

IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1993] SGCA 4

CA 155/1991

Between

Indian Overseas Bank

... Appellant

And

Cheng Lai Geok

... Respondent

GROUND OF DECISION

Damages — Measure of damages — Contract; Land — Sale of land —
Contract

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Indian Overseas Bank v Cheng Lai Geok

[1993] SGCA 4

CA 155/1991

Chao Hick Tin J; Warren Khoo L H J; Yong Pung How CJ

12 January 1993

1 Cur Adv Vult

2 This appeal raises a number of issues relating to the question of damages in the event that a purchaser should default in proceeding with the purchase of a property concluded at an auction.

3 On 2 July 1981, the respondent successfully bid at an auction for the purchase of the properties known as Nos 27, 29, 31 and 33 Birch Road, Singapore (`the said properties`) for a sum of \$ 2.6m. The appellants were at all relevant times the mortgagees of the said properties and they had, in exercise of the powers under the mortgage, placed the said properties for sale by public auction. The sale was subject to certain special conditions and the general conditions known as `The (Revised) Singapore Conditions of Sale` (hereinafter referred to as `the special conditions` and `the general conditions` respectively). It was expressly provided that in the event of any conflict between the two sets of conditions, the special conditions were to prevail.

4 The agreement was duly signed by the respondent on the very day of his successful bid. He also handed over to the auctioneers, as agents for the appellants, a cheque for \$650,000, being the required deposit.

5 Clause 1 of the special conditions required the respondent, immediately after the sale, to pay a deposit of 25% of the purchase price (ie \$650,000) to the auctioneers as agents for the appellants and to sign the agreement which was attached to the special and general conditions of sale. Clause 2 of the special conditions provided that the purchase shall be completed at the office of the appellants' solicitors within one calendar month from the signing of the agreement. The completion date accordingly fell on 2 August 1981.

6 On the next day after signing the agreement, however, the respondent countermanded payment of the said cheque and also informed the appellants that he had decided not to proceed with the purchase of the said properties because of certain caveats lodged against the said properties and four pending suits in the High Court which concerned the said properties. The respondent thereafter failed to complete the purchase on 2 August 1981.

7 On 8 October 1981 the appellants instituted this action against the respondent seeking specific performance and damages or damages in lieu of specific performance. However, sometime in March 1991 the appellants decided to put up the said properties for re-sale by tender. After giving due notice to the respondent to complete, the appellants on 11 April 1991 sold the said properties to Messrs Lim Chor Piau and Lim Choo Kuan who submitted the highest bid of \$2.33 m.

8 When hearing commenced before the learned judicial commissioner, leave was given to the appellants to amend their pleadings to abandon the claim

for the relief of specific performance. In a written judgment the learned judicial commissioner ruled that the respondent was wrong to have refused to complete the purchase and that the appellants were entitled to damages. No notice of appeal was filed by the respondent against the decision of the court. The judgment is reported in [1992] 2 SLR 38 , where the facts are fully set out. However, the appellants are dissatisfied with the damages awarded by the court and have appealed against that part of the decision. The appellants are also dissatisfied with the court`s decision not to award interest on the judgment sum.

9 In the re-amended statement of claim the appellants asked for the following reliefs:

- (1) damages for breach of contract;
- (2) a declaration that the plaintiffs are entitled to the deposit of \$650,000 for their own use and benefit;
- (3) payment of the said deposit of \$650,000 and interest thereon at such rate and for such period as the court shall think fit;
- (4) interest on the purchase money at 8% pa from 2 August 1981 to date of judgment;
- (5) further, or alternatively, interest on the amount of such damages at such rate and for such period as the court shall think fit.

10 In his submission to the learned judicial commissioner, counsel for the appellants claimed the following as damages:

- (1) the difference between the contract price and the market price of the said properties as on the day of the breach;
- (2) further, or in the alternative, the deposit of \$650,000;
- (3) miscellaneous expenses (insurance, property tax, repairs and security guard) which the appellants had incurred in respect of the said properties for the period from 1 August 1981 to 17 May 1991, amounting to \$301,128.25.

