IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1992] SGCA 55

CA 53/1989

Between

Lee Kai Corporation (Pte) Ltd

… *Appellant*

And

Chong Gay Theatres Ltd

… *Respondent*

GROUNDS OF DECISION

Contract — Contractual terms — Express terms; Land — Sale of land — Conditions of sale

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Lee Kai Corporation (Pte) Ltd v Chong Gay Theatres Ltd

[1992] SGCA 55

CA 53/1989
Rajendran S J; L P Thean J; Yong Pung How CJ
02 September 1992

1 **The facts**

2 Cur Adv Vult

3 Chong Gay Theatres Ltd (`Chong Gay`), the respondents in this appeal, were at all material times the developers of a commercial building known as Golden Mile Tower (`the building`) at Beach Road; the development started in late 1971 or early 1972 and was completed in August 1975 or thereabout. While the construction of the building was in progress, Chong Gay on 5 December 1973 entered into five sale and purchase agreements (`the sale agreements`) with Collin Corporation Pte Ltd, which subsequently changed their name to Lee Kai Corporation Pte Ltd (`Lee Kai`), the appellants in this appeal, for the sale to Lee Kai of five floors of the building, namely, the fifth, thirteenth, eighteenth, nineteenth and twentieth floors. Each floor consists of nine office units and the sale price of each floor was $760,000. Except for the description of the premises therein all the sale agreements contained identical terms and conditions. The purchase price under cl 4 of each sale agreement was to be paid as follows:

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> (i) 20% thereof on signing the sale agreement;
>
> (ii) 75% thereof within 14 days after production by Chong Gay of `the certificate of fitness for occupation whether temporary or permanent` issued by the competent authority; and
>
> (iii) the balance of 5% on the issue of nine subsidiary strata certificates of title to the nine office units comprised in the sale agreements and the transfer thereof to Lee Kai.

4 In accordance with the provision of cl 4, 20% of the purchase price for each floor was paid by Lee Kai to Chong Gay on or before the execution of the sale agreements.

5 On the following day, 6 December 1973, the same parties entered into five supplemental agreements (`the supplemental agreements`) varying certain terms of the five sale agreements respectively. Essentially the supplemental agreements provided for the immediate payment of the second instalment, namely, the 75% of the purchase price to Chong Gay, notwithstanding that there was no production of the certificate of fitness for occupation as required under cl 4(b) of the sale agreements. This instalment was paid by Lee Kai to Chong Gay upon the signing of the supplemental agreements.

6 The temporary occupation licence for the building was issued by the competent authority on 11 August 1975 and possession of all the premises comprised in the sale agreements was given to Lee Kai sometime thereafter. The certificate of fitness for occupation was issued about three years later, namely, on 14 June 1978. Subsequently, a dispute arose between Lee Kai and Chong Gay. Lee Kai claimed that under cl 2 of the supplemental agreements Chong Gay undertook to obtain `the certificate of fitness for occupation from the competent authority` on or before 31 December 1974 and as such certificate was obtained only on 14 June 1978, Chong Gay were liable to pay liquidated damages calculated at the rate as provided in cl 2 for the period from 1 January

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1975 to 13 June 1978 amounting to a total sum of $1,494,243.25, which after deducting a sum of $380,000 paid on behalf of Chong Gay, came to $1,114,24.025. On 3 May 1979 Lee Kai instituted an action in Suit No 1304 of 1979 (`first action`) against Chong Gay claiming the sum of $1,114,243.25 as the balance of the liquidated damages. Chong Gay resisted the claim and, among other things, relied on the issue of the temporary occupation licence on 11 August 1975 as the certificate of fitness for occupation for the purpose of cl 2 of the supplemental agreements. They conceded, however, that, if at all they were liable to pay to Lee Kai liquidated damages, this should only be for the period from 1 January 1975 to 11 August 1975.

7 While the first action was pending, Lee Kai on 21 November 1980 commenced another action in Suit No 3678 of 1980 (`second action`) against Chong Gay claiming specific performance and damages for breach of contract. They alleged that Chong Gay had failed or refused to obtain the subsidiary strata certificates of titles relating to the office units comprised in the sale agreements and had failed or refused to complete the sale of the premises as soon as reasonably possible or within a reasonable time. Chong Gay resisted the claim. In their defence Chong Gay averred, inter alia, that the time for issue of the subsidiary strata certificates of title was not specifically stipulated in the sale agreements and accordingly was not of the essence of the contract, and that possession of the premises had been delivered to Lee Kai and as beneficial owners Lee Kai were able at all times to deal with the premises as if the certificates of titles had been issued. Chong Gay also averred other facts or circumstances (which it is unnecessary for us to set out in any detail) and sought to justify or explain the time taken in applying for and obtaining the subsidiary strata certificates of title to the premises and the delay in transferring the premises to Lee Kai and on those grounds denied that they were in breach of

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contract as alleged by Lee Kai. Subsequently, Chong Gay obtained leave of the court to amend the defence by adding a further and alternative defence that Lee Kai were not entitled to the relief of specific performance on the ground that they themselves were not ready and willing to fulfil their obligations under the sale agreements, namely, their obligations to pay monthly maintenance fees and service charges under cl 13 of the sale agreements.

