

IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1992] SGCA 36

CA 25/1988

Between

Tian Teck Construction Pte
Ltd

... Appellant

And

Exklusiv Auto Pte Ltd

... Respondent

GROUND S OF DECISION

Contract — Discharge — Performance; Land — Conveyance

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Tian Teck Construction Pte Ltd v Exklusiv Auto Pte Ltd

[1992] SGCA 36

CA 25/1988

Chan Sek Keong J; L P Thean J; Yong Pung How CJ

30 April 1992

1 (delivering the grounds of judgment of the court): By an agreement in writing dated 11 July 1984 (the agreement), Tian Teck Construction Pte Ltd (the appellants) agreed to sell and Exklusiv Auto Pte Ltd (the respondents) agreed to purchase the property known as No 11 Leng Kee Road, Singapore (the property) at the price of \$2.4m, of which a 10% deposit of \$240,000 was paid by the respondents to the appellants.

2 Clause 8B of the agreement provided as follows:

Provided the usual legal requisitions are sent within seven (7) days from the date of this agreement the sale shall be subject to satisfactory replies to the said legal requisitions of the purchasers solicitors to the various government departments and to the MRT authority. In the event that the said replies are not satisfactory the purchaser shall be entitled to, by notice in writing served on the vendor within seven (7) days of receipt of such replies, rescind this agreement whereupon the vendor shall refund to the purchaser the deposit paid herein without interest and each party shall have no claim against the other whatsoever.

3 In this clause, none of the replies from the relevant authorities shall be deemed to be not satisfactory unless it reveals -

- (i) any intention on the part of any public authorities to acquire the whole of the property or any part thereof, in the latter case, the area of the part affected shall exceed 5% of the total area of the property; or
- (ii) the existence or contemplation of any public schemes which will inevitably affect the property adversely and in consequence thereof would be compulsorily acquired; or
- (iii) a defect in the building in that it was built without approval(s) of the competent authority(ies); or
- (iv) the existence of any outstanding notice or notices with which the vendor is unable or could not reasonably be required to comply with all notices outstanding as at the date of this agreement will be complied with by the vendor.

4 Even before the agreement was executed, the respondents solicitors had sent the usual legal requisitions to the various government departments. On 10 July 1984 they received an initial reply from the Building Control Division which included the following information:

5 Question 6 : Master plan zoning:

6 Answer : Residential/major traffic route

7 Because of the cryptic answer to question 6, the respondents solicitors applied to the relevant authority on 11 July 1984 for a road interpretation plan. It was alleged later by the appellants that this interpretation plan was available for collection by the respondents at the office of the relevant authority on 24 July 1984. The respondents contended, however, that they could not have known and did not know that the interpretation plan was to be collected, and that the interpretation plan was in fact received by them only on 2 August 1984. In any event, on receipt of this interpretation plan, the respondents sought advice on it. Meanwhile, on 15 August 1984, the respondents solicitors forwarded by

letter their draft of the instrument of transfer to the appellants solicitors for approval.

8 On 16 August 1984, the respondents solicitors wrote to the appellants solicitors that, according to the interpretation plan, the property was affected by a category 4 road proposal along Leng Kee Road and a category 5 road proposal along Hoy Fatt Road which abutted the property on one side. The area affected was coloured pink on the interpretation plan and the legend referring to the affected area read: land required for road widening. On 17 August 1984, the respondents solicitors, having confirmed with their architects that approximately 18.2% of the area was affected by the road widening, as indicated in the interpretation plan, informed the appellants that since the area affected exceeded the 5% provided for in the agreement, the respondents were not prepared to purchase the property unless a fresh agreement at a different price was renegotiated. Copies of the legal requisitions and the interpretation plan were sent by the respondents solicitors to the appellants solicitors for their inspection. By another telex, the respondents solicitors asked for the refund of the deposit since the sale and purchase was aborted. Notice of rescission was thus served on 17 August 1984.