(4) expenses incurred by the appellants in reselling the properties amounting to \$35,005.50.

11 The learned judicial commissioner granted the appellants damages in the sum of only \$50,000 and refused their alternative claim for the deposit of \$650,000. He also refused the claim for the miscellaneous expenses and the expenses incurred to resell the said properties. Interest on the judgment sum was also refused.

12 In the present appeal, the appellants are no longer pursuing their claim for the miscellaneous expenses. But they contend that the learned judicial commissioner has erred in awarding only the sum of \$50,000 for general damages. They say that he has applied the principle wrongly. It should be the difference between the contract price and the market price of the said properties as of the date of the breach. They also argue that the expenses which they would have to incur in reselling the said properties should also be taken into account. They further contend that if this court is with them in their claim for the deposit of \$650,000, then, to the extent that the deposit exceeds the amount of general damages, their claim for general damages could be reduced to a nominal sum. Their last point was that the court below was wrong to have refused to grant them interest on the judgment sum. We shall now proceed to examine each of these issues in turn.

13 **Measurement of damages**

14 In determining the quantum of damages the learned judicial commissioner took the date of the breach of contract as the appropriate date. He held that the correct measure would be `the difference between the price of \$2.6m which the [respondent] agreed to pay for the subject properties on 2 July 1981 and the market price at the date of completion, ie 2 August 1981.` Of

course this is not an inflexible rule. In appropriate circumstances it could be the date when the contract is lost rather than the date of the breach. In the circumstances of this case, the adoption of the date of breach as the appropriate date cannot really be faulted and counsel for the appellants does not seek to do so. The principle stated by the learned judicial commissioner is clearly correct: see **York Glass Co Ltd v Jubb** [1925] All ER 285 and **McGregor on Damages** (15th Ed) at para 937-8. But what counsel for the appellants contends is that the court below, having stated the principle correctly, had misapplied it to the facts.

15 The appellants tendered to the court below a valuation report which was not disputed by the respondent. The valuers, Messrs Michael Sim & Associates, gave the following as representing the market values of the said properties on the dates indicated:

16 2 July 1981 - \$2.3m (date of contract)

17 2 August 1981 - \$2.25m (date for completion)

18 11 April 1991 - \$2.1m (date on which the mortgagee sold the said properties)

19 It seems to us that if the learned judicial commissioner had applied the test simpliciter to the facts, he would have arrived at the figure of \$350,000 being the difference between the contract price and the market value of the said properties on 2 August 1981. Instead, at the invitation of the respondent's counsel, he went on a process of comparing the contract price on 2 July 1981 and the resale price on 11 April 1991 with the market values as given by the valuers on those two dates and came to the conclusion that ` the values arrived

at by the valuers for the subject properties for the different dates ... are not the true market values of the properties on those dates.` He then held that in any event, as the appellants` valuers were of the view that the market value of the said properties had only depreciated by \$50,000 between the date of the contract (2 July 1981) and the scheduled date for completion (2 August 1981), it would be in order to assess the loss to the appellants in that amount.

20 In our view, the error in the approach of the learned judicial commissioner lies in equating contract price with market value. The two very often do not coincide. It might well be that the contract price of \$ 2.6m which the respondent bid was high. That is the appellants` good fortune. But there is no reason why the appellants should not be entitled to the benefit of a good sale. The market value of the said properties at the date of contract is quite irrelevant:

McGregor on Damages

21 (15th Ed), at para 938. When there is a breach by a purchaser, in the absence of an immediate re-sale of the property thereafter by the vendor, the only possible yardstick which could be used to determine the probable loss to the vendor would have to be the estimated market value of the property on the date of the breach. It would not be possible to say whether, if the vendor had put the property for sale on the day of the breach, he would obtain something more or something less than the market value. The law assumes that he would only obtain the market value. There is nothing inequitable about this rule as the vendor should be entitled to be compensated for his loss. The rule could also, in appropriate circumstances, work to the benefit of the purchaser. Take the situation where the property market is buoyant and prices have risen steadily. It might well be that at the date of the breach, the vendor would have suffered no loss because the market value as at the date of breach would have been higher than the contract price. In such an event, the damages awarded would be

nominal. We would add that there was no contrary evidence to suggest that the valuations of M/s Michael Sim & Associates were wrong. Those valuations were simply not challenged.