8 The disputes between the two parties were not confined to these two actions. Further disputes between them ensued. Lee Kai failed or refused to pay to Chong Gay maintenance fees and service charges under cl 13 of the sale agreements, and on 21 July 1982 the latter instituted proceedings in Suit No 2966 of 1982 (`third action`) against Lee Kai claiming the sum of $504,380.70, later amended to $503,093.70, being the total amount of arrears of maintenance fees and service charges under cl 13 of the sale agreements. Lee Kai disputed this claim and their main defences (so far as relevant for the purpose of this appeal) were: (i) that their liability to pay maintenance fees and service charges was based on the nett rentable area as ascertained from the strata title plans of the premises and upon the issue of the strata title plans the amounts of maintenance fees and service charges were to be adjusted accordingly and any overpayments were to be paid to Lee Kai or be credited to their account, but in breach of the sale agreements Chong Gay had refused and continued to refuse to adjust the maintenance fees and service charges; (ii) that Chong Gay had in breach of the sale agreements carried out the maintenance of the common parts of the building and the services of the lifts `negligently, badly and inefficiently and without skill and care and in an improper manner`, and (iii) that Lee Kai had paid the sum of $432,738.80 for maintenance and services rendered and denied liability to pay any further sum on the ground that they had suffered damage by reason of the negligent, bad and inefficient maintenance and services

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performed by Chong Gay. Subsequently, Lee Kai amended their defence by adding a counterclaim for $91,306.49; but the basis for this counterclaim is unclear.

9 The three actions were consolidated by an order of court made on 20 March 1987 and were heard together before Sinnathuray J. At the conclusion of the hearing the learned judge gave judgment as follows. With regard to the first action he dismissed Lee Kai`s claim subject only to the admission made by Chong Gay in respect of which credit was to be given for the payment of $380,000 as admitted in the statement of claim. In respect of the second action he dismissed Lee Kai`s claim. As for the third action he allowed the claim and entered judgment for Chong Gay in the sum $503,093.70 and dismissed Lee Kai`s counterclaim. He awarded to Chong Gay costs in all the three actions. Against the decision of the learned judge this appeal has been brought.

10 **First action**

11 We propose to consider the issues raised in the appeal with reference to each action separately. The issues raised with respect to the first action are as follows:

> (i) whether upon the true construction of cl 2 of the supplemental agreements the temporary occupation licence for the building issued by the competent authority comes within the meaning of `certificate of fitness for occupation` in cl 2 of the supplemental agreements and therefore upon the issue thereof the liability of Chong Gay to pay liquidated damages under that clause ceased;
>
> (ii) if the answer to the above issue is in the affirmative, whether in ordering that credit be given to Chong Gay for the payment of $380,000 made on their behalf to Lee Kai the court below, by implication, ordered that Lee Kai pay to Chong Gay the sum of $116,519.46.

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12 The first issue turns on the true construction of cl 2 of the supplemental agreements. Before we embark on the construction of this provision, it is helpful to look at the matrix of facts in which the sale agreements and the supplemental agreements were made, as the surrounding circumstances including `the genesis and aim of the transaction` are relevant in construing the agreements: see **Prenn v Simmonds** [1971] 1 WLR 1381 at pp 1384-1385. At or about the time of the execution of the sale agreements the construction of the Golden Mile Tower was well advanced and only two or three storeys remained to be completed. Prior to that, in November 1973, negotiations for the sale and purchase of the premises were conducted mainly between Tan Geok Tee, the chairman of Lee Kai, and Ng Eng Kiat, the managing director of Chong Gay. They agreed on the price and also agreed that 95% thereof be paid. It was not in dispute that the first instalment of the purchase price, namely, 20% thereof, was paid on or before the execution of the sale agreements. Tan Geok Tee and Koh Seng Leong, a director of Chong Gay, attended at the office of the firm of solicitors acting for both parties to sign the agreements. Upon the advice of the solicitor, who drafted the sale agreements, the term as to the immediate payment of the 95% was not provided in the sale agreements; instead the sale agreements provided for payment of 20% on the execution thereof, 75% upon the issue of `certificate of fitness for occupation whether temporary or permanent` and the balance of 5% on completion. This provision did not accord with the agreement reached between Ng Eng Kiat and Tan Geok Tee. Nonetheless, Koh Seng Leong and Tan Geok Tee signed the sale agreements at the solicitor`s office on that day, that is, 5 December 1973, and immediately thereafter Tan Geok Tee had a discussion with Ng Eng Kiat, and following that Tan Geok Tee instructed another firm of solicitors to draw up further agreements. In consequence, the supplemental agreements were drawn up and were executed at the office of Ng Eng Kiat on the following day, 6 December 1973, and thereupon the 75% of the

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purchase price was paid to Chong Gay. Looking at these surrounding circumstances it seems to us that the `genesis and aim` of the supplemental agreements was essentially to provide for the immediate payment of the 75% of the purchase price which was not provided for in the sale agreements.

