IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1992] SGHC 291

Suit 1253/1989

Between

Cheung Yong Sam Investments Pte Ltd

… Plaintiff

And

Land Equity Development Pte Ltd

… Defendant

GROUNDS OF DECISION

Land — Sale of land — Conditions of sale; Words and Phrases; Words and Phrases

Version No 1: 11 Sep 2026 (01:05 hrs)

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Cheung Yong Sam Investments Pte Ltd v Land Equity Development Pte Ltd

[1992] SGHC 291

Suit 1253/1989
Judith Prakash JC
23 November 1992

1 Cur Adv Vult

2 On 20 May 1987, the plaintiffs, the owners of the the CYS Building which stood at the corner of Malacca Street and Market Street, entered into an agreement (`the agreement`) to sell this piece of land to the defendants. The agreement, which I will discuss in more detail later, provided that it was a condition precedent to the completion of the sale and purchase that the defendants should obtain by 30 November 1987 planning approval under s 9(1) of the Planning Act `upon terms satisfactory to the [defendants] for the development for commercial use of the said property either by itself or in conjunction with other lands`. On 29 January 1988 the defendants purported to rescind the agreement on the ground that planning approval had not been obtained by the specified date. The plaintiffs were dissatisfied with the rescission and brought this action for damages for breach of contract. The defendants counterclaimed for the return of the 5% deposit they had paid the plaintiffs.

3 **Events leading up to the agreement**

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4 The defendant company was established in 1986 by Mr Serge De Kantzow, an Australian developer, for the purpose of developing on a site in Raffles Place a building of significant proportions in terms of height and bulk and which would make a definitive statement of international architecture. The development was to be known as `Republic Plaza`. Initially the defendant company was co-owned by Mr De Kantzow himself and an Australian company. Later two Japanese shareholders were brought in. Mr De Kantzow had made endeavours to involve Singaporean companies like the Hong Leong Group in the project but had not been successful.

5 From the outset, the defendants` efforts were focused on acquiring a substantial parcel of land at the corner of Raffles Place. This rectangular parcel is shown on the site plan appendixed to this judgment. It would be seen that the parcel was bordered by Cecil Street, D`Almeida Street, Malacca Street and Market Street and was made up of several lots owned by various private owners and the state. The defendants tried hard to acquire substantially the whole of that parcel apart from lot 456 at the corner of D`Almeida Street and Malacca Street which was being developed for the UCO Bank.

6 If one looks at the plan in the direction of Malacca Street, one sees that the parcel was then divided into a right hand portion and a left hand portion by lots 194 and 193-2 on which Amber Building was constructed and lot 193-5 on which the Great Eastern Life Building stood. I shall henceforth call lots 194, 193-2 and 193-5 `the intermediate lots`. To the right of the intermediate lots were lots 195-2, 292, 199-2 and 200 and to the left were lots 192-4, 191, 195, the lots on which the CYS Building and Fidvi Building (which was adjacent to the CYS Building) stood, and a number of state-owned lots. A back lane ran between and separated those lots which fronted Cecil Street and those which

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fronted Malacca Street. The significance of the back lane was that in effect it joined the right hand lots to the left hand lots so that a person on one side could have access to the other side without having to pass over the intermediate lots. There was also a back lane which connected Malacca Street and Cecil Street.

7 By about November 1986, the defendants had successfully acquired options to all the private lots in this parcel except for the intermediate lots which were owned by the OCBC Group (`OCBC`) and Great Eastern Life Assurance Co Ltd (`GEL`) and the lots on which the the CYS and Fidvi Buildings stood. Although the defendants attempted vigorously to start negotiations with OCBC and GEL for the purchase of the intermediate lots, they were met with complete disinterest.

8 At all material times the competent authority for the approval of building plans was the Development and Building Control Division of the Public Works Department (`the authority`). The defendants were aware that the intention of the authority was to have a `comprehensive development` on this parcel. From the authority`s view such a comprehensive development would be one which covered the whole area bounded by Cecil Street, D`Almeida Street, Malacca Street and Market Street (excluding only lot 456). The defendants agreed that this intention was desirable in town planning terms. Their aim was to acquire all the necessary lots and amalgamate them in order to effect the authority`s intentions but the disinterest of GEL and OCBC put a major stumbling block in their path.

9 In November 1986 the defendants submitted to the authority, through their architects, RSP Architects Planners & Engineers (`RSP`), an outline planning application (`OPA`) for the proposed development on the private lots

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which they had acquired together with the state land in the parcel. As the defendants` intention was to continue their efforts to acquire the intermediate lots, the concept contained in this proposal was for a two-phased development. Phase 1 was for the construction on one part of the land of a 280 m high tower having a wide-based podium big enough to accommodate four banking halls and covered walkways leading past the intermediate lots to the other side of the land. The height of 280m was significant as it was the same as the height of the two highest developments in Singapore, viz the OUB Centre and the UOB Plaza. If the defendants succeeded in acquiring the intermediate lots, Phase 2 would be implemented by extending the podium to cover the intermediate lots. The purpose of the OPA was to test whether the defendants could get approval for a tower of the requisite height and a net plot ratio of 10. On 22 December 1986 the authority rejected the OPA on the ground that it was `not in order for consideration`. This phrase was interpreted by the architects to mean that the proposal was not acceptable for planning evaluation as it was not a comprehensive development.