22 We turn next to consider a related point: whether the court should have allowed, as part of the damages recoverable, the expenses which would have been incurred had the property been re-sold on 2 August 1981. The basis for this contention is that the seller is entitled to the difference between the contract price and the net market value of the property left in his hands at the date for assessing the damages. It is argued that the fact that no resale had in fact taken place on the date of the breach is immaterial.

23 The following passage in McGregor at para 940 appears to support this contention:

*One such expense commonly encountered is the expense of the abortive sale to the defendant; in **Essex v Daniell** the seller recovered damages representing the auctioneer's charges for the abortive sale and the costs incurred by him in preparing to complete the sale. It is true that this case concerned special conditions of sale, but Brett J said that 'under ordinary circumstances' the seller's expenses in preparing for the sale are recoverable. This head of damage requires to be analysed rather carefully, since the expenses of the abortive sale would have been incurred even had the purchaser not defaulted; putting the seller into the position he would have been in had the contract been performed still entails his having incurred these expenses. The true analysis is this. The seller recovers the full contract price less the net market value of the property left on his hands, ie the amount at which a resale has been or could be made deducting therefrom the costs of resale. Thus the expenses to be looked at are not those of the abortive sale but those of the resale, or, where there has been no resale, the estimated costs of a resale. [Emphasis added]*

24 There was evidence before the court that when the appellants re-sold the said properties in 1991, expenses incurred for the sale amount to \$35,005.50 consisting of advertisements (\$5,000), commission to agents (\$23,300) and

legal fees (\$6,705). It seems to us clear that if the appellants had accepted the rescission and immediately put the property for re-sale by tender or auction, advertisement cost and commission to agents would have to be incurred. These would be additional expenses which would arise out of the breach of contract by the respondent. As regards the legal fees (for conveyancing), we doubt that the conveyancing fees in respect of the sale to the respondent would have been incurred and paid since the refusal by the respondent to go through with the sale was almost immediate. Therefore, the conveyancing fees that would be incurred on a resale of the said properties would not have been additional costs. Viewed in this light and having regard to what was incurred by the appellants for advertising and agents' commission on the re-sale in 1991, we think a sum of \$25,000 would have been the additional expenses incurred by the appellants at a resale. We think that the award of this sum would be in line with the general principle for the assessment of damages which is compensatory, ie that the innocent party is to be placed, so far as money can do, in the same position as if the contract had been performed: **Johnson v Agnew** [1980] AC 367 at p 400.

25 In the light of the foregoing we hold that the correct measure of damages to be awarded to the appellants is \$375,000, consisting of \$350,000 plus \$25,000. This is subject to set-off against the deposit (see below).

26 **Deposit of \$650,000**

27 The next issue relates to the deposit which the respondent had failed to pay. It will be recalled that though the respondent issued a cheque to the auctioneers for \$650,000, being the required deposit, payment was in fact not received as the respondent had instructed his bank to stop payment on the cheque. Neither the appellants nor the auctioneer sued on the cheque. The

question is, are the appellants now entitled to claim for the payment of the deposit and to forfeit it.

28 Special condition (1) states that `the purchaser shall immediately after the sale pay a deposit of twenty-five per cent (25%) of the purchase price to Messrs Cheong Hock Chye & Co (Pte) Ltd as agents for the vendors and will sign the sub-joined agreement.` In contrast, general condition (2) provides that `the purchaser shall immediately after the sale pay to the auctioneer as stakeholder a deposit of twenty-five per cent on the amount of the purchase money.` These two conditions are not entirely consistent and obviously special condition (1) should prevail.