13 We now turn to consider cl 2 of the supplemental agreements. Plainly cl 2 cannot be read and constructed in isolation but in the context of the sale agreements and the supplemental agreements. For this purpose, the relevant provisions are cll 4 and 18 of the sale agreements and cl 1 of the supplemental agreements. Clause 4 and cl 18 provide respectively as follows:

> (4) The purchase price shall be paid by the purchaser to the vendor by the progress payments and at the times following, that is to say:
>
> (a) Immediately upon the signing of this agreement a sum equivalent to 20% of the purchase price such sum to include the booking fee.
>
> (b) Within fourteen (14) days after production by the vendor of the certificate of fitness for occupation, whether temporary or permanent and issued by the competent authority the purchaser shall pay 75% of the purchase price. The balance of 5% shall be paid to the vendor when the said subsidiary strata certificates of title in respect of the said office are issued and the transfers thereof to the purchaser are effected.
>
> (18) The vendor undertakes to produce the issue of the relevant certificate of fitness for occupation (whether temporary or permanent) of the Chief Building Surveyor in respect of the said office on or before 31 December 1974 and will at its own cost and expense comply with all requirements of the Chief Building Surveyor which are conditions precedent to the issue of such certificate of fitness and undertakes to produce such certificate of fitness to the purchase [sic] when issued. If such certificate of fitness is not issued on or before 31 December 1974, the vendor shall pay the purchaser interest on such sums paid towards or in respect of the said office at the rate of 12% per annum calculated from 1 January 1975 up to date of the issue of such certificate of fitness. The vendor and its workmen and agents shall be entitled (if necessary) at any time after delivery of vacant possession of the said office to the purchaser and

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> prior to the issue of the said certificate of fitness to make such alternation and or addition to the said office as may be required by the Chief Building Surveyor and the purchaser shall allow them access into the said office at all reasonable times for the purpose.

14 Clause 1 and cl 2 of the supplemental agreements provide as follows:

> (1) 75% of the purchase price shall be paid to the vendor upon the signing of this agreement, the receipt whereof the vendor hereby acknowledges notwithstanding that there is no production of the certificate of fitness for occupation from the competent authority of the said office as required by cl 4(b) of the said agreement. The balance of 5% of the purchase price shall be paid to the vendor upon the issue of the nine (9) subsidiary strata certificates of title in respect of the said office and the transfers thereof to the purchaser are effected.

> (2) In consideration of the payment aforesaid, the vendor undertakes to obtain the certificate of fitness for occupation from the competent authority on or before 31 December 1974. If the vendor fails to obtain the certificate of fitness for occupation on or before the said date, the vendor shall pay to the purchaser liquidated damages calculated from day to day at the rate of twelve per cent (12%) per annum based on the sum paid by the purchaser until the certificate of fitness for occupation is issued.

15 In both cll 4(b) and 18 we find the phrase `certificate of fitness for occupation whether temporary or permanent` (except that in cl 18 the words `whether temporary or permanent` are in parenthesis). It is accepted by both parties that the competent authority does not, and did not at the material time, issue such certificates as `temporary certificate of fitness for occupation` and `permanent certificate of fitness for occupation`, but `temporary occupation licence` (`TOL`) and `certificate of fitness for occupation` (`COF`). It is also accepted that in relation to a building which has been completed the practice of the authority is, and was at the material time, to issue, first, the TOL and, later, after a lapse of some years, the COF. It is common ground that, in the context

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of the sale agreements, a `temporary` certificate of fitness for occupation and a `permanent` certificate of fitness for occupation mean TOL and COF respectively. Therefore, the words `certificate of fitness for occupation, whether temporary or permanent` in cll 4(b) and 18 mean TOL or COF.

16 We turn next to cll 1 and 2 of the supplemental agreements. Clause 1 provides for an immediate payment of 75% of the purchase price by Lee Kai `notwithstanding that there is no production of the certificate of fitness for occupation ... as required by cl 4(b)` of the sale agreements. It is true that in cl 1 the words `whether temporary or permanent` are not present after the words `certificate of fitness for occupation`. But it seems to us that such words are not really necessary as the clause refers to the certificate `as required by clause 4(b)` and the certificate as required by cl 4(b) is a `certificate of fitness for occupation whether temporary or permanent`. It is clear beyond peradventure that the words `certificate of fitness` in cl 1 of the supplemental agreements means `certificate of fitness for occupation whether temporary or permanent`, ie TOL or COF.

