne & Co Ltd v Heller & Partners* < 1964 > AC 465.

72 Conclusion

73 This is an unfortunate tale of a development which has not taken off because it seems to have appeared at the wrong time. It was caught by the recession. Perhaps due to the recession, or at least partly due to it, the expectation that the Havelock/Outram area would become a second tourist belt like Orchard Road has not materialized. Both Bestland and the defendants have been adversely affected. Each party would have to bear its own loss. It is anybody's guess how much of the present misfortune of the shopping centre was caused by the actions of purchasers like the defendants. If these purchasers had not taken the stand they did, including the withholding of payments, and had actively cooperated with Bestland in promoting the shopping centre, would it not have made a difference to the fortune of the shopping centre?

74 Finally, I wish to emphasise that the decision in this case must not be taken to suggest that a developer can in future make wild statements or promises with impunity. The present is not such a case. Each case would have to be decided on the evidence before the court. In a proper case where misrepresentation is shown, or where it is proven that there is a collateral warranty, followed by a breach, the court would not hesitate to rescind the contract or award damages or both, as may be just and appropriate.

75 In the premises, I grant to the plaintiffs an order for specific performance of the Sale and Purchase Agreement. The defendants shall pay to the plaintiffs

all overdue progress payments with interest at the rate specified in the Sale and Purchase Agreement and all maintainence and service charges up to the date of this judgment with interest at 6%. The defendants shall also pay the sum of \$120.14 being their share of contribution towards government survey fees and plans. The plaintiffs shall have their costs of the action, including the counterclaim.

Chao Hick Tin J

Loh Boon Huat (with Steven Ang) for the plaintiffs
Michael Kor for the defendants
