

IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1992] SGCA 57

CA 29/1990, 72/1990

Between

Hong Fok Realty Pte Ltd

... Appellant

And

Bima Investment Pte Ltd and
another appeal

... Respondent

GROUND OF DECISION

Contract — Remedies — Damages

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**Hong Fok Realty Pte Ltd v Bima Investment Pte Ltd and
another appeal**

[1992] SGCA 57

CA 29/1990, 72/1990

Chan Sek Keong J; Warren Khoo L H J; Yong Pung How CJ

14 September 1992

1 Cur Adv Vult

2 These appeals concern the proper basis for the award of damages where a purchaser rescinds a contract for the purchase of real property on account of the vendor's repudiatory breach.

3 The appeals were originally heard by this court consisting of three judges. Chan Sek Keong J has since relinquished his appointment as a judge on taking up another public office. In accordance with s 33(1) of the Supreme Court of Judicature Act (Cap 322), the parties have consented to the two remaining judges of the court continuing with the case and giving this reserved judgment.

4 **The facts**

5 Hong Fok Realty Ltd, as developers and vendors, entered into a contract on 4 August 1983 for the sale of a warehouse unit in a multi-storey warehouse development in Henderson Industrial Park to Bima Investment Pte Ltd at the price of \$1,075,200. The property was under construction, and the purchase

price was payable under the contract by instalments pegged for the most part to the completion of stages of the construction works. On 14 December 1984, Bima having paid the instalment due on the issue of a temporary occupation licence by the building control authorities, Hong Fok were obliged to give, and Bima were entitled to take, possession of the unit. By that time, Bima had paid a total of \$806,400, or 75% of the purchase price.

6 Bima took possession, and spent money on furnishing the unit to make it into a warehouse for letting out to others for the storage of goods. They soon discovered that there were serious problems of leakage and seepage of waste matter from the floor above. This was eventually traced to defects connected with the plumbing of toilets on the floor above the unit. Hong Fok made attempts to remedy the defect, but the problem remained. In fact, the learned judge in the court below found that the problem was still there at the date of the hearing. On 15 October 1985, Bima by letter told Hong Fok that they were rescinding the contract. They demanded the return of all the instalments which they had paid. On 26 November 1985, they took out an originating summons, seeking a declaration that they had effectively rescinded the contract and the return of the \$806,400 which they had paid to Hong Fok, and various other remedies. They also claimed interest.

7 The originating summons proceeded as an action by writ. In a reserved judgment dated 28 February 1990 [see [1990] 2 MLJ 193], the learned judge, Lai Kew Chai J, found that by reason of the defect Bima were not getting substantially the same property which Hong Fok had contracted to sell to them, and that Bima were therefore entitled to rescind the contract. He found that of the total floor area of 3,584sq ft, about 476sq ft (13.28%) were directly, and 905sq ft (25.27%) were indirectly, affected by the defect.

8 The learned judge awarded Bima the various remedies which they sought. In summary, they are as follows. Firstly, Bima were to have the return of the sum of \$806,400 which they had paid to Hong Fok by way of instalments under the contract. Secondly, Bima were awarded damages to be assessed for the loss of use of 38.5% of the warehouse space which was directly or indirectly affected by the leakage and seepage. Thirdly, Bima were to be reimbursed for the cost incurred by them in the setting-up and furnishing of the warehouse, including the cost of the internal partitioning, and the cost incurred by them for dismantling and removal on vacating the premises. (For short, we shall refer to this head of damages as `the setting-up cost`.) Fourthly, Bima were to have the cost and expenses incurred by them `in or about` the sale and purchase agreement, ie the conveyancing cost. The learned judge ordered inquiries to ascertain these heads of damages.

9 The learned judge also held that Bima were entitled to a lien on the property for the sum of \$806,400 and the other damages recoverable from Hong Fok. He held that Bima were entitled to remain in possession in exercise of their lien as purchasers.

10 **Assessment of damages**

11 In pursuance of the judgment, the three heads of damages were assessed by an assistant registrar on 17 April 1991. It is necessary only to mention the assessment of the loss of use of the unusable portion of the unit. The judgment did not in terms direct what period in respect of which the loss of use was to be assessed. The parties argued this point before the learned assistant registrar. Bima contended that the period should be from the date Bima took possession up to the date Bima were to give up possession on being paid all the sums due

to them under the judgment. The assistant registrar ruled against Bima and decided that the period should be from 14 December 1984, the date Bima took possession, to 15 October 1985, the date they rescinded the contract.