17 The most crucial term in the supplemental agreements is undoubtedly cl 1. That was intended to vary cl 4(b) of the sale agreements as regards the payment of the 75% of the purchase price; it provides what the parties had agreed and intended but had not been provided for in cl 4(b). Clause 2 is merely a follow through from cl 1. The first sentence of that clause refers to the payment of the 75% and states that `in consideration of the payment aforesaid, [Chong Gay] undertakes to obtain the certificate of fitness for occupation` on or before 31 December 1974. In that context, the `certificate of fitness for occupation` refers to and means the same `certificate of fitness for occupation` mentioned in cl 1, ie the certificate of fitness for occupation whether temporary or permanent as required by cl 4(b) of the sale agreements. The second sentence of cl 2 provides for the consequence that follows should Chong Gay fail to

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obtain `the certificate of fitness for occupation` on or before `the said date`. The `certificate of fitness for occupation` referred to in the second sentence means also the same certificate referred to in the first sentence. Hence, consistent with cl 1, cl 2 of the supplemental agreements also does not have the words `temporary or permanent` after `certificate of fitness for occupation`. But, in the context of cl 1, the words `certificate of fitness for occupation` (wherever they appear) in cl 2 have the same meaning as they have in cl 1. It is true that thus construed cl 2 repeats, in substance, what has been provided in cl 18 of the sales agreements and is therefore otiose. This is understandable, as the solicitor who drafted the supplemental agreements was not the same solicitor who drafted the sale agreements, and since he drafted the supplemental agreements on a fairly urgent basis he might not have acquainted himself fully with the contents of the sale agreements. In our opinion, having regard to the factual matrix in which the supplemental agreements were prepared and executed and in the context of cll 4 and 18 of the sale agreements and cl 1 of the supplemental agreements, the words `certificate of fitness for occupation` in cl 2 have the same meaning as they have in cl 1 and refer to the certificate as required in cl 4(b) of the sale agreements, namely, `certificate of fitness for occupation whether temporary or permanent`, ie TOL or COF. If it was the intention of the parties that `the certificate of fitness for occupation` in cl 2 should mean only COF and not TOL also, then no doubt the word `permanent` would have been inserted immediately before these words.

18 We agree with the learned judge`s view that this construction of cl 2 of the supplemental agreements is practical and gives commercial purpose to that clause. Upon the issue of the TOL, possession of the premises could be given to Lee Kai, and it was given to Lee Kai sometime thereafter, and it makes good business sense that Lee Kai should be entitled to liquidated damages if there

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was a delay in the delivery of vacant possession caused by the failure to obtain the TOL.

19 In our judgment, upon the true construction of cl 2 of the supplemental agreements the temporary occupation licence issued by the competent authority for the building on 11 August 1975 comes within the meaning of the words `certificate of fitness for occupation` in that clause. Accordingly, under cl 2 Chong Gay was liable to pay liquidated damages at the rate therein provided for the period from 1 January 1975 to 11 August 1975 being the date of the issue thereof.

20 The second issue arose from the order made by Sinnathuray J when he dismissed the claim of Lee Kai. According to the minutes of the learned judge, the order he made was as follows:

> *Plaintiffs` claim is dismissed subject to para 6 of the defence as regards which credit must be given to the defendants as per para 5 of the statement of claim.*

21 Mr Jimmy Yap for Lee Kai said that the effect of the order is that Lee Kai would have to pay to Chong Gay the sum of $116,519.46 being the difference between the sum of $380,000 paid on behalf of Chong Gay and the sum of $263,480.54, the amount of liquidated damages payable by Chong Gay for the period 1 January 1975 to 11 August 1975. This was not disagreed to by Mr Sia for Chong Gay. Apparently that was also the view or understanding of the counsel appearing for the parties at the time the order was made. Hence, when the judgment was extracted and perfected it contained, inter alia, the following term:

> *The plaintiffs do pay to the defendants the sum of $116,519.46 due after giving credit to the defendants of the sum of $380,000 in the pleadings mentioned.*

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22 To consider whether the learned judge made or intended to make this as a term of the judgment, it is necessary to examine the pleadings and the evidence adduced in relation to the payment of $380,000. Lee Kai expressly pleaded in para 5 of the statement of claim that on 10 August 1976 Chong Gay caused to be paid to Lee Kai the amount of $380,000 to account of the liquidated damages. Lee Kai therefore had accepted this payment as having been made by Chong Gay, and they gave credit for this amount in their claim with the result that they claimed only for the balance alleged to be due. Oddly enough in their defence Chong Gay did not expressly accept this payment of $380,000 as having been made on their behalf. They averred by para 6 thereof that if Chong Gay were liable for liquidated damages they were liable only for the period from 1 January 1975 to 11 August 1975. If they and those advising them were minded to examine the statement of claim and consider their liability for the amount payable for this period, it would at once become apparent that there was an amount of $116,519.46 overpaid on their behalf which they could have counterclaimed. Unfortunately, there was no counterclaim for this amount by Chong Gay.

23 With regard to the evidence it was not disputed that the amount of $380,000 was paid by Ng Eng Kiat out of his own funds; he was at the time the chairman of Chong Gay. His evidence was that at or about that time Tan Geok Tee (the chairman of Lee Kai) often telephoned him pressing for payment and alleging that he (Tan) could not get in touch with Lim Djit Sun, the managing director of Chong Gay. Because of the constant pressures from Tan and also because of `old friendship` he thought he could come out with some money to pay Tan so that `the matter could be settled once and for all`; accordingly, he paid the sum of $380,000 to Tan. According to Tan, when the payment was made, Lim Djit Sun was present. Ng Eng Kiat, however, had not claimed the

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amount from Chong Gay, though he `harboured a hope` that the company would pay him one day. He also said that he did not make the payment for Chong Gay.