10 The defendants appealed against this decision. In his letter of appeal (AB57) dated 19 January 1987, Mr De Kantzow sought to explain the rationale behind the OPA. He informed the authority of the unsuccessful efforts undertaken by the defendants to acquire all the private land lots forming part of the parcel. He explained that since the defendants had been frustrated in their efforts to put together the total parcel as required by the authority, they had sought to identify and implement a solution which could: (a) enable the project to begin on those land lots already secured; (b) provide for the creation of a building of international architectural and commercial impact which would be a credit to the city; and (c) provide the means, by way of design considerations, to eventually enable the incorporation within the development of the two

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intermediate lots. The defendants believed that their OPA represented the best and most practical solution to the problem as it served as a development control plan for the entire parcel to enable it to be developed in accordance with the authority`s guidelines. The thinking of the defendants as disclosed in this letter formed the basis for their later actions.

11 On 29 April 1987, before a decision had been made on the defendants` appeal, RSP withdrew the appeal and lodged a formal planning application. This application embodied the same two-phased concept as the OPA and envisaged the construction of a high tower and podium.

12 In the meantime the defendants had commenced negotiations to acquire the CYS and Fidvi Buildings. The rationale behind this acquisition was explained at a project control meeting of the various parties involved in the project held on 19 May 1987. The position was that in order for the government to approve the sale of the state land in the parcel to the defendants without going through a public tender, the area of private land involved in the project had, at the least, to be equal to that of the state land to be purchased. The acquisition of the CYS and Fidvi Buildings would bring the area of private land under the control of the defendants up to the necessary level. The meeting confirmed that the defendants should obtain an option to purchase the two properties to be valid until December 1988 on the basis that there was a potential risk of losing the deposits paid therefor. At this meeting a senior partner from RSP assured the parties that the acquisition of the CYS and Fidvi Buildings would allow the project to be approved.

13 On 20 May 1987 the agreement was signed and the plaintiffs agreed to sell the CYS Building to the defendants for $17,500,000.

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14 Salient terms of the agreement

15 The salient terms of the agreement for the purpose of this action are set out below.

> (1) On signing, the defendants paid a deposit of $875,000 being 5% of the purchase price to the plaintiffs` solicitors to be held by them as stakeholders on an interest bearing account. All interest accrued on the deposit until completion was to be paid to the defendants.
>
> (2) By special condition (4)(i) the completion of the sale was subject to the following condition precedent:
>
> *The [defendants] obtaining planning approval under s 9(1) of the Planning Act (hereinafter called `the planning approval`) upon terms satisfactory to the [defendants] for the development for commercial use of the said property either by itself or in conjunction with other lands which the [defendants have] acquired or [are] in the course of acquiring. Provided that the [defendants] shall be at liberty (but not bound) to appeal against any terms of the planning approval not satisfactory to the [defendants] and until completion of such appeal upon terms satisfactory to the [defendants], this condition precedent shall be deemed not to have been met and if the terms of any planning approval are not satisfactory to the [defendants] to withdraw and/or lodge any or further application(s) for planning approval and until such has been approved upon terms satisfactory to the [defendants] this condition precedent shall be deemed not to have been met.*
>
> (3) The defendants undertook to use their best endeavours to lodge the application for the planning approval at their own cost within 12 weeks from the date of the agreement.
>
> (4) It was provided by special condition (6) that if the planning approval should not have been obtained upon terms provided in special condition (4) by 30 November 1987 then the defendants would be entitled at their option, at any time before completion of the agreement, to rescind the agreement by notice to the plaintiffs whereupon the deposit would be refunded to the defendants and the agreement cancelled.
>
> (5) The defendants were to pay the plaintiffs a sum of $175,000 a month from the time the plaintiffs received confirmation that a right of first refusal to their land which had been given to third

> parties was not to be exercised by such third parties. This payment would continue until the defendants notified the plaintiffs that all the conditions precedent specified in the agreement had been fully satisfied or that the defendants had waived such condition precedent or the defendants gave irrevocable notice to the plaintiffs that they were ready and willing to complete the agreement. The monthly payments were not to be refunded to the defendants in any circumstances nor were they to form part of the purchase price. In the events that happened, the defendants commenced payment of the monthly sum of $175,000 on 11 June 1987 and continued to make such payment until the agreement was rescinded.