9 For the next month there was a flurry of letters exchanged between the respective solicitors. The respondents contended that the replies to the requisitions were not satisfactory, and that therefore, by virtue of the condition in cl 8B, the respondents were entitled to rescind the agreement and claim a refund of the deposit. The appellants contended that for cl 8B to apply, the respondents had to show proof of an intention on the part of the public authorities to acquire the affected area and the replies did not amount to proof of such an intention.

10 As the dispute could not be resolved, the appellants on 13 September 1984 accepted the respondents repudiation, and forfeited the deposit; and on 22 September 1984 the respondents filed Originating Summons No 813 of 1984 for the following declarations:

(1) a declaration that the plaintiffs have lawfully rescinded the aforesaid sale and purchase agreement and that the same was effectively rescinded and was null and void and of no further effect;

(2) that the defendants may be ordered to repay to the plaintiffs the deposit of \$240,000 together with interest thereon at 18% pa from 20 August 1984 until payment and costs.

11 The originating summons was heard on 13 and 14 April 1987, and again on 22 February 1988, and was decided on 29 February 1988. The learned judge made an order-in-terms of the prayers of the originating summons, except that interest was ordered at 8% pa. The appellants appealed. The parts of the grounds of decision of the learned judge which are relevant to this appeal are reproduced below:

(2) Did the plaintiffs rescind within time?

Counsel for the defendants contended that the plaintiffs had failed to rescind within the seven days after receipt of the requisitions, as required by cl 8B. The evidence disclosed that the plaintiffs solicitors received the RIP [road interpretation plan] on 2 August 1984 (although it was, unknown to them, ready for collection on 28 July 1984). The solicitors then sought instructions from their clients and clarifications from their clients architects whose calculations were only received on 17 August 1984, whereupon they gave notice of rescission to the defendants solicitors. The evidence also showed that the defendants were not concerned with the time limit imposed by cl 8B as this point was raised after they had changed solicitors.

12 In my view, the question whether or not the rescission was made in time depended on whether the time for rescission was of the essence of the

agreement. By virtue of s 4(7) of the Civil Law Act [Cap 43, 1988 Ed], time is not of the essence in an agreement for sale of land unless the parties have expressly stipulated as such or that the nature of the subject matter of the contract or the surrounding circumstances show that time should be considered of the essence: 9 Halsburys Laws [of England] (4th Ed) para 481 (stating the rule in equity), per Lord Simon. I was unable to find anything in cl 8B or the circumstances in which the agreement was made or in the nature of the subject matter which was of sufficient cogency to override the presumption that time was not of the essence.

13 In *United Scientific Holdings Ltd v Burnley BC* [1978] AC 904, the House of Lords held that the timetable specified in a rent review clause for completion of the various steps for determining the rent payable in respect of the period following the review was not of the essence of the contract. I thought the reasoning of their Lordships was applicable to the present action. In that case, the failure of the landlords to set the procedure in motion within the timetable did not prejudice the lessees in any way. Here too, the defendants were not prejudiced as the date for completion was 90 days from 11 July 1984.

14 Furthermore, the local circumstances for such contracts of sale being invariably made subject to satisfactory requisitions must be properly appreciated. In England, it is the practice not to exchange contracts until all preliminary searches have been done and found satisfactory. That is why gazumping is possible and frequently practised in England. In Singapore before the first property boom in the early sixties, the practice was the same. When the property boom came, purchasers were not minded to wait for requisitions to come in and found satisfactory before they were prepared to bind themselves to an agreement. They wanted to sign a binding agreement before requisitions were sent and they wanted protection by means of the satisfactory requisitions

clause. The legal profession was able to resolve the problem of gazumping without the aid of legislation. The historical development of cl 8B would not suggest that any time therein would be of the essence.

15 I was also of the view that the essence of cl 8B was the nature of the requisition, ie whether it was satisfactory or unsatisfactory. The plaintiffs had to apply an objective and not a subjective assessment as to the nature of the reply to the requisition. To do that, it was necessary to seek expert advice or clarification. Here, they had to obtain a calculation from their architects.