24 On the basis of the pleadings and the evidence Mr Yap submitted that the learned judge erred in ordering Lee Kai to give credit to Chong Gay in respect of that payment with the result that Lee Kai would have to pay to Chong Gay the sum of $116,519.46, notwithstanding that Chong Gay did not in their pleadings or at the trial claim it to be theirs. We are unable to agree with Mr Yap; we do not think that the learned judge was in error. First, Lee Kai had accepted the payment of $380,000 as having been made on behalf of Chong Gay and had given credit for such payment in their claim. Lee Kai cannot now resile from their statement of claim and say that such payment was not made on behalf of Chong Gay. Secondly, we do not think it was intended by the learned judge that a credit of $380,000 be given to Chong Gay so as to result in Lee Kai repaying to Chong Gay the excess amount of $116,519.46. We think that what the learned judge meant by the minute of his order was this: on the claim for liquidated damages, Chong Gay in para 6 of their defence admitted liability for the amount covering the period 1 January to 11 August 1975, and giving credit for the amount paid on behalf of Chong Gay as admitted in para 5 of the statement of claim, Lee Kai`s claim had been wholly satisfied and ought to be dismissed. It is manifestly clear to us that the learned judge did not intend to order, and did not in any way order, Lee Kai to pay to Chong Gay the sum of $116,519.46 or any part of it. It is unfortunate that it did not occur to counsel then representing the parties that the learned judge could not have intended to make such a term in the judgment; they should have gone before the learned judge and sought a clarification thereof before extracting and perfecting the judgment. Even if counsel had thought that the learned judge did intend to make such a term in the judgment it was still open to them, before the judgment was

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extracted and perfected, to go before him and show that on the bases of the pleadings and the evidence such a term could not properly be made. Accordingly, in our judgment, para 2 of the judgment dated 15 June 1989 requiring Lee Kai to pay to Chong Gay the sum of $116,519.46 was obviously inserted in error and ought to be expunged.

25 **Second action**

26 In the second action Lee Kai claimed specific performance of the sale agreements as varied by the supplemental agreements and/or damages for breach of contract, and the main issues before us are: (i) whether Chong Gay are obliged under cll 11 and 12 of the sale agreements to obtain, within a reasonable time, the subsidiary strata certificates of title to the premises comprised in these agreements and upon the issue of the subsidiary strata certificates of title, within a reasonable time, to transfer the premises to Lee Kai; and (ii) if so, whether Chong Gay have failed to discharge these obligations. Clauses 11 and 12 provide as follows:

> (11) The vendor shall at its own cost and expense:
>
> (a) obtain the approval of the competent authority under section 9(3) of the Planning Act (Cap 279, 1970 Ed) and
>
> (b) obtain the said nine subsidiary strata certificates of title for the separate disposal of the said office but any delay in obtaining such approval shall not be a ground for any delay by the purchaser in the payment on due date of any of the progress payments of the purchase price hereinbefore referred to in clause 4 hereof and the interest thereon (if any).
>
> (12) The transfers of the said office to the purchaser shall be executed by the vendor as soon as the nine subsidiary strata certificates of title have been issued for the said office.

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27 Both these clauses do not provide a specific time within which Chong Gay were to obtain the subsidiary strata certificates of title to the premises and to execute the transfers thereof to Lee Kai. That being so, Chong Gay under cl 11 are obliged to obtain within a reasonable time (a) approval for subdivision under s 9(3) of the Planning Act and (b) the subsidiary strata certificates of title, and under cl 12 are obliged, within a reasonable time, upon the issue of the subsidiary strata certificates of title to execute the transfers of the premises to Lee Kai. The question, therefore, is whether in the events that had happened Chong Gay have discharged their obligations under these provisions.

28 In relation to this question the relevant primary facts are these. The sales agreements were entered into on 5 December 1973. The TOL for the building was obtained on 11 August 1975 and the COF on 14 June 1978. It was not disputed that after the issue of the TOL application could be made to the competent authority for approval for subdivision of the building under s 9(3) of the Planning Act. However, Chong Gay did not appear to have done anything towards applying for such approval after the issue of TOL. Only in March 1980 did they appoint a surveyor, Anthony Lim, to prepare the necessary survey plans and apply for approval for subdivision of the building and the application was submitted only on 31 March 1981 or thereabout, and that was nearly six years after the issue of TOL. No explanation for such long lapse of time or delay was given by or on behalf of Chong Gay. The irresistable inference is that Chong Gay for some unexplained reason had been extremely dilatory. The approval for subdivision was obtained on 11 November 1981. Thereafter, another one year had elapsed before Chong Gay submitted strata title plans to the Chief Surveyor for approval, namely, on 18 November 1982. The plans were finally approved on 7 April 1983 and the subsidiary strata certificates of title were issued on 29 July 1983. Taking the date of the execution of the sale agreements as the

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material date, it took about nine years and eight months for Chong Gay to obtain the subsidiary strata certificates of title. In these circumstances, the conclusion is inescapable that Chong Gay have been guilty of inordinate and unreasonable delay in obtaining the subsidiary strata certificates of title, and in our opinion they have committed a breach of their obligation under cl 11 of the sale agreements. They have also committed a breach of their obligation under cl 12. Up to the date of hearing of this appeal Chong Gay have still not executed the transfers of the premises to Lee Kai. Hence, unless there is some valid defence to the claim, specific performance ought to be granted to Lee Kai.