16 In addition to the foregoing, the plaintiffs contended that there was an implied term of the agreement to the effect that the right of the defendants to rescind the agreement on the ground that a satisfactory planning approval had not been obtained by 30 November 1987 was conditional upon:

> (a) the defendants having complied fully with its undertaking to lodge an application for planning approval; and
>
> (b) the defendants not having thereafter by their own act or omission prevented, hindered or delayed the processing by the authority of such application for planning approval or having otherwise in any way caused or contributed to the fact that such application had not been so processed by 30 November 1987.

17 Before relating what happened after the agreement was concluded, it is helpful to set out the grounds on which the plaintiffs base their claim.

18 **The plaintiffs` contentions**

19 The plaintiffs contended that the defendants were not entitled to rescind the agreement on the ground that planning approval had not been obtained within the terms of special condition (4)(i) by 30 November 1987 and that their notice of rescission was wholly ineffective. Disregarding matters contained in

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the statement of claim which the plaintiffs did not rely on at the trial, the gravamen of their complaint is as follows:

> (1) The defendants were in breach of their undertaking to lodge an application for planning approval within 12 weeks in that the application which they lodged was not in the correct form and/or was not capable of being processed by the authority. This was because the planning application which the defendants lodged in July 1987 pursuant to the agreement purported to attribute to the proposed development site (which included the CYS Building) development rights relating to other lots not contiguous therewith and, in consequence, the plans submitted with the said application were not in order for processing by the authority and a fresh application was required.
>
> (2) The defendants by their own acts prevented, hindered and delayed the processing by the authority of the said application and caused or contributed to the fact that the application had not been processed by 30 November 1987.

20 Various particulars were given in support of this assertion including the facts that:

> (a) by a letter dated 31 September 1987 RSP (on behalf of the defendants) wrote to the authority asking them for further time to look into the details of the proposal. This resulted in the authority informing RSP on 30 September 1987 that consideration of the proposal had been deferred for one month; and
>
> (b) by letter dated 13 November 1987 RSP wrote to the authority asking for time until the end of December 1987 to look into the details of the proposal which letter resulted, as the defendants well knew it would, in the application not being processed up to 30 November 1989.

21 **Events after 20 May 1987**

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22 In July 1987, the planning application of 29 April 1987 was withdrawn. In its place RSP submitted an updated formal planning application dated 1 July 1987 (`FPA`) which included the lots on which the CYS and Fidvi Buildings stood. The proposal was essentially the same as that embodied in the withdrawn application. Once again, the phase 1 construction on the site would consist of a 280 m high tower with a podium and basement. The tower would be located at the junction of Cecil Street and Market Street with a rear podium stretching along Market Street up to Malacca Street and a frontal podium on the lots 199-2, 200 and 292 at the junction of D`Almeida Street and Cecil Street. The two podiums would be interlinked by covered walkways. Lot 195-2 and part of the back lanes would remain as an open air alley in this phase. In phase 2 which would commence if and when the intermediate lots were acquired, certain floors would be added to the tower block and the podium buildings would be extended.

23 It is important to note at this juncture that the proposal was based on a plot ratio of 10 being applied to the whole of the site and on the authority treating all the lots included in the parcel as forming one undivided site and thereby permitting the development rights of the right hand lots to be transferred to the left hand lots on which the tower was to be constructed. The defendants` position was that the right hand lots were contiguous to the left hand lots since they were connected thereto by the back lane which made it possible to have physical access from one side to the other without walking over the intermediate lots. If the authority did not accept the site as consisting of contiguous lots then the plot ratio would have to be calculated on a plot by plot basis and separately for the left hand lots and the right hand lots. Such a calculation would make the construction of a single tower of the height the defendants wanted impossible.

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24 On the same day that the OPA was filed, RSP put forward an alternative scheme of development to the authority. This was contained in exh AB176 and it contemplated a different type of two-phased development entitled the phase A/phase B proposal. The proposal envisaged the separation of the site into two parcels. In phase A the left hand parcels would be developed on their own into a 53-storey tower building of 280 m in height and a 6-storey podium building. No construction would take place on the right hand lots at all which would only be developed in phase B into a 11-storey podium building and an atrium plaza when the intermediate lots had been secured. Additionally further floors would be added to the phase A tower. The letter proposed a plot ratio of 14 for phase A and a plot ratio of 8 for phase B resulting in a combined plot ratio of 11.3. The letter ended by asking the authority to consider the phase A proposal, which was of a substantial size, by itself for approval. Thus approval of either the official phase 1/2 proposal or the alternative phase A/B scheme would result in the proposed single prestigious tall tower being built.