12 Bima remained in possession until 30 April 1991, when the damages as assessed by the assistant registrar had been paid to them together with the return of the instalment sum of \$806,400.

13 Hong Fok`s appeal in Civil Appeal No 29 of 1990 is against the remedies granted by the judge in this judgment of 28 February 1990.

14 **Interest**

15 The learned judge reserved the question of interest for argument. Bima submitted that they were entitled to interest on:

- (a) the sum of \$806,400 which they had paid under the agreement;
- (b) the damages for the loss of use;
- (c) the setting-up cost; and
- (d) the conveyancing cost.

16 The learned judge dealt with the question of interest in this way. He said that the principle underlying an award of interest is not to compensate a plaintiff for any damage done but to compensate him for being kept out of his money. He then said:

*Counsel for the defendants submitted, and I accepted his submissions, that the plaintiffs had the benefit of the usable portion of the warehouse as they had collected storage charges from various bailors and that therefore the plaintiffs had occupation and use of the usable part. See **Allen v Smith***

17 [1924] 2 Ch 308 and **Lloyd v Stanbury** [1971] 2 All ER 267. As for the unusable portion which was affected by the leaks is concerned, I had ordered damages to be assessed. Plainly, those damages would be in lieu of the storage charges the plaintiffs would have earned and would represent the value for the proportionate price of that portion of the warehouse which the plaintiffs had paid.

18 As for the setting-up cost and the conveyancing cost, he disallowed Bima`s claim for interest on the ground that they had derived substantial benefit from having incurred those costs without which they would not have been given possession and they would not have been able to let out the warehouse space.

19 The learned judge, in a judgment dated 28 September 1990, thus dismissed with costs all Bima`s claims for interest. Bima`s appeal in Civil Appeal No 72 of 1990 is against this judgment.

20 **Issues in the appeals**

21 As a broad summary, Hong Fok say that the learned judge was wrong in awarding Bima damages for loss of use without taking into consideration the benefit that Bima received from being in possession of the property. Bima, they say, should be charged an occupation rent. They also say that it was wrong for the learned judge to award damages for the loss of use and at the same time the setting-up cost as well. They say that if loss of use was to be awarded, it should be on the basis of the 13.28% of floor space that was directly affected, not the 25.27% that was only indirectly affected. They also say that Bima should not have been awarded the conveyancing cost.

22 Hong Fok also say that the judge was wrong in holding that Bima were entitled to remain in possession of the premises in exercise of their lien as purchaser.

23 Hong Fok framed the issues as they saw them as follows:

24 Issue 1: Were the respondents entitled to remain in possession in exercise of a lien?

25 Issue 2:

26 Are the respondents chargeable with an occupation rent?

27 Issue 3:

28 Were the respondents entitled to claim damages for loss of use though rescission was ordered?

29 Issue 4:

30 Assuming the respondents were entitled to claim damages for loss of use, were they entitled to compensation for the loss of use of 38.55% instead of 13.28% of the total area of the unit?

31 Bima, on the other hand, say that the learned judge was wrong in refusing interest.

32 **Terminology: `rescission`**

33 Before dealing with these questions, it is necessary to clarify certain problems of terminology which have presented themselves in submissions before the court below and before us. These revolve around the use of the word `rescission`.

34 There are two main senses in which the word is used in contractual disputes. Dixon J in **Mcdonald v Dennys Lascelles Ltd** [1933] 48 CLR 457 expressed the position as follows:

When a party to a simple contract, upon a breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning. Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected. When a contract is rescinded because of matters which affect its formation, as in the case of fraud, the parties are to be rehabilitated and restored, so far as may be, to the position they occupied before the contract was made. But when a contract, which is not void or voidable at law, or liable to be set aside in equity, is dissolved at the election of one party because the other has not observed an essential condition or has committed a breach going to its root, the contract is determined so far as it is executory only and the party in default is liable for damages for its breach.

35 The above statement of the law was referred to with approval by Lord Wilberforce in **Johnson v Agnew**.² He there drew the distinction between cases of rescission ab initio, such as those arising in cases of mistake, fraud or lack of consent, and rescission by the acceptance of a repudiatory breach. In the former case, the contract is treated as never in law having come into existence, whereas in the latter case, the contract has come into existence but has been put to an end or discharged.