29 There is only one defence raised by Chong Gay that merits serious consideration, and it is this: Lee Kai have not fully performed their obligations under the sale agreements and are therefore not entitled to the decree of specific performance. They alleged that Lee Kai had failed or refused to pay maintenance fees and service charges under cl 13 of the sale agreement. Clause 13 reads as follows:

> (13) Until the provision of lift services and maintenance of the common parts of the said building are taken over by the management corporation to be set up under the Land Titles (Strata) Act 1970, the purchaser shall as from the date stated by the vendor that possession of the said office may be taken pay the vendor the monthly maintenance fee and service charge of 30 cents per square foot calculated at the nett rentable area. The purchaser shall also as from such date be liable for all property tax and other outgoings in respect of the said office and shall on demand reimburse the vendor for such property tax and other outgoings as may have been paid by the vendor. Provided …

30 This allegation of Chong Gay was not without any basis. Lee Kai have indeed failed or refused to pay the maintenance fees and service charges under cl 13 - before us only the quantum is in issue and we shall come to it in a

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moment. There was therefore a breach of the sale agreements by Lee Kai and the question is whether such breach disentitles them to the relief of specific performance.

31 Before us Mr Yap submitted that cl 13 is not a condition precedent to the completion of the sales and that cl 13, on the one hand, and cll 11 and 12, on the other, are not inter-dependent obligations. Lee Kai were ready and willing to fulfil the obligations necessary to the completion, that is, the payment of the balance of the purchase money, and upon payment thereof they should be entitled to the transfer of the premises. He referred us to two cases, ***Measures Brothers Ltd v Measures*** 2 and ***Australian Hardwoods Pty v Commissioner for Railways*** 3 and further submitted that not every breach of a contractual obligation would disentitle Lee Kai to specific performance of the contract. The breach must be one which would render it `inequitable` to grant Lee Kai such relief and it would be inequitable (i) if the breach relates to the non-performance of a vital obligation or (ii) if the breach is one which is not severable from the obligation sought to be enforced. The payment of the maintenance fees and service charges under cl 13 of the sale agreements is neither the `consideration` for Chong Gay`s obligation to complete the sale under cl 12 nor something which must be performed before Chong Gay`s obligation to complete the sale under cl 12 can be specifically enforced.

32 In both ***Measures Brothers Lt d*** 2 and ***Australian Hardwoods*** 3 the courts refused to grant equitable reliefs - in the first case, injunction, and in the second case, specific performance - on the ground of breach of contract on the part of the party seeking the relief. But the reasoning and the analyses in the judgments in these two cases are helpful. In ***Measures Brothers Ltd*** 2 the defendant entered into a service contract with the plaintiff company whereby he agreed to hold office as a working director of the plaintiff company for seven

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years at a certain salary and covenanted that while he held that office and within seven years after ceasing to hold such office he would not carry on or be engaged or concerned or interested in a business in competition with that carried on by the plaintiff company. About six years later, a receiver and manager of the plaintiff company`s undertaking was appointed and subsequently an order was made for the compulsory winding up of the plaintiff company. The service of the defendant was terminated by the receiver and manager before the winding up and thereafter the defendant commenced to carry on his own business and the receiver commenced an action against him seeking to restrain him from carrying on that business in competition with the company. Based on the express terms of the agreement, the Court of Appeal, by a majority, held that the consideration for the covenant not to compete was the employment of the defendant as a director and payment of his remuneration and since the plaintiff company could not continue to employ him it was not entitled to enforce that covenant. This is abundantly clear from the judgment of Cozens-Hardy MR where he said, at p 261:

> *I do not think it necessary to consider whether the mutual obligations contained in the agreement of July 1908, are strictly interdependent, although my impression is that they are so. I prefer to base my judgment upon the ground that the plaintiffs, who are seeking equitable relief by way of injunction, cannot obtain such relief unless they allege and prove that they have performed their part of the bargain hitherto and are ready and able also to perform their part in the future. The consideration which the defendant was to receive for his covenant from the company was (1) the position of a director of the company; (2) the salary of 1000 **l** a year; and (3) a contingent share of the profits. The plaintiffs have not given, and cannot in future give, the defendant this consideration. The contract on their part has been broken.*

33 Kennedy LJ said, at pp 260-261:

> *If, having contracted with another, I find myself incapacitated by circumstances from performing, or continuing to perform, my contract, the fact that the non-performance arises from*