25 On 22 July 1987 another project control meeting was held (AB238). It was noted at the meeting that the intermediate lots had been purchased by the Hong Leong Group (the actual purchaser was CDL Properties Pte Ltd) and that negotiations were now in train with this group for their entry into the project so that the total parcel could be amalgamated. It was also noted that if these negotiations were successful then the acquisition of the CYS and Fidvi Building sites might not be required. A letter from the defendants` Australian lawyers, Freehill Hollingdale and Page (`Freehills`) dated 21 July 1987 was discussed at the meeting. This letter set out the grounds on which it was possible for the defendants to rescind the agreement. After discussion it was decided that the CYS and Fidvi contracts be allowed to run until such time as the negotiations with the Hong Leong Group had been completed and formalized at which

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juncture a decision as to whether these contracts should be continued with could be taken.

26 Another significant event at the meeting was that Mr Albert Hong of RSP reported on the lodging of the FPA and informed the meeting that in his discussions with three department heads of the authority he had been given unofficial advice that they were in favour of the OPA as it stood. Mr Hong advised that he expected by the end of August 1987 to have an indication of the status of the approval. Thus the meeting was given favourable indications in respect of the likely approval of the FPA and accordingly reaffirmed that the project manager should diligently pursue the obtaining of such approval.

27 Following this on 31 July 1987, Freehills wrote to RSP (AB242) to tell them to proceed with the FPA with `the utmost vigour`. In their letter dated 4 August 1987 (AB243) the defendants pressed RSP to the same effect. On 17 August 1987 Freehills wrote to RSP (AB250) asking them to let Freehills have copies of correspondence and records of conversations between RSP and the authority confirming their request to the authority to pursue its consideration of the FPA. This letter was written on the express instructions of Mr De Kantzow and by it he intended to reinforce his message that the architects should pursue the FPA with `the utmost vigour`. According to Mr De Kantzow, at this time everyone in Singapore (meaning the authority, potential lessees and property agents) knew that Hong Leong had acquired the intermediate lots. This acquisition had caused a situation of uncertainty to develop around the parcel. The defendants wanted to make it clear that they were still pursuing their original proposal inspite of the change in the situation.

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28 In early September, the defendants` fears were realized. A deputy director of the authority telephoned Mr Hong and told him that the planning authority wanted to see a comprehensive development. The hint was that if RSP did not indicate at that stage to the authority that the defendants were seriously looking into acquiring the intermediate lots and needed time to sort out the matter (ie complete the acquisition) the authority would reject the FPA outright. Accordingly on 4 September RSP asked the defendants whether they were agreeable to asking the authority for further time. As the defendants saw it, the message underlying the authority`s approach was that it was wondering whether the intermediate lots would be incorporated into the development.

29 The defendants` initial response to RSP given on 7 September 1987 (AB253) was that the proposed delay was unacceptable and that they wanted the authority to consider their application as submitted. This was followed the next day by a letter from Freehills (AB254) which stated that at that stage there were no binding legal arrangements or agreements with the Hong Leong Group and that even if any such arrangements did occur they would not be finalized until early October at the earliest. The solicitors asked RSP to inform the authority of this decision and have the authority treat the existing FPA on its merits.

30 RSP went back to the defendants on 15 September (AB256) reiterating the need to request a suspension of the approval process. Mdm Wong Meng Heng, who was the partner overseeing the day-to-day development of the project, sent this memorandum. Her view was that the authority had given a clear indication that it wanted a comprehensive development for its processing and if no extension of time was asked for, the authority would have to react on the FPA and issue a formal refusal. If an extension was asked for, however, the

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authority could justify not dealing with the FPA and this would mean that existing land contracts would not be jeopardized. Mdm Wong was clearly under the impression that a rejection of the FPA would adversely affect the defendants` position in relation to certain of their contracts for the acquisition of the lots within the parcel. On receipt of this memorandum, the defendants agreed to RSP`s proposal and on the defendants` instructions the letter which RSP wrote to the authority on 21 September asking for the extension read as follows:

> *Please refer to our formal planning submission of 1 July 1987. Please assist to permit us for some time to look into the details of the proposal. We will contact you with further representations later.*

31 As a result, on 30 September the authority granted a one month extension of time.

32 Sometime in early October 1987 the defendants` representatives met Hong Leong Group representatives to discuss the project. Hong Leong suggested a deal but no agreement was arrived at and the meeting was, essentially, exploratory in nature. Subsequently, on 9 October 1987, Freehills wrote exh AB261 to RSP on the instructions of Mr De Kantzow. In this letter, they stated inter alia:

> (1) No agreement has been reached with the Hong Leong Group to form a joint venture with them or otherwise in relation to the Republic Plaza project.
>
> (2) All negotiations and discussions with the Hong Leong Group have been terminated because of major commercial differences between the parties.
>
> …

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> (4) The project is to proceed on the four (4) parcels of land originally purchased together with the CYS and FIDVI land and the relevant state land and will not include the OCBC and GEL land.

33 The letter ended with a confirmation of Mr De Kantzow`s instructions that RSP `continue with the utmost vigour to seek planning permission for the current application`. The defendants had a proposal which, for the time being at least, excluded the intermediate lots but which they felt was acceptable and they wanted the authority to deal with it.