29 The provision that deals with the disposal of the deposit in the event of default on the part of the purchaser is general condition (30), which reads as follows:

If the purchaser shall fail to comply with these or the special conditions or the contract, the vendor shall be at liberty (after ten days` written notice to the purchaser or his solicitor) to treat the deposit as forfeited and without tendering an assurance to resell the property by public auction or private contract subject to such conditions and generally in such manner as he may think fit with power to vary or rescind any contract for sale buy in at any auction and resell and the deficiency in price (if any) arising on sale and all expenses of and incident to a resale or attempted resale shall be made good and paid by the purchaser and be recoverable by the vendor as liquidated damages, the purchaser receiving credit for the deposit, but any increase of price on a resale shall belong to the vendor.

30 It is submitted for the appellants that, on a proper construction of general condition (30), the right to forfeit the deposit may be exercised, irrespective of any subsequent resale. In other words, had the deposit in fact been paid, the appellants would have been entitled to forfeit the same whether or not the appellants subsequently went on to resell the property. They argue that the

position should not be any different just because the deposit had not been paid. The respondent should not be placed in a more advantageous position by his double defaults: failure to pay the deposit and to complete. The appellants also contend that the fact that they also claim for damages under common law should not disentitle them from forfeiting the deposit.

31 Up until March 1991 the appellants had insisted on specific performance. It was only on 28 March 1991 that the appellants' solicitors informed the respondent's solicitors that the appellants demanded completion of the sale by 10 April 1991, failing which the appellants would treat the respondent's failure to complete as a repudiation which the appellants would accept but reserving their rights to claim for damages for breach of contract, interest and costs.

32 It cannot be disputed that the appellants were entitled to ask for the deposit soon after the contract was entered into or soon after the breach on the part of the respondent. Without further ado they could have sued on the cheque on which payment was stopped. Does their failure to sue on the cheque disentitle them to claim for the deposit? The appellants rely on the case **Dewar v Mintoft** [1912] 2 KB 37 in support of their claim for the deposit sum. There the contract of sale of a farm by auction contained a condition - 'if the purchaser shall neglect or fail to comply with any of the above conditions his deposit money shall be forfeited to the vendor who may with or without notice resell the premises ... and if thereby the vendor shall incur a loss by reason of diminution in price or expenses incurred or both after taking into account the deposit the defaulter at this sale shall pay to the vendor the amount of such loss as liquidated damages ...'. No deposit was in fact paid. The purchaser refused to carry out the contract. The vendor elected to treat the contract as discharged. The farm was subsequently resold. The actual damages suffered by the vendor by reason of

the breach were less than the sum the purchaser would have deposited if he had carried out the contract. The court held that the vendor was entitled to recover the sum which should have been paid as deposit and not just the actual loss. We have noted that the main issue in the case was whether there was a sufficient memorandum in writing for the purposes of s 4 of the Statute of Frauds 1677 for the contract to be enforceable.

33 The rule in **Dewar v Mintoft** [1912] 2 KB 37 was approved in **Millichamp v Jones** [1982] 1 WLR 1422 and applied in **Damon Cia Naviera SA v Hapag-Lloyd International SA** [1983] 3 All ER 510[1985] 1 All ER 475. We should mention that **Dewar v Mintoft** [1912] 2 KB 37 was not followed in an earlier case **Lowe v Hope** [1969] 3 All ER 605 where Pennycuik J said at p 608:

... it seems to me that the vendor having elected to bring the contract to an end by rescission is not entitled to insist on the performance of the contract in relation to the deposit. This is admittedly so, insofar as the deposit bears the character of part of the unpaid purchase price. It seems to me that it must equally be so, insofar as the deposit bears the character of a pledge; for once the vendor has rescinded the contract there are no outstanding obligations on the purchaser in respect of which the vendor can be entitled to be protected by a pledge.