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misfortune, and not either through any negligence or wilful refusal on my part, does not shield me from the legal consequences, unless I have either expressly or impliedly bargained in my contract not to be liable for non-performance, except where it arises from negligence or wilful default. I see no ground for reading into the text of the present contract any such shielding stipulation. It is plain that the continuance of the director in his office was the essential consideration for the defendant`s covenant. I incline, indeed, to the opinion, although it is not necessary so to decide, that the displacement of the defendant in the present instance may be regarded as having been caused by an actual default of the plaintiff company. ***Australian Hardwoods*** *[1961] 1 WLR 425 was an appeal to the Privy Council from the decision of the Supreme Court of New South Wales. There, the plaintiffs entered into an agreement with the defendant, the Commissioner of Railways, New South Wales, who held an occupation permit and a sawmill licence and who was entitled to occupy the land and operate a sawmill. By that agreement the plaintiffs agreed to take over the sawmill operations on certain terms. The agreement contained, among other things, (i) a provision enabling either party to determine the agreement upon giving three months` notice in the event of a breach of the agreement by the other, and (ii) a provision giving an option to the plaintiffs to purchase the sawmill, and in the event of the plaintiffs exercising the option and purchasing the sawmill the Commissioner was required at the instance of the plaintiffs to request the Forestry Commission to transfer the occupation permit and sawmill licence to them and to continue the supply of milling timber to them. Subsequently, the Commissioner gave three months` notice to the plaintiffs to terminate the agreement on the ground of breaches of the agreement by the plaintiffs, but between the date of the notice and the date of its expiry, the plaintiffs paid moneys to the Commissioner in purported exercise of the option and called upon the Commissioner to request the Forestry Commission to transfer the occupation permit and sawmill licence and to continue the supply of timber. The plaintiffs initiated an action against the Commissioner claiming, inter alia, declarations and specific performance. At the trial it was conceded that the plaintiffs had committed a number of breaches of obligations under the agreement. Before the Privy Council it was assumed that the plaintiffs had exercised the option and purchased the sawmill and the only question was whether the plaintiffs were entitled to specific performance of the obligation by the Commissioner to forward to the Forestry Commissioner the request provided in the agreement. It was held, inter alia, that the plaintiffs were not entitled to specific performance as they had committed breaches of their obligations at the time of the notice of termination and the breaches had resulted in a termination of the agreement. Lord*

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> *Radcliffe delivering the judgment of the Board said, at pp 432-433:*
>
> *A plaintiff who asks the court to enforce by mandatory order in his favour some stipulation of an agreement which itself consists of interdependent undertakings between the plaintiff and the defendant cannot succeed in obtaining such relief if he is at the time in breach of his own obligations. The case of* ***Measures Brothers Ltd v Measures*** *[1910] 2 Ch 248 is a familiar instance of this principle. The appellant in this case has not been able to deny or, at any rate, has not denied that it was in default in several respects at the time when the respondent served upon it the notice of termination. Secondly, where the agreement is one which involves continuing or future acts to be performed by the plaintiff, he must fail unless he can show that he is ready and willing on his part to carry out those obligations, which are, in fact, part of the consideration for the undertaking of the defendant that, the plaintiff seeks to have enforced. Here the appellant could never show that it was ready and willing to perform its share of the agreement of 1956; for its breaches had brought upon it the notice of determination which precluded it for good from doing anything more in furtherance of that agreement.*

34 In the old case of ***Green v Low*** 4 the owner of a plot of land agreed to grant a lease of the land to one AB as soon as the latter had erected a villa thereon, and it was stipulated that should AB fail to perform the agreement, the agreement would be void and the owner might re-enter. It was also agreed that AB was to insure the villa in a particular way and he was to have an option of purchasing the land within two years. AB erected the villa but insured it with a wrong insurer and in the wrong name. No lease was granted but within the stipulated period AB exercised the option and tendered the purchase price for the land. The owner refused to convey the land insisting that the agreement had become void. The owner initiated proceedings at law to recover possession and AB filed a bill for specific performance of the contract. It was held by Sir John Romily MR that on the true construction of the contract the right to purchase was independent of the right to a lease and he decreed specific performance.

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35 Reverting to the instant case, we agree with the contention of Mr Yap that on the true construction of cll 11, 12 and 13, cl 13, on the one hand, and cll 11 and 12, on the other, are not inter-dependent, and the payment of maintenance fees and service charges under cl 13 is not a condition precedent to or the `consideration` for obtaining the subsidiary strata certificates of title under cl 11 and the completion of the sale under cl 12. The `consideration` for cll 11 and 12 is essentially the payment of the purchase price, of which 95% has been paid, and Lee Kai were and are ready and willing to pay the remaining 5%. The `consideration` for payment of maintenance fees and service charges under cl 13 is, by its express terms, the provision of lift services and maintenance of the common parts of the building. In our judgment, the failure or refusal by Lee Kai to pay any maintenance fees and service charges under cl 13 does not disentitle them to the decree for specific performance; such decree ought to be granted.

36 Lee Kai also claimed damages for breach of contract. Sinnathuray J found that Lee Kai had not suffered any loss or damage, though that finding was made in relation to his disposal of the claim for specific performance. He based his finding on the fact that Lee Kai had had full enjoyment of the premises from the time they took possession thereof after the TOL was issued. The learned judge also found that Lee Kai had not made good their allegation that they were unable to mortgage the premises without the subsidiary strata certificates of title to the premises; and that no evidence was adduced by them in this regard. As a matter of law, they certainly could create an equitable mortgage of the premises but whether such mortgage would be acceptable to any bank or financial institution is a separate matter on which Lee Kai must adduce evidence. Before us Mr Yap submitted that the learned judge has misdirected himself on the ground that before him the proceedings were conducted on the footing, inter

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alia, that damages, if any, would be the subject of inquiry and it was for that reason Lee Kai did not adduce evidence of damage or loss suffered. In his submission, it would be unfair for a judge to make a finding when the parties before him have agreed that that finding is to be made on a separate occasion.