16 I also find that the defendants knew or must have known that when the rescission took place on 17 August 1984, it was outside the time the plaintiffs had to rescind. Notwithstanding this, they continued to regard the time as not expired and what is more, gave additional time for the plaintiffs. This appears in their solicitors letter dated 21 August 1984 when they gave the plaintiffs one week to show that it was intended that the portion coloured red on the plan was to be acquired. Correspondence after this also reveals that the defendants waived any rights they may have had as a result of the plaintiffs rescinding outside the time limit.

17 Before this court, counsel for the appellants conceded that the replies were unsatisfactory and addressed the court on only two points, namely, whether cl 8B required rescission within seven days of receipt of the unsatisfactory replies, and, if so, whether that requirement was waived. He went into the background of the inclusion of cl 8B in the agreement. He submitted that the clause, which was drafted by the appellants solicitors, was inserted to protect the respondents as the purchasers from compulsory acquisition, but the right to rescind was limited to a notice of rescission sent within seven days of receipt of the replies. There was no evidence that the respondents could or could

not check the satisfactoriness of the replies within this period. He referred us to *United Scientific Holdings Ltd v Burnley Borough Council*.¹ In so far as waiver was concerned, counsel for the appellants submitted that the series of correspondence between the solicitors were challenges on the legal right to use cl 8B in order to rescind the agreement which could not amount to a waiver. Furthermore, there was no detrimental reliance in this case. He relied on *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd*² and *Bremer Handelsgesellschaft mbH v Vanden-Avenne Izegem PVBA*.³ He submitted that the subsequent conduct of the parties in not raising the seven-day period until two years later was irrelevant in construing whether time was of the essence in cl 8B. He also submitted that as the seven-day period under cl 8B was for the mutual benefit of both parties, it could not be waived unilaterally by one party.

18 Counsel for the respondents also referred us to the background in this case. He submitted that time was not of the essence in cl 8B because the period of completion was 90 days from 11 July 1984. If it was of the essence, the date from which computation of the seven-day period began was 17 August 1984. This was because a solicitor could not be expected to make sense of the reply to the requisition, in particular whether the 5% limit was reached, without the assistance of an architect. In any event, the seven-day period could be and was waived by the appellant, since it was put there for the appellants benefit. Finally, he submitted that the forfeiture of the deposit by the appellants on 13 September 1984 was an indication that the appellants were of the opinion that they were not bound or no longer bound by the contract. He also relied on *United Scientific Holdings Ltd v Burnley Borough Council*.¹

19 It will be convenient if we consider, first, whether time was of the essence in cl 8B. In *United Scientific Holdings Ltd v Burnley Borough Council*,¹ which was heavily relied on by both parties, there were two appeals

which were heard together. The headnotes set out the facts. In the first of them, the respondents leased adjoining properties from the appellants for 99 years at a rent of o1,000 a year each. A rent review clause provided, *inter alia*, that during the year preceding the second and each succeeding ten-year period the parties should either agree or determine by arbitration the sum total of the properties current rack rent and that one quarter of that sum, or o 1,000, whichever was the greater, would be the rent of each property for the next ten years. The first ten-year period ended on 31 August 1972, and by that date, the new rent had neither been agreed nor referred to arbitration and the respondents sought a declaration that since time was of the essence of the contract, the appellants had lost their chance of increasing the rent for the second ten-year period. Pennycuick VC held that although the review clause was expressed merely as a provision for the quantification of additional rent, it constituted a unilateral right to increase the rent which was vested in the appellants alone; that time was of the essence of the contract and that since the appellants had not exercised that right promptly in accordance with the requirements of the review clause, the rent reserved for each property would remain at o1,000 for the second ten-year period. On appeal, the Court of Appeal dismissed the appeal.