36 In *Heyman & Anor v Darwins Ltd* [1962] AC 343 at p 399, Lord Porter viewed with some disfavour the use of the term to describe the situation where one party to the contract exercises his right to treat himself as discharged for breach. He said:

To say that the contract is rescinded or has come to an end or ceased to exist may in individual cases convey the truth with sufficient accuracy, but the fuller expression that the injured party is thereby absolved from future (sic) performance of his obligations under the contract is a more exact description of the position. Strictly speaking, to say that on acceptance of the renunciation of a contract the contract is rescinded is incorrect. In such a case the injured party may accept the renunciation as a breach going to the root of the whole of the consideration. By that acceptance he is discharged from further performance and may bring an action for damages, but the contract itself is not rescinded.

37 It is important to keep clearly in mind the two senses in which the word is used. Failure to do so leads to confusion of thinking in regard to the legal consequences that follow, as is well illustrated by the present case. Both before Lai Kew Chai J and before us, Hong Fok's counsel submitted that Bima were not entitled to rescind the contract unless *restitutio in integrum*

38 was possible. *Restitutio in integrum* was not possible, he said, as the parties could not be restored to the *status quo ante*. He explained that while Hong Fok would be able to return the money paid in pursuance of the agreement, Bima, on the other hand, had been in possession for ten months before they purported to rescind; the property that Bima would return by way of *restitutio* would not be the same property as that when Bima took possession in December 1984.

39 There was a patent confusion of thought when reference was made to *restitutio in integrum* in the sense of restoring the parties to their respective

positions as if the contract had not been made, or the status quo ante as it was put. It is quite inappropriate in a case like the present where the rescission is not on the footing that the contract was void ab initio because of some vitiating factor like fraud or mistake, but on the footing that the other party had been guilty of repudiatory breach and that repudiatory breach had been accepted by the innocent party. In this type of situation, the innocent party is entitled to treat the contract as having come to an end and to sue for damages. The object of the award of damages in this type of situation is not to restore the parties to their respective positions as if the contract had not been made, but rather, in recognition of the existence of the contract and the subsequent breach, to compensate the innocent party, as far as money can do so, for the loss, damage and injury which he has suffered as a result of the breach. It is to place the innocent party, so far as money can do so, in the same position as if the contract had been performed. It is clear that any argument about placing **both** parties in their respective positions as if the contract had not been made is entirely out of place.

40 **Principles applicable**

41 The principles applicable to damages recoverable for breach of a contract for the sale of land are no different from those applicable to breach of contract in general. The starting point is that the plaintiff is entitled to be placed, so far as money can do it, in the same position as he would have been in had the contract been performed. This is qualified by the rules on remoteness as first enunciated by Alderson B in *Hadley v Baxendale* e4 and refined in subsequent cases.

42 As the present case shows, it is the application of the principles to the facts of individual cases that often gives rise to difficulties. Decided cases are instructive for the illustrations they provide of how the general principles have been applied to the facts of particular cases. It must be borne in mind, however, that the ascertainment of damages is an exercise to establish a question of fact, that is what loss and damage have been suffered by the plaintiff in the particular case before the court, and to award him damages ascertained according to these principles. Decided cases are useful more for the principles they enunciate, than for the result of the application of the principles.

43 With this in mind, we turn to examine some of the cases that have been cited to us.

44 **Application of the principles: some cases**

45 In **Day v Singleton**, [1899] 2 Ch 320 in a sale of a leasehold property, the sale was aborted and the purchaser lost his bargain as a result of the defendant's failure or wilful refusal to obtain the necessary consent to the assignment of the lease. The purchaser claimed damages and the return of the deposit on the purchase price. It was held that he was entitled, not only to the return of the deposit with interest and the costs of investigating title, but also to the damages he had sustained by the loss of his bargain through the defendant's failure or wilful refusal to obtain the grant of the necessary consent. Lindley MR said [at p 328]:

*In such an action (unless **Bain v Fothergill** extends to it, which I will consider presently) the measure of damages would not be confined to the deposit and interest, and costs rendered useless; but the measure of damages would be the loss occasioned by not obtaining the lease ...`*

46 The reference to **Bain v Fothergill** 6 need not detain us. That is the rule, shortly stated, that where the vendor fails to convey a real property because of a defect in title, the purchaser can claim only expenses he has incurred, and not substantial damages for loss of bargain. The point does not arise in the case before us.