34 **Millichamp v Jones** 4 was concerned with the question of a failure to pay a deposit as required under a contract of repurchase. The failure was unintentional. When the failure was drawn to the attention of the plaintiff, the deposit was tendered. But the defendant refused to accept it. The court held that as the non-tender of the deposit earlier was due to an oversight, there was no breach. The court also held that in a contract for the sale of land a requirement that a deposit should be paid was not a condition precedent, failure of which would prevent the contract from coming into existence at all. But it was in general a fundamental term, a breach of which would entitle a vendor to treat a

contract as discharged and to sue for damages, including the unpaid deposit. Warner J approved **Dewar v Mintoft** [1912] 2 KB 37 and he thought that that particular part of Pennycuick J's judgment in **Lowe v Hope**, [1969] 3 All ER 605, which we have quoted above, seemed to have been invalidated in **Johnson v Agnew** [1980] AC 367 where the House of Lords held that acceptance of a repudiatory breach did not bring about 'rescission ab initio'. In such an event, the contract had come into existence but had been put to an end to or discharged.

35 In **Damon Cia Naviera SA v Hapag-Lloyd International SA**, [1983] 3 All ER 510[1985] 1 All ER 475 which was a case concerned with the sale of three ships, the purchaser was required to pay a deposit of 10%. Another clause provided that in the event of the purchaser failing to pay the purchase price, the seller could cancel the contract and retain the deposit. The purchaser failed to complete the purchase and the vendor accepted the repudiation and sold the ships to a third party at a loss of o60,000. The vendor claimed to be entitled to receive the deposit from the purchaser, who refused to pay. At first instance Leggatt J held that the right of the vendor to receive the deposit had accrued before the purchaser's repudiation had been accepted and the vendor was therefore entitled to recover the amount of the deposit as damages for breach of the obligation to pay the deposit. The court also went on to hold that the vendor was also entitled to claim damages for the repudiation but since the amount recoverable in respect of the deposit was greater than his actual loss, only nominal damages could be recovered in addition to the amount of the deposit. Leggatt J explained the basis of the decision in **Dewar v Mintoft** [1912] 2 KB 37 to be 'the principle, which is axiomatic to the sale of goods lawyer, that acceptance of repudiation releases the offending party from liability only for future obligations, not for obligations already incurred.'

36 On appeal to the Court of Appeal, the decision of Legatt J was affirmed. Robert Goff LJ dissented from the majority decision on a different aspect. The Court of Appeal held that the provision in a contract for payment of a deposit was not a condition precedent to the formation of a contract. It was, however, a fundamental term of a concluded contract the breach of which would entitle the purchaser to renounce further performance. With regard to the specific question now under consideration, Fox LJ, who delivered the majority judgment, adopted the following statement of law enunciated by Dixon J in **McDonald v Dennys Lascelles Ltd** [1933] 48 CLR 457 at p 476:

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.

37 Fox LJ then proceeded to discuss the decisions in **Dewar v Mintoft** [1912] 2 KB 37 and **Lowe v Hope** [1969] 3 All ER 605 and indicated his preference for **Dewar v Mintoft** [1912] 2 KB 37. This was how he reasoned (at p 488):

*It is said, however, that such a conclusion is inconsistent with **Lowe v Hope** [1969] 3 All ER, [1970] Ch 94 which was, in fact, a more straightforward case than the present because under the contract the obligation to pay the deposit had clearly arisen. Before coming to **Lowe v Hope**, I should mention **Dewar v***

Mintoft [1912] 2 KB 373. In allowing the claim for damages for failure to pay the deposit, Horridge J in that case directed the jury, at pp 387-388:

‘the defendant could not put himself in a better position by a refusing to pay the deposit than if the deposit had in fact been paid, in which case it could be retained by the seller ...’

However, Pennycuick J in **Lowe v Hope** rejected that and said that **Dewar v Mintoft** was wrong. The vendor in **Lowe v Hope** having sought rescission by his statement of claim, then claimed the amount of the unpaid deposit. Pennycuick J said at ([1969] 3 All ER 605 at 608, [1970] Ch 94 at 98:

‘... it seems to me that the vendor having elected to bring the contract to an end by rescission is not entitled to insist on the performance of the contract in relation to the deposit. This is admittedly so, in so far as the deposit bears the character of part of the unpaid purchase price. It seems to me that it must equally be so, in so far as the deposit bears the character of a pledge; for once the vendor has rescinded the contract there are no outstanding obligations of the purchaser in respect of which the vendor can be entitled to be protected by a pledge.’