20 In the second appeal the respondents leased property from the appellants for a term of 21 years. For the first period of seven years, the rent was o117,340 a year. For the second and third periods of seven years, the respective rents were to be determined in accordance with a rent review clause which contained a definition of market rent and defined the review date as meaning, in respect of the second period, 8 April 1975. The procedure laid down for determining the market rent had to be initiated by a lessors notice specifying the proposed new rent. The notice had to be served between twelve and six months before the review date. The appellants gave the requisite notice in respect of the period

starting on 8 April 1975, within the time specified, but no agreement was reached either as to the new rent or upon a valuer to determine it. Accordingly, as provided by the lease, the appellants, on 25 June 1975, applied for the appointment of a valuer to the President of the RICS, who was unwilling to comply with that request without a ruling by the court that it was a valid and effective application since the rent review clause stipulated that the valuer must notify both landlord and tenant of his valuation not less than 14 days before the review date. On a summons issued by the appellants, Graham J held (i) that the time for the service of a lessors notice was of the essence of the contract, but that that stipulation had been complied with; (ii) that the time for applying for the appointment of a valuer was not of the essence; and (iii) that the market rent as determined by the valuer, if higher than o117,340 a year, would be recoverable retrospectively to the review date. On appeal, the Court of Appeal reversed that decision.

21 On the appellants appeals, it was held by the House of Lords, allowing both appeals, (1) that there was nothing in either of the leases in question to displace the presumption that strict adherence to the timetables specified in their respective rent review clauses was not of the essence of the contract, and that therefore the new rents should be determined in accordance with the procedures specified in the respective leases; and (2) that the rents fixed by the valuations would be payable retrospectively from the respective review dates. After a consideration of the development of the law of contract, stipulations as to time, and s 25 of the Supreme Court of Judicature Act 1873, Lord Diplock said, beginning at p 928 of the report:

Both in the Court of Chancery and in the courts of common law the rules that have been developed about particular stipulations not being of the essence of the contract or not being conditions precedent applied to synallagmatic contracts only. They did not apply to unilateral or if contracts, of which the example most

germane to the instant appeals is an option. As pointed out by Lord Denning MR in United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd [1968] 1 WLR 74, 81 where speaking of options to purchase real or personal property or to renew a lease, he said:

In point of legal analysis, the grant of an option in such cases, is an irrevocable offer (being supported by consideration so that it cannot be revoked). In order to be turned into a binding contract, the offer must be accepted in exact compliance with its terms. The acceptance must correspond with the offer.

Exact compliance with the terms of the offer in an if contract had been required in courts of equity as well as in courts of common law: see Weston v Collins (1865) 12 LT 4; Finch v Underwood (1876) 2 Ch D 310. A rationale of the distinction which was drawn between the two kinds of contracts in courts of equity is that equity was concerned with the performance of contracts into which parties had already entered. It did not force any person to enter into a contract with another.

22 Again I will refrain from repeating the more elaborate juristic analysis of the distinction between the two types of contract that I attempted in the United Dominions Trust case [1968] 1 WLR 74, 83-84. A more practical business explanation why stipulation as to the time by which an option to acquire an interest in property should be exercised by the grantee must be punctually observed, is that the grantor, so long as the option remains open, thereby submits to being disabled from disposing of his proprietary interest to anyone other than the grantee, and this without any guarantee that it will be disposed of to the grantee. In accepting such a fetter upon his powers of disposition of his property, the grantor needs to know with certainty the moment when it has come to an end.

23 My Lords, although a lease is a synallagmatic contract it may also contain a clause granting to the tenant an option to obtain a renewal of the lease upon the expiration of the term thereby granted. Such a clause provides a classic instance of an option to acquire a leasehold interest in futuro, and it is well established that a stipulation as to the time at which notice to exercise the option

must be given is of the essence of the option to renew. Although your Lordships have not been referred to any direct authority upon the converse case of a break clause granting to the tenant an option to determine his interest in the property and his contractual relationship with the landlord prematurely at the end of a stated period of the full term of years granted by the lease, there is a practical business reason for treating time as of the essence of such a clause, which is similar to that applicable to an option to acquire property. The exercise of this option by the tenant will have the effect of depriving the landlord of the existing source of income from his property and the evident purpose of the stipulation as to notice is to leave him free thereafter to enter into a contract with a new tenant for tenancy commencing at the date of surrender provided for in the break clause.

...