47 In **Allen v Smith** [1924] 2 Ch 308 the purchaser contracted to buy a leasehold property. She paid a substantial sum by way of deposit and part payment and was allowed into possession pending completion of the sale. She objected to a clause in the draft lease and refused to complete. The vendor sued for specific performance. She counterclaimed for rescission and refund of the deposit and part payment. She offered to pay a reasonable occupation rent. It was held by Eve J that she was entitled to judgment for rescission and refund of the deposit and part payment, together with interest.

48 In **Re Daniel** [1917] 2 Ch 405 the purchasers' claim was for the loss of bargain resulting from the vendor's inability to obtain a discharge of the mortgage on the property contracted to be sold. They were awarded damages on the basis of the difference between the contract price and the true value of the property. Sargant J refused to award the wasted costs of investigating title. He said that this was because the damages were based on the estimated value of the property if it had been conveyed to the purchasers and if the property had been conveyed to them they would have had to incur all the expenses of investigating title.

49 In **Wallington v Townsend** 9 the defendant owned two adjacent bungalows and agreed to sell one to the plaintiff. A dispute arose between the parties as to whether a small strip of land included in the plan attached to the

contract was subject to the contract. The defendant refused to complete, and the plaintiff claimed the return of the deposit and damages. The defendant counterclaimed for a declaration that the disputed strip was not included in the contract, or, alternatively, rectification. The plaintiff's claim was upheld, and the defendant's dismissed.

50 Morton J held that where a vendor fails to complete for reasons other than defect of title, and the purchaser does not prove damages by way of loss of bargain, the plaintiff is entitled, by way of damages, in addition to the return of the deposit, to interest in respect of the loss of the use of the deposit and to the conveyancing expenses. Morton J said that in such cases the damages are at large and the court can give such damages as, according to general principles, it thinks right.

51 In *Lloyd v Stanbury* 10 L, who had retired from his business in London, contracted with S to buy certain freehold farmland in Devon. He paid a deposit equivalent to 10% of the purchase price. After the signing of the contract, disputes arose between the parties as to whether a small parcel of scrub land had been included in the contract. This resulted in an impasse preventing completion. L sued for damages on the basis that S had repudiated the contract, and S's defence was in effect a claim for rectification of the written contract. L's object in buying the land, as S knew when the contract was entered into, was to earn his living by poultry farming, for which purpose he required early completion. S intended to build a bungalow on land being retained by him, and it was a term of the contract that L should place a caravan on the land which S and his family could occupy until their bungalow should be completed. In anticipation of the fulfilment of that term, L moved his caravan on to the farm

and installed a chemical toilet for use in connection with it. He also incurred other expenses in anticipation of the contract being completed.

52 Completion was to take place on 1 July 1966, but did not. On 18 July 1966, L issued a writ. However, despite the issue of the writ, L went into occupation in November, incurring expenses in improving the property. In July 1967, as a result of interlocutory proceedings, L agreed to go out of possession and to allow a deduction to be made from his deposit as an occupation rent for the period of his occupation, claiming only the return of the balance of his deposit with interest, and special damages.

53 Brightman J in the chancery division held that S was in breach, and he awarded damages in favour of L. The deposit was returned to L. It is not clear from the report whether interest was awarded on the deposit.

54 As for special damages, there was a long list of 14 items. We refer only to those which are of assistance to the resolution of the issues raised in the case before us. Brightman J proceeded largely on the basis whether the particular item of damage was within the knowledge of the party in default, or was within the contemplation of the parties. Thus, he allowed L's claim for the expense of moving his furniture from London to the farm on the basis that S knew that L required a quick completion because he had sold his house in London. It was, he said, within the contemplation of the parties that this expense would be incurred. Similarly, he allowed L's claim for the cost of a chicken-house incurred the day before completion was due to take place. He found that S knew that L intended to carry on poultry-farming.