34 Not being satisfied to rely on correspondence, Mr De Kantzow asked for an urgent meeting with the authority. This took place on 15 October and was followed by a letter of the same date (AB265) from the defendants to the authority. Both at the meeting and in the letter, Mr De Kantzow informed the authority that the defendants desired the authority to consider the FPA most urgently as it was their firm intention to proceed with the development referred to in the FPA. He confirmed that there was no agreement with the Hong Leong Group to form a joint venture with them or otherwise in relation to the Republic Plaza project. He also stated that all negotiations and discussions with the Hong Leong Group had been terminated because of `major commercial differences between the parties and I do not presently foresee that these differences can be overcome.` Mr De Kantzow was being rather disingenuous at this point because he in fact believed that the Hong Leong Group, having paid record breaking high prices for the intermediate lots, had in fact no viable commercial alternative but to come to some accommodation with the defendants and that they would do so in due course. Be that as it may, it was still important to him that the authority grant approval to the FPA so that phase 1 at least could commence. Such an approval would also, probably, put more pressure on Hong Leong to reach agreement with the defendants.

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35 The next development was that a week or so later, a Ms Cheong, an officer of the authority, telephoned Mdm Wong and asked why it was so difficult for a comprehensive development to be effected. She wanted the defendants to give her details of these difficulties. She also indicated that if the comprehensive proposal was not possible then the defendants would have to submit a new proposal based on the left hand lots being developed first and the right hand lots being developed later. Mdm Wong obtained an assurance from Ms Cheong that any further submission which would incorporate the new proposal would be treated as an amendment submission rather than as a fresh proposal which would involve a withdrawal of the FPA as Mdm Wong did not want existing land dealings to be jeopardized. Mdm Wong reported this conversation to the defendants and suggested that a meeting should be held with the authority.

36 Accordingly on 27 October 1987 the architects met officers of the authority. At that meeting the authority reiterated its desire for a comprehensive development of the site and the documentary evidence mentioned previously. The authority repeated that if the comprehensive proposal really was impossible, the defendants could proceed to prepare and submit a proposal based on the left hand lots only. The only concession obtained from the authority was that the documentary evidence of the difficult business dealings with the Hong Leong Group need not be sent in immediately. Instead it could be submitted at the same time as the defendants` proposed new amendment submission proposal based on the left hand lots.

37 Two days later Mdm Wong reported the results of the meeting to the defendants (AB272-273). She suggested that RSP write to the authority asking them for time until the end of December 1987 for RSP to work out the details

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of the proposal on behalf of the defendants. She pointed out that this course would give the defendants until the end of December 1987 to decide on what further action to take.

38 Mr De Kantzow read AB272. He understood that the type of amendment submission suggested by the authority would be based on a plot ratio of 10 and that that proposal would result in two low towers on either side of the site. This was an unacceptable proposal from the defendants` view point. They had started with a proposal of a single tower of 280 m in height and this was the proposal which Mr De Kantzow had presented to the defendants` Japanese partners to involve them in the project. It was also the presentation made to potential tenants. In the defendants` opinion the alternative proposal would diminish the value of the development and would leave the project undistinguished from the other proposed office developments near to the Republic Plaza site. Mr De Kantzow also pointed out in his testimony that if the defendants had agreed to the alternative proposal the need for the CYS and Fidvi lots would have been obviated. What came with the acquisition of those lots were the State lands and walkways which made the tall tower a possibility.

39 On 3 November 1987 the authority wrote to RSP (AB274). This letter formalized the authority`s views as conveyed in the meeting on 27 October. Paragraph 2(i) of AB274 asked for documentary evidence to prove that the defendants had exhausted all avenues of negotiation with the Hong Leong Group on the purchase of the intermediate lots. Paragraph 2(ii) stated that there should be no transfer of development rights from the lots east of the intermediate lots as they were not contiguous with the development site. The plot ratio calculation would have to be based on the plot-by-plot method. This meant that the land lots on the left hand side had to be capable of an independent

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development based on a net plot ratio of 10 and the right hand lots would also have to be capable of an independent development based on a net plot ratio of 10. It was a concept that was different from both the phase 1/2 scheme and the phase A/B alternative. Accordingly, the next sub-para 2(iii) confirmed that the FPA submitted on 1 July was not in order for processing as it did not comply with para 2(ii). Finally, the letter stated that at the meeting of 27 October 1987 RSP had indicated that an extension of time was required. The authority wanted to know the latest position since it had not received a formal written request for extension. The letter ended `no action will be taken to process your application until your confirmation is received.`

40 Mdm Wong testified that RSP had wanted an extension of time in order to keep the FPA alive. RSP was concerned that otherwise the FPA would be refused. The architects thought that such a refusal would affect the various contracts for acquisition of the lots comprising the development site. Whilst RSP did not share the authority`s view that the land lots were not contiguous, they felt that it was no point arguing with them. In AB274 the authority had made its position abundantly clear and the choices which faced the defendants were either to acquire the intermediate lots in some fashion or construct two shorter towers. Whilst as far back as May 1987 there had been hints that the authority might not approve a transfer of development rights from one part of the site to the other, RSP knew that the only way to get an official decision on the point was to put in a formal submission. There was always the possibility that the authority would, after considering such a submission, change its mind and approve it. The most important thing was the final official response and, in regard to the contiguity of the site, this was contained in AB274.