24 My Lords, I see no relevant difference between the obligation undertaken by a tenant under a rent review clause in a lease and any other obligation in a synallagmatic contract that is expressed to arise upon the occurrence of a described event, where a postponement of that event beyond the time stipulated in the contract is not so prolonged as to deprive the obligor of substantially the whole benefit that it was intended he should obtain by accepting the obligation.

25 So upon the question of principle which these two appeals were brought to settle, I would hold that in the absence of any contra-indications in the express words of the lease or in the interrelation of the rent review clause itself and other clauses or in the surrounding circumstances the presumption is that the timetable specified in a rent review clause for completion of the various steps for determining the rent payable in respect of the period following the review date is not of the essence of the contract.

26 We must also refer to the passage of Lord Fraser of Tullybelton. After considering the effect of s 41 of the Law of Property Act 1925 which provided that:

Stipulations in a contract, as to time or otherwise, which according to rules of equity are not deemed to be or to have become of the essence of the contract, are also construed and have effect at law in accordance with the same rules,

27 Lord Fraser said, at p 958, that:

I consider that s 41 should now be taken to mean what it appears to say and that the law is correctly summarized in the following passage from 9 Halsburys Laws of England (4th Ed) para 481:

The modern law, in the case of contracts of all types, may be summarized as follows. Time will not be considered of the essence unless: (1) the parties expressly stipulate that conditions as to time must be strictly complied with; or (2) the nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of the essence; or (3) a party who has been subject to unreasonable delay gives notice to the party in default making time of the essence.

28 We adopt that passage from Halsbury as the correct summary of the law. At this juncture we wish to emphasize that a stipulation of a time for the doing of an act is different from the substantive obligation to do the act, for example the obligations to convey property and to pay money for it. Whereas the promises to convey and to pay are correlative and concurrent, and breach of them involves a measurable loss, a time stipulation is a machinery aspect of a substantive obligation and breach of it merely involves a delay in performance which may involve no loss at all. This distinction between the substance on the one hand and the form or the machinery aspects on the other, of a contractual obligation, lies at the heart of equity's treatment of stipulations limiting the time within which a contract's obligations are to be performed.

29 With that distinction in mind, our starting point in this case is that time is not of the essence unless any of the exceptions referred to in Halsbury apply. In the present case, we only need to consider if the second exception, that is whether the subject matter or surrounding circumstances show that time is of the essence, is applicable. The other two exceptions are not applicable. We are not concerned with whether time was of the essence for the first part of cl 8B.

30 The second part of cl 8B provides:

In the event that the said replies are not satisfactory the purchaser shall be entitled to, by notice in writing served on the vendor within seven (7) days of receipt of such replies, rescind this agreement whereupon the vendor shall refund to the purchaser the deposit paid herein without interest and each party shall have no claim against the other whatsoever.

31 Our first observation is that the clause does not state expressly that rescission of the agreement owing to unsatisfactory replies cannot be made if the notice is served after seven days of receipt. Neither does it state the effect of any delay. For example, if as in this case, the replies are unsatisfactory, could the respondents sue for damages or could the appellants compel specific performance? The clause is silent.

32 The phrase time is of the essence must also be carefully considered. In this context, the dispute is whether time is of the essence for the respondents to serve a notice of rescission when the replies are unsatisfactory if the respondents so decide to rescind. This must be seen in the context of the rest of cl 8B and the agreement as a whole. The time frame to make the agreement subject to satisfactory replies is given. So is the time frame for rescission. Both these time frames relate to the machinery which is ancillary to the substance of the clause. One yawning gap in cl 8B in the timing was that no time frame was provided for the receipt of the replies. This could be because the time frame for that was

outside the control of the parties. It also could be because that time frame was not important to the parties or at least not important enough to state a period. This means that the parties were willing to allow a reasonable time for the receipt of the replies.

33 As stated above, the most substantive issue in cl 8B is the satisfactoriness of the replies. If, for example, the replies were not available till six months after the requisitions were sent, then even the completion date of 90 days from 11 July 1984 could not be complied with. The absence of a time frame for resolution of such a substantive issue in cl 8B is a sufficiently strong indication that the parties did not intend the period of seven days in which to rescind to be of the essence.