55 **Cost of improvements while in occupation**

56 As for the money spent on improving the property while in occupation pending completion, Brightman J said:

I think that there is an important limitation to be imposed on the claim for damages in a case such as the present. If the buyer is let into possession prior to completion and sees fit to improve the property after the date of the contract, I do not think that the expenses which he incurs can in any normal case be recovered, for two reasons. In the first place, it is not usually, in my view, within the contemplation of the parties that a buyer will spend money on improving the property before it has been conveyed to him. Secondly, if the buyer treats the contract as repudiated he is not, in my judgment, entitled to recover an expense which he only incurred because he was at that time keeping his option open to sue for specific performance. If he decides to claim damages such expenditure is the very reverse of mitigation of damages; it increases them. In other words, a purchaser cannot keep his options open at the expense of the vendor and then elect to treat the contract as repudiated and recover his intermediate expenditure ...

57 It was for these reasons that Brightman J disallowed L's claim for the cost incurred for the quarry rubble delivered on the site between 4 and 14 July to enable L to construct or improve a roadway across a part of the property. This was just before L was to issue the writ. Brightman J said that for the reasons which he gave in the passage above, the expenditure was not recoverable by L as he had treated the contract as repudiated. He also disallowed, for similar reasons, expenses incurred in installing a television aerial in July 1966 and a power circuit in December 1966.

58 **Occupation rent**

59 Where the purchaser is let into possession pending completion, it was conceded in *Allen v Smith* 7 and *Lloyd v Stanbury* [1971] 1 WLR 535[1971] 2 All ER 267 that he is chargeable for occupation rent. There is no doubt that this concession was properly made. It is only right that the purchaser as the

innocent party has to bring into account all benefits he has enjoyed from the occupation of the property. This is consistent with the compensatory nature of the award of damages and is consistent with the general principle of mitigation of damages. The editors of 12 **Halsbury's Laws of England** (4th Ed) at para 1196, basing their views on Viscount Haldane LC's statement of the law in **British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd** [1912] AC 673 at 692, state:

The defendant may take advantage of steps which are a reasonable and prudent course naturally arising out of the circumstances in which the plaintiff was placed by the defendant's wrong, but not those which are res inter alios acta or collateral to the wrong. Thus, account may be taken of transactions which form part of a continuous dealing with the situation in which the plaintiff finds himself, but not independent or disconnected transactions. If a transaction of which account may be taken produces a gain to the plaintiff that gain may be set against the initial loss.

60 Professor Barnsley in his book **Conveyancing Law and Practice** (3rd Ed) at p 557 states that the purchaser must account for rents received and is chargeable with an occupation rent if he has enjoyed personal possession. Although the authority referred to, **Allen v Smith**,⁷ did not decide this point, as the author recognizes, we have no doubt that the statement of the law is quite right.

61 **Summary of the position**

62 By way of a summary, the position in regard to damages in cases of rescission on account of the vendor's repudiatory breach where the special rule in **Bain v Fothergill**⁶ does not apply may be stated broadly as follows. Firstly, the purchaser is entitled to damages for such consequences of the vendor's breach of contract as follow in the usual course from the breach or may

reasonably be supposed to have been in the contemplation of both parties at the time of contract: 42 ***Halsbury's Laws of England*** (4th Ed) para 267.

63 Secondly, the deposit is returnable with interest in all events. This position is so well established that it is almost taken for granted. All the cases reviewed above (with the exception of ***Lloyd v Stanbury*** 10 where the point is not clearly reported) support this proposition. 42 ***Halsbury's Laws of England*** (4th Ed) para 255 states, we think correctly:

Where the vendor makes a default in performing his part of the contract which entitles the purchaser to rescind the contract, the purchaser can recover the deposit with interest at an appropriate rate determined by the court or such other rate as may be agreed.

64 Thirdly, so far as wasted expenditures are concerned, the position depends on how the purchaser frames his claim for damages. If he sues for loss of bargain, the damages he recovers are the difference between the market value of the property at the date of breach and the contract price. A purchaser would frame his claim in this way where he can establish that the market value is greater than the contract price. If he is unable to do so, he is still entitled to claim substantial damages (as opposed to nominal damages where the rule in ***Bain v Fothergill*** 6 applies). In such a situation, however, expenditures to put the purchaser in the position to be able, notionally, to realize the market value are not recoverable, for the reasons stated by Sargant J in ***Re Daniel*** 8 above. On the other hand, if the purchaser does not sue for loss of bargain, he can claim all wasted expenditures provided they are within the contemplation of the parties. See ***Lloyd v Stanbury*** [1971] 1 WLR 535[1971] 2 All ER 267 and ***Wallington v Townsend*** [1939] 1 Ch 588

65 Fourthly, where the purchaser is let into possession pending completion, he must bring into account all benefits he has enjoyed from the occupation of the property.