37 On examining the record, we do not find anything that truly substantiates what Mr Yap said. Nowhere have we found that the parties have agreed, or have informed the learned judge that they had agreed, that damages, if any, would be the subject of an enquiry; and it does not appear to us that the proceedings were conducted on that footing. Even if they had agreed they should seek a clear direction from the court. A party in pursuing a claim for damages must be prepared at the trial, unless the court otherwise directs, to establish both liability and quantum. The learned judge has certainly made no such direction in this case.

38 Contrary to what Mr Yap said, in reviewing the evidence we note that Ching Mun Fong, a director of Lee Kai, was cross-examined by counsel for Chong Gay at some length on the loss Lee Kai had in mind and in response to questions she gave evidence with reference to the loss and extra costs involved in respect of property tax and income tax. She then referred to the `cash flow` and said that that was `the biggest loss`. However, nothing was produced by her to substantiate her assertions. Her evidence on the alleged loss suffered by Lee Kai was totally unconvincing. The evidence of Ching Mun Fong must have been considered by the learned judge and must have been found to be wholly unsatisfactory. In our judgment, the learned judge was justified in coming to the finding, as he did, that Lee Kai had not suffered any loss. They had not proved any.

39 **Third action**

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40 We now turn to the issues raised in the third action and they concern the arrears of maintenance fees and service charges under cl 13 of the sale agreements. That clause provides clearly the obligation of Lee Kai to pay maintenance fees and service charges at the rate of 30 cents per square foot calculated on the net rentable area. Lee Kai purchased five floors of the building from Chong Gay and each floor has an approximate area of 8,158 sq ft and the total maintenance fees and service charges payable by Lee Kai was $12,237 per month amounting to $146,844 per year. Chong Gay`s claim was for the recovery of $504,380.70, later amended to $503,09.70, being the arrears of maintenance fees and service charges owing by Lee Kai for the period from January 1978 to June 1982. It was not disputed before Sinnathuray J that there were arrears of maintenance fees and service charges which Lee Kai had not paid. But it was contended on behalf of Lee Kai that the services provided by Chong Gay were unsatisfactory and they were therefore excused from such payment or that in view of such unsatisfactory services there ought to be a diminution to `an appropriate extent` of the amount of maintenance fees and service charges payable. On this point the learned judge made the following finding:

> *I have dealt with that evidence. Having reviewed the totality of this evidence, I found that whilst there had been a litany of complaints by Lee Kai on the shortcomings of the services and facilities in the Golden Mile Tower, taking all the circumstances together, Chong Gay had provided a reasonable standard of maintenance and services. The argument raised by Lee Kai that these services were so hopelessly inadequate could not be an excuse for them not to pay Chong Gay the maintenance fees and service charges.*

41 We have not been persuaded that the learned trial judge`s finding on this aspect of the case was in any way erroneous and we can see no ground for disturbing this finding.

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42 Next, it was contended on behalf of Lee Kai that Lee Kai had paid a total sum of $431,451.80 and part of this amount, namely, $277,044.34 had not been taken into account. The evidence adduced before the learned judge showed that all the amounts paid by Lee Kai had been taken into account. Among other things, a running account and analysis thereof have been produced to show that, with the exception of a small sum of $1,287 (in respect of which the original claim has been amended and reduced to $503,093.70), all payments received from Lee Kai for maintenance fees and service charges had been taken into account in arriving at the figure claimed. Again, we are not persuaded that the learned judge, who has reviewed the evidence at some length, has in any way misdirected himself.

43 **Concluded**

44 In the result, we now make the following order with reference to the judgment below. First, we expunge para 2 of the judgment of the High Court which requires the plaintiff (Lee Kai) to pay to the defendant (Chong Gay) the sum of $116,519.46 after giving credit to Chong Gay for the sum of $380,000. Secondly, we set aside that part of the judgment concerning Suit No 3678 of 1980 and order specific performance of the sale agreements, namely, that Chong Gay transfer to Lee Kai or their nominee or nominees the premises comprised in the sale agreements, and also order that Chong Gay pay the costs in that suit. Save to the extent we have set out, the judgment of the High Court is affirmed.

45 We now turn to the question of costs in the appeal. Lee Kai have succeeded partially in the appeal. In the circumstances, they should bear only a fair portion of the costs of appeal, and in our opinion, the portion should be 60%. We accordingly so order. There will also be an order that the deposit paid

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into court as security for costs be paid to Chong Gay or their solicitors to account of costs.

46 **Outcome:**

Rajendran S J
L P Thean J
Yong Pung How CJ

Jimmy Yap (Donaldson & Burkinshaw) for the appellants
Sia Moon Joon (Chor Pee & Co) for the respondents

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