34 There were in fact two other clauses in the agreement which referred to a period of time. Clause 4 provided as follows:

(1) The purchase shall be completed and the balance of the purchase money shall be paid at the office of Messrs Shook Lin & Bok, 2 Battery Road #06-00, Malayan Bank Chambers, Singapore within ninety (90) days from the date hereof.

(2) If the purchase herein shall not be completed within the time stipulated by reason of the purchasers breach or default, the purchaser shall pay to the vendor interest on the balance of the purchase price at the rate of twelve per cent (12%) pa. The vendor may give to the purchaser notice in writing to complete the purchase and if the purchaser shall fail to comply with such notice within thirty (30) days from the date or receipt of such notice (time to be of the essence) the vendor may elect to treat this agreement as having been repudiated by the purchaser in which event the deposit of \$240,000 shall be forfeited to the vendor without prejudice to any other right or remedy available to the vendor at law or equity.

35 In cl 4(2), the 30-day period for compliance with the notice was clearly of the essence because it was expressly provided.

36 Then cl 11 provided as follows:

This agreement is subject to the purchaser obtaining the written consent of the lessor of the said property or such competent authority for the mortgage of the said property to a financial institution provided that the application for such consent is made within seven (7) days of the date notice is given by the vendors solicitors that the application under cl 10 hereof has been submitted and provided further that where consent to mortgage is granted subject to conditions precedent such as the conditions set out in appendix B hereof being satisfied the purchaser and its prospective mortgagee shall comply with all the conditions promptly. If for any reason, other than the non-compliance of the conditions stipulated as aforesaid, approval is refused the purchaser shall be entitled within seven (7) days of the receipt of such refusal to rescind this agreement and the vendor shall refund to the purchaser the deposit paid hereunder but without any interest and neither party shall be liable to the other for any loss whatsoever.

37 Clause 11 was similar to cl 8B in form in that there was no express statement that time was of the essence. It was also similar in that a seven-day period was given to rescind the agreement if the relevant consent was not obtained.

38 From cl 11 and cl 8B, two observations arise. The first is that the seven-day period for rescission in both clauses appear to have been chosen without regard to the condition subsequent preceding them. To determine whether replies are unsatisfactory or not is a more difficult and intricate task than to determine whether consent has been obtained. In the former case, a lot more checking is required unlike the latter. This further indicates to us that time is not of the essence in cl 8B. Indeed, if time were of the essence in cl 8B, the respondents would have had at most seven days to consider whether the replies were satisfactory. It would have been a brave solicitor who would have dared to rely on his own ability to calculate whether an area affected exceeded 5% of a total area. Reference to an expert on such matters would be more than just prudent, and it would be utterly unrealistic to expect a party to get an expert

opinion and refer to the clients and serve a notice in writing, all within seven days.

39 A second observation is that the two conditions subsequent in cl 8B and cl 11 go to the very heart of the contract that of getting substantially what the purchaser is buying and that of being able to pay for it. It would be terribly harsh to require strict compliance of seven days as opposed to strict compliance with the condition subsequent if the purchaser is not able to get what he bargained for.

40 We have also examined the analysis in the United Scientific Holdings case¹ of break clauses and whether cl 8B is a break clause thereby making time of the essence. In some ways, cl 8B resembles a break clause in that it gave the respondents an option to rescind the agreement. This made it akin to, for example, withdrawal clauses in charterparties and break clauses in leases. However, in this case, where the vendor intended that time was to be of the essence in a particular event, he provided for it expressly, eg cl 4. In our view, having regard to the interrelation of cl 8B and other clauses and in the surrounding circumstances, we were of the view that as a matter of construction the parties did not intend time to be of the essence in cl 8B.

41 Since we decided that time was not of the essence, there was no need for us to consider the question of waiver. Accordingly, we dismissed the appeal with costs.

42 **Outcome:**

Chan Sek Keong J
L P Thean J
Yong Pung How CJ

Cheong Yuen Hee and Tan Kay Khai (Chua Hay & Wee) for the
appellants
Goh Aik Chew (Goh Aik Chew & Co) for the respondents