66 **The present case**

67 Turning now to the case at hand, we are of the view that the learned judge was right, firstly, in ordering the return of the instalment sums and secondly, in awarding the expenses thrown away in the form of the setting-up cost and conveyancing cost. However, we have difficulties with the manner in which the learned judge dealt with the question of interest on the instalment sums and the related questions of loss of use and occupation rent or benefits.

68 We do not need to deal with the question of the return of the instalment sums (as opposed to the interest on them). There is no dispute about that. We set out in the following paragraphs our reasons for agreeing and disagreeing with the decision of the learned judge in regard to the other matters.

69 **The setting-up cost**

70 The learned judge was right in awarding Bima the wasted expenditure incurred in setting up the warehouse and in dismantling it at the end. The reason is that the incurrence of these costs and expenses must have been something within the contemplation of the parties at the time they entered into the contract. Clause 13 of the contract required that Hong Fok give vacant possession within 14 days after the issue of a temporary occupation licence by the authorities. The notice to take vacant possession issued by Hong Fok had to be accompanied by a copy of the licence and a certificate by the architect that the unit and all roads,

drainage and sewerage works serving the unit had been completed and water and electricity supplies had been connected to the unit.

71 There is no doubt in our minds that what is contemplated in this clause is that the purchaser is to have a fully functioning unit of the warehouse complex ready to be put to use for the purpose for which he contracted to buy it. We are encouraged in this view by the provision of cl 14 of the contract. Under this clause once the strata certificate of title is available, the vendor on producing either a temporary occupation licence or (the more permanent) certificate of fitness for occupation, may require completion and therefore the payment of the instalment of the purchase price due at completion. Thus, in a case where the strata certificate of title is available before the certificate of fitness for occupation (as opposed to a temporary occupation licence), the vendor need only produce the temporary occupation licence and require completion. What we infer from these provisions of the contract is that at the stage when the temporary occupation licence is issued and the purchaser is let into possession, the property contracted to be sold should have been constructed in every way according to the contract, and be ready to be put to use for the purpose for which it was contracted to be sold.

72 Since the subject property was a warehouse unit, it follows that it was within the contemplation of the parties that Bima, as any other buyer in their position, particularly as they had paid as much as three-quarters of the entire purchase price, would do what was necessary to turn to account the bare unit they had bought. The cost of setting up the property as a warehouse, in order to enable them to use it as such to earn income, must have been within the contemplation of the parties. As a result of Hong Fok's repudiatory breach of the contract, all that was wasted. In addition, Bima had to incur expenses to

dismantle and take away the partitions, etc at the end of it when they gave the premises back to Hong Fok.

73 Bima`s position is quite unlike the position of the purchaser in **Lloyd v Stanbury** .¹⁰ There, the purchaser had paid a deposit of only 10% of the purchase price. He was let into possession pending completion, presumably as a licensee, as is normally the case. Brightman J was quite entitled to come to the view that the purchaser was not expected to spend money on improving the property before completion of the sale.

74 We are therefore of the view that the setting-up cost was properly awarded. However, if the partitions, racks and air-conditioners and other paraphernalia that were dismantled had any salvage value, that should be deducted from this head of damages.

75 **Conveyancing cost**

76 The claim in the case at hand, as in **Wallington v Townsend** [1939] 1 Ch 588 is not one for loss of bargain. Sargant J`s reasoning in **Re Daniel** [1917] 2 Ch 405 for not awarding the conveyancing cost clearly does not apply. Morton J in **Wallington v Townsen** ^{d9} drew and relied on the distinction from the facts in **Re Daniel** [1917] 2 Ch 405 and held that the purchaser was entitled to recover as damages the conveyancing costs wasted as a result of the rescission of the contract. We see no reason why the conveyancing cost wasted should not be awarded on the basis that they were within the contemplation of the parties as losses which the purchaser would sustain if the vendor should repudiate the contract.

77 **Loss of use and interest on instalment sums**

78 The learned judge approached the loss and benefit question in the way earlier stated. In brief, he held that Bima should not be awarded interest because under his judgment Bima were to get:

- (a) the rental income they actually received for the usable portion; and
- (b) the rental income they would have got if the unusable portion had been usable.