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41 On 13 November 1987, on the defendants` instructions, RSP wrote to the authority requesting an extension of time until the end of December 1987. This request was acceded to on 4 December 1987. On 17 December 1987 the defendants asked RSP to obtain a further extension till end of January 1988 `due to procrastinations in the negotiations with our partners`. By this the defendants were referring to delays in their negotiations with Hong Leong. No such request was however made until 12 January 1988 when the defendants themselves wrote to the authority asking for an extension of time for the consideration of the FPA up to the end of May 1988. The ground was that the defendants were negotiating with CDL Properties to form a joint venture in order to place before the authority a project which included the intermediate lots. The extension was granted.

42 In the meantime, on 5 January 1988, the plaintiffs` representatives had a meeting with Mr Colin Moore of Jones Lang Wootton, the defendants` estate agents. The plaintiffs were asked whether they were prepared to waive the monthly payment of $175,000 which the defendants were making to them. The plaintiffs declined to do so and on 29 January 1988 the defendants rescinded the agreement (AB298).

43 The defendants were able, eventually, to conclude a joint venture with the Hong Leong Group and in May 1989 a final planning application was submitted by RSP for a comprehensive development which included the intermediate lots but not the CYS Building land. This development proposed a 66-storey office building which accorded with the defendants` original scheme. In October 1989 the plaintiffs entered into a contract to sell the CYS Building to CDL Properties at a price of $16,500,000.

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44 The scheme finally approved by the authority was for the development of a tower block of a height of 280 m and adjoining podium on a development site which included the intermediate lots and the CYS and Fidvi Building lots but excluded the sate land at the junction of Market Street and Cecil Street which was sold by tender to another developer.

45 **Did the defendants take advantage of their own wrong?**

46 It is a well established principle of the law of contract that a party to a contract who by his own act brings about the occurrence of a certain event cannot rely on such event to escape from his contractual obligations. This principle is cogently set out in an oft-quoted paragraph from the judgment of Lord Atkinson in **New Zealand Shipping Co Ltd v Societe Des Ateliers Et Chantiers De France.** [1919] AC 1 At p 9 of the report, his Lordship states:

> *It is undoubtedly competent for the two parties to a contract to stipulate by a clause in it that the contract shall be void upon the happening of an event over which neither of the parties shall have any control, cannot bring about, prevent or retard. For instance, they may stipulate that if rain should fall on the thirtieth day after the date of the contract, the contract should be void. Then if rain did fall on that day the contract would be put an end to by this event, whether the parties so desire or not. Of course, they might during the currency of the contract rescind it and enter into a new one, or on its avoidance immediately enter into a new contract. But if the stipulation be that the contract shall be void on the happening of an event which one or either of them can by his own act or omission bring about, then the party, who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or to compel the other party, who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong, in the one case directly, and in the other case indirectly in a roundabout way, but in either way putting an end to the contract.*

47 The plaintiffs applied the above doctrine to the present case. They said that although the issue of the planning approval by a certain date appears on the face of it to be an act out of the defendants` control, in fact the defendants by their conduct caused the non-issue of the approval by the specified date. In this context the defendants are the `blameable` party and they cannot therefore be allowed to insist on their right of rescission under the contract.

48 But are the defendants `blameable` simply because they twice asked for the postponement of the consideration of the application? The defendants said no. They contended that they would only be blameable if the actions they took were in breach of a legal duty imposed on them by the agreement. They relied for this proposition on the New Zealand Supreme Court case of **Mulvena v Kelman.** [1965] NZLR 656 The plaintiff there had contracted to purchase the defendant`s farm and had paid a deposit leaving the balance to be paid on completion. The contract contained a clause stating that the sale was subject to finance being arranged by a specific date for the completion of such purchase. The plaintiff alleged that he could not arrange the necessary finance by the prescribed date and sued to recover his deposit. The defendant contended that the plaintiff had no case as he was relying on his own wrong. In dealing with this contention the trial judge, Henry J, stated:

> *The law is well settled that no man can take advantage of his own wrong. Where a person is in breach of the express terms of his contract, the maxim clearly applies. But wrong can mean only a legal wrong, that is some breach of a legal duty or obligation. The plaintiff in the present case can, in my view, be said to be within the well settled principle to which I have referred only if he is in breach of some term expressed or implied in the bargain. He can be called upon to take steps to arrange finance only if that is part of the bargain made, and then only to the extent that the bargain so binds him.*

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49 He bolstered the above opinion by his analysis of the passage from Lord Atkinson`s judgment in the New Zealand shipping case quoted above:

> *As I read that passage the act or omission must be something which is included in the legal and not moral sense of `wrong`. In law a party is blameable or responsible only if he is in default either by act or omission in respect of some legal duty. Accordingly, I think that the `wrong` must be a breach of the terms of the bargain either express or implied.*

50 In the event he held that the plaintiff, having used his best efforts to obtain finance, was not in the wrong simply because he had not been successful.