79 In doing so, the learned judge appears to have equated the loss of use of the instalment sums represented by interest on them on the one hand with the rental income Bima received or would have received for the whole of the premises on the other. He proceeded on the basis that since Bima were being awarded the latter, they need not be awarded the former.

80 We see considerable difficulties in approaching the matter in this manner. The interest is not necessarily comparable with the rental, as a matter of principle or as a matter of quantum. There are variables on each side of the supposed equation. On the one side, these include the rate of interest and its rise and fall and the period over which each instalment sum was held by Hong Fok before it was returned to Bima. On the other side of the supposed equation, the variables include the rate of rental and its rise and fall and the period in respect of which it is taken into account.

81 What we say becomes obvious when it is borne in mind:

- (a) that the various instalment sums were held by Hong Fok over varying periods from as early as the date of the contract (4 August 1983) to the date when all the sums were returned (30 April 1991);

- (b) that no rental was received or could be received until after Bima took possession in December 1984; and
- (c) rates of interest are not necessarily equal to rental yields.

82 The difficulty is further compounded by the fact that no direction was given in the judgment as to the date up to which the loss of rental was to be ascertained, and the assistant registrar took it up only to the date of the letter of rescission, 15 October 1985.

83 Furthermore, what Bima was awarded and was allowed to retain was in the nature of profit from the property. At the same time Bima were also awarded damages for wasted expenditure in the form of the setting-up cost and conveyancing cost. There is considerable force, it seems to us, in the submission by Hong Fok's counsel that a plaintiff cannot claim wasted expenditure and loss of profit at the same time. The reason is that a claim for profit is made on the hypothesis that the expenditure had been incurred (see *Cullinane v British 'Rema' Manufacturing Co Ltd* 12). There is a parity of reasoning in the case of a claim for loss of bargain (*Re Daniel* [1917] 2 Ch 405).

84 **The proper approach**

85 It is wrong in principle, in our view, to award Bima the wasted expenditures as well as the rentals they actually received or would have received for the premises. On our analysis, the proper approach is to award interest on the instalment sums and damages for the wasted expenditures and then to take into account, in mitigation, the benefits of occupation enjoyed by Bima.

86 As to the benefits, it is in evidence that Bima received income from customers using the warehouse space rented to them by Bima. If, in addition, Bima occupied any space not rented to customers for Bima's own purposes,

such as to store their own goods, then an occupation rent should be charged for the use of such space. On the other hand, if the sole use of such space by Bima was to enable them to service the customers and thus to generate the income, no occupation rent should be charged for such use of such part of the space by Bima.

87 On our view of the matter, therefore, inquiries should be directed to ascertaining how much benefit Bima actually received, either in terms of rental income or in terms of occupation for their own purposes. Approaching the matter in this way, there is no need to ascertain how much Bima lost by not being able to make use of the space affected directly or indirectly by the defect in the premises. What proportion of the floor space was and was not usable is thus entirely irrelevant.

88 **Interest on damages**

89 Apart from not awarding interest on the instalment sums, the learned judge declined to award interest on the damages which he awarded, ie:

- (a) the loss of use;
- (b) the setting-up cost; and
- (c) the conveyancing cost.

90 On the view which we take of the loss of use item, it is only necessary for us to consider the question of interest on (b) and (c).

91 The learned judge declined to award interest on these two items of damages because, he said, Bima had derived substantial benefit from having

incurred those costs without which they would not have been given possession and would not have been able to let out the warehouse space.

92 Since the benefit mentioned by the learned judge is, under the approach which we have adopted, to be taken into account in favour of Hong Fok, it follows that, on the other hand, the cost of the money expended on putting Bima in a position to generate the benefit should also be taken into account in favour of Bima. That means that interest on the two items of wasted expenditure should be awarded to Bima.

93 **The `lien` point**

94 We have in deference to counsel's submission to deal with one further point before concluding this judgment.

95 Counsel for Hong Fok criticized the judge for saying that Bima were entitled to remain in possession in exercise of their lien for the instalment sums which Bima had paid. Counsel embarked on a discourse on the subject of equitable lien, and submitted that the purchaser's equitable lien for the instalment sums and damages did not confer any right to possession.

96 On the authorities which counsel cited, he may be perfectly right, but the point really does not arise for consideration. The judge mentioned the lien in dealing with the issue raised before him whether Bima's right to rescind the contract had been compromised by the fact that, among other things, Bima had stayed on after their letter of rescission. Since Hong Fok is not appealing against the judge's decision that there was no affirmation and that the rescission was effective, we do not really see the relevance of the point raised.

97 It is true that, having rescinded the contract, Bima should have vacated the premises. On the other hand, Hong Fok should have immediately returned the money which Bima had paid. The fact of the matter is that neither party did what they ought to have done. Bima stayed on. They did not persist in their demand for the return of the money. Hong Fok, on the other hand, did not demand that Bima return the premises to them. Indeed, Hong Fok's position was to continue as if the rescission had not taken place. Complaints continued to be made and steps continued to be taken to try to remedy the defect. Hong Fok were holding Bima to the contract, as evidenced by the fact that when the certificate of title was issued, they served a notice on Bima requiring Bima to complete, with which Bima refused to comply.

98 In these circumstances, it is futile for Hong Fok to complain that Bima should not have stayed on, or that the learned judge was wrong in saying that Bima had the right by virtue of an equitable lien to stay on. One must accept the continued occupation of the premises by Bima as a fact, as a situation accepted or desired by both parties, and to ascertain the effect this had on the damages that Bima were entitled to receive.

99 **Conclusion**

100 We therefore hold that Bima are entitled to interest on the instalment sums paid in pursuance of the contract, the interest to be paid from the date each instalment was paid to 30 April 1991. Income received by Bima from the date they took possession to 30 April 1991 should be brought into account in diminution of the interest on the instalment sums as and when each item of income was received in the manner of a running account. If any occupation rent is chargeable for any portion of the premises occupied by Bima themselves on

the basis which we have earlier indicated, the rent chargeable should similarly be brought into account, and should be treated as payable by Bima in advance on the first day of each calendar month.

101 Bima are to have interest on the conveyancing cost and on the setting-up cost (as defined at the beginning of this judgment) from the date each item of expenditure was incurred to 30 April 1991. Hong Fok is to be credited on 30 April 1991 with any salvage value of the materials from the dismantling of the warehouse.

102 As for the rate of interest, this is a commercial case and a commercial rate should apply. The contract in cl 6 prescribes, in cases where the purchasers are late in paying the instalment sums, a rate of 2% above the average of the prevailing prime rates of the four major banks (DBS, OCBC, OUB and UOB) rounded down to the nearest one-eighth (1/8) per cent. Although, of course, this is not in terms applicable, we think it is as good a guide to what is the commercial rate as any other. We think this is probably reflective of the rate at which plaintiffs in general might be able to borrow (see **Miliangos v George Frank (Textiles) Ltd (No 2)** [1977] QB 489 *Tate & Lyle Food and Distribution v Greater London Council* 14). We order that the interest which we have allowed be computed at the rates prescribed in cl 6.

103 We order all necessary inquiries, except that all findings and decisions of the assistant registrar made at the inquiries on 17 April 1991 which are not inconsistent with our judgment shall stand.

104 We therefore allow both appeals and the judgments of the court below, to the extent that they are inconsistent with our judgment, are varied accordingly.

105 **Costs**

106 Hong Fok, we regret to say, raised a number of points on which they failed. Some of the points raised were also raised in a manner which did not help to bring out the real issues. On the other hand, Hong Fok have succeeded generally on the question of occupation benefits. We are in the circumstances disposed to allowing them half the costs of their appeal in Civil Appeal No 29 of 1990. Bima, on the other hand, was responsible for obscuring the interest point by their claim for loss of use. Although they have succeeded before us on the interest point, we do not think they should have their full costs. They shall have three-quarters of their costs in Civil Appeal No 72 of 1990. We do not make any order in regard to the costs in the court below.

107 **Outcome:**

Chan Sek Keong J
Warren Khoo L H J
Yong Pung How CJ

Joseph Ang (Lee & Lee) for the appellants in Civil Appeal No 29 of
1990 and the respondents in Civil Appeal No 72 of 1990
Rabi Doraisamy (Cooma Lau & Loh) for the respondents in Civil

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Appeal; No 29 of 1990 and the appellants in Civil Appeal No 72 of
1990