51 Also relevant in this connection are Denning LJ`s views in **Brauer & Co (Great Britain Ltd) v James Clark (Brush Materials) Ltd** [1952] 2 All ER 497 which was a case involving a sale contract expressed to be subject to the granting of an export licence. His Lordship having stated that the contract was only binding on the sellers if a Brazilian export licence could be obtained described that clause as `a special exemption inserted in favour of the seller` and held therefore that `in order to enable [the sellers] to take advantage of it they must show that, notwithstanding that all reasonable steps were taken by them, they could not obtain a licence to export during any part of the shipment period, or, alternatively that it was useless for them to take any such steps, or any further steps, because it was quite impossible for them to obtain a licence.`.

52 I do not think that the defendants here seriously disputed that under the agreement they had an obligation to take all reasonable steps to procure the issue of the planning approval by 30 November. Their response to the plaintiffs` allegations was two-fold. First, they contended that they did their best to get the authority to deal with the application on its merits until it became clear that the authority was not disposed to approve the FPA in the form it was presented.

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That contention is substantiated by the evidence which the defendants adduced and which has been set out at length above. The sincere and serious attempts made by the defendants to put forward, and have approved, a feasible proposal is manifest in that evidence. At an early stage the defendants had received professional advice that their proposed course of action had a good chance of approval and, having decided their course, they kept to it and pushed it along as best they could.

53 In this connection, I should also deal with the plaintiffs` point that the FPA was not in order for consideration because the site was not contiguous. This assertion was in fact not in the plaintiffs` closing submissions and, in my view, wisely so. The evidence of both Mdm Wong and Mr Yang Soo Suan, an eminent architect, called as an expert witness by the defendants, was that the right hand lots and the left hand lots in the defendants` site were contiguous since no lots outside the defendants` site would have to be crossed when getting from one corner of it to the other. The authority`s view on the issue is not determinative thereof. That the lots would not be treated as contiguous was a policy decision which was within the purview of the authority to take but the fact that the authority chose such a course does not mean that from the outset the FPA was incapable of being processed.

54 The second response which the defendants made to the plaintiffs` argument was that what steps are `all reasonable steps` must be judged in the context of the agreement which provided not just for the issue of an approval as such but specifically for the issue of a planning approval `upon terms satisfactory to the [defendants]`. They emphasized that if the approval did not satisfy them they had complete licence to deal with the situation as they chose - they could reject it in which case the right of rescission would have been

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available or they could appeal. If they appealed they could withdraw the appeal and/or lodge further applications and the plaintiffs would have no say in any of this. The defendants argued that since they possessed this liberty there was no legal obligation on them to insist that the approval be issued when it was quite clear that the authority would, if prevailed on to come to a decision, have rejected the FPA outright or, at best, issued a qualified approval for a new scheme based on the plot by plot ratio which the defendants would have rejected as unsatisfactory.

55 It is not, however, correct that the defendants were completely unfettered in their right to object to any planning approval on the grounds of its not being satisfactory to them. The Court of Appeal in **Peh Kwee Yong v Sinar Co (Pte) Ltd** [1987] 2 MLJ 533 dealt with the extent to which a party could rely for rights of rescission on a clause in a contract providing for something to be to his satisfaction. Once again, a contract for the sale of land was involved. Clause 6 thereof provided that the property was sold subject to satisfactory answers to requisitions being received and `in the event of any of the answers to such requisitions being found unsatisfactory to you [ie. the purchaser] or your solicitors you may annul the sale...`.

56 Dealing with the ambit of the right conferred on the purchaser by this clause, Thean J who delivered the judgment of the court said:

> *It is the submission of Mr Karthigesu that cl 6 in this case is significantly different from the corresponding provisions in the two cases, and the significant difference lies in the presence of the five words, `to you or your solicitors`, which were absent in those provisions. The addition of these words, `to you or your solicitors`, determines that the unsatisfactoriness of the answers to the requisitions should be looked at in a subjective sense, ie unsatisfactory to the purchaser or his solicitors. The question here is one of construction of Clause 6. The parties here have used the words, `being found unsatisfactory to you or your*

> *solicitors,` and these words are clear and must be read in their ordinary sense; due weight and effect must be given to the express words used by the parties. There is nothing in cl 6 which is inconsistent with such construction. Furthermore, the contract was made by both parties with the benefit of the advice and assistance given by their respective legal advisers. They must be taken to know and mean precisely what they said in the contract. We are therefore of the opinion that the parties intended that the unsatisfactoriness of any of the answers to the requisitions is a matter lying wholly within the subjective judgment of the appellant or his solicitors.*

57 The conclusion we have reached does not, unfortunately, resolve the matter before us. There arises a further question whether the appellant, as the purchaser, was, in the circumstances of the case, justified in giving the notice under cl 6 to annul the sale and purchase agreement. There is, as Mr. Karthigesu candidly conceded, an objective element in determining the exercise by the appellant of his contractual right of annulment. In our view, there are constraints on the exercise of such a drastic right by the appellant, as a purchaser; he cannot in reliance on cl 6 treat an answer to a requisition as unsatisfactory when there is no ground for him to say so, and in determining the answer as unsatisfactory he cannot act arbitrarily, capriciously or unreasonably and certainly not in bad faith; for that will be giving him an unbridled right to get out of the contract which he had deliberately and intentionally entered into.

58 Thus, while in this case the defendants would have been entitled to reject a planning approval that was not satisfactory to them, in determining its satisfactoriness they would not have been entitled to act arbitrarily, capriciously or unreasonably. If they did so they would not be able to rely on their right of rescission. The question then becomes whether the defendants would have been arbitrary, unreasonable or capricious if they had rejected a planning approval which permitted only the separate development of the left hand lots and the right hand lots resulting in two smaller towers. In my judgment the answer to that

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question must be no. The defendants had been formed with a particular aim in mind. Since incorporation they had been working towards achieving that aim and had sold that aim to other investors and prospective tenants. Having been stymied in their efforts to incorporate the intermediate lots in their plans, they had worked hard to come up with an alternative which would give them the type of development they wanted and which they believed would eventually lead to the resolution of the problem of the intermediate lots by involving these lots in the project at a later stage. For the foregoing reasons, it would not in my opinion have been arbitrary, capricious or unreasonable for the defendants to have rejected a planning approval that did not give them the impressive and prestigious development they sought.

59 Counsel for the plaintiffs submitted that one should not speculate what the decision of the authority would have been had it actually been made. He pointed out that such decisions were taken by a committee and the defendants had no knowledge whether the members of this committee would be the same officers from the authority with whom they had dealt previously. Whilst there is no doubt that the committee would have had the ultimate say on the application, my impression from the evidence was that it was highly improbable that such decision would have differed substantially from the views of the authority as set out in AB274. Mdm Wong, who, as the defendants` architect had been in constant touch with the authority, testified that from AB274 she was quite certain as to the attitude of the authority: viz that the defendants had no chance whatsoever of getting approval for the FPA in its then form and secondly, if they could show that a comprehensive development was impossible due to difficulties with Hong Leong, they would get approval for two smaller towers on a plot by plot ratio development. The views of such a professional deserve due weight and the natural inference therefrom is that had no extension

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of time been asked for on 13 November 1987 the authority would either have rejected the FPA outright or (but this was highly unlikely since the plans submitted were for a different type of development) issued an approval which would not have been satisfactory to the defendants as their prestigious tower would have been flattened before it was built. In any event there would not have been in place on 30 November 1987 a planning approval that was satisfactory to the defendants.

60 It is worth pointing out that the agreement is a complex legal document drafted and negotiated by lawyers from well established practices. The plaintiffs having had the benefit of competent legal advice would have been aware from the beginning that the defendants only wanted to complete the purchase of the CYS Building provided that its acquisition fitted into the larger scheme of things. They had no use for the land on its own. The defendants were willing to compensate the plaintiffs within reason for the time it took to determine whether their plans were achievable. They did this by agreeing to pay the plaintiffs $175,000 a month until the conditions precedent to completion were satisfied or the contract rescinded on the basis that the conditions were not satisfied by a specified date. The plaintiffs in turn were willing to accept such payment for the time they remained committed to sell the land to the defendants always knowing that in view of the scale of the defendants` plans there was a chance that the agreement would be brought to an end. In the event that is just what happened. In my judgment since the defendants having done their best could not persuade the authority to issue, or even to indicate that it was prepared to issue, the type of approval the defendants wanted, they were entitled to rescind the contract.

61 In the circumstances the plaintiffs` claim fails. The defendants are entitled to judgment on the counterclaim.

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62 Accordingly I hereby order:

(1) that the plaintiffs` claim be dismissed;

(2) that the plaintiffs do forthwith refund to the defendants the deposit of $875,000 together with all interest accrued thereon and not hitherto paid to the defendants; and

(3) that the plaintiffs pay to the defendants their costs of the claim and counterclaim as taxed.

63 **Outcome:**

Judith Prakash JC

Choo Han Teck and Lek Siang Pheng (Helen Yeo & Partners) for the plaintiffs
Joseph Ang (Marina Chin and Raymond Wong with him) (Lee & Lee) for the defendants

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