As regards the view of Horridge J that the defendant could not put himself into a better position by refusing to pay the deposit, Pennycuick J said that he did not think that there was any place for such a rule in the present context.

38 Counsel for the seller contends that **Dewar v Mintoft** is to be preferred to **Lowe v Hope** because rescission by the injured party only releases the party in breach from future obligations. I think that is right. In deciding **Lowe v Hope** Pennycuick J did not have the advantage of the decision in **Johnson v Agnew** and the clarification of the law which it contained. Pennycuick J remarked that it was admittedly the case that if the vendor has accepted the purchaser’s repudiation, there can thereafter be no recovery in respect of money bearing simply the character of purchase price. That is correct but it is dealing with a different problem. A purchase price is payable in return for a conveyance and if the obligation to convey has gone because of the acceptance of the repudiation there is no longer a purchase and sale to which a purchase price can be related. The right of the vendor to forfeit the deposit is not, however, dependent upon

completion of the purchase. The right to forfeit arises out of the breach and is, therefore, something quite different from the right to receive the purchase money in return for a conveyance.

39 From the discussion above it seems clear that what was decided in **Dewar v Mintoft** [1912] 2 KB 37 is good law and we agree with it. The moment the respondent successfully bid at the auction and signed the written agreement, a firm contract has come into being. By not paying the deposit, the respondent was in breach of a fundamental term of the contract entitling the appellants to treat the contract as discharged and to sue for damages, including the unpaid deposit.

40 Another argument which was raised by the respondent and which was upheld by the court below was that the deposit amounted to a penalty and thus should not be recoverable. The learned judicial commissioner was influenced to a great extent by the fact that the valuation of M/s Michael Sim & Associates showed that for the period of one month from 2 July to 2 August 1981 the value of the said properties only depreciated by \$50,000. We have earlier indicated the error of this comparison. We would further add that it is wrong to think that the pertinent period is just one month: 2 July-2 August 1981. If, as was the case, the sale was aborted, time would have to be spent to set up another auction to have the said properties sold. The question whether a sum stipulated is a penalty or liquidated damages is a question to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not at the time of the breach: see **Dunlop Pneumatic Tyre Co v New Garage and Motor Co** [1915] AC 79 at pp 86-87. One of the tests to assist in the determination of the question is whether the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach. In the

instant case, there was simply no evidence to show what could have been the greatest loss that could be caused to the appellants if the respondent failed to proceed with the purchase. The requirement of a 25% deposit was the standard term prescribed then by the Law Society of Singapore in relation to the sale of property by auction. It seems to us that one of the reasons for requiring a higher deposit on auction sale must be because bids at auction could and perhaps do tend to vary rather widely. There is no evidence before us at all to show the sort of range within which bids at auction do fluctuate. In the circumstances, there is no basis for the court below to find that the 25% deposit is a penalty.

41 Accordingly, we order the respondent to pay the appellants the sum of \$650,000. As this sum exceeds the damages of \$375,000, there will be no separate award for the latter.

42 **Interest**

43 The learned judicial commissioner refused to grant interest on the damages he awarded. In coming to this decision, he had regard to `all the circumstances leading to the sale of the subject properties and to conduct of the (appellants) in the pursuit of the remedy for specific performance`.

44 We agree with the learned judicial commissioner that this is a case where interest should not be awarded. Our reasons are:

- (i) While the appellants did promptly institute the action claiming for specific performance and damages or damages in lieu of specific performance, it is equally clear that there was undue delay on the part of the appellants in bringing the action to trial. The action should have been set down for trial within 30 days of 15 October 1982. It was not done until 9 April 1987. No explanation was given for the inordinate delay.

(ii) The appellants did not claim for the payment of the deposit until the statement of claim was amended at the commencement of trial, a delay of almost ten years.

45 Finally, we turn to the question of costs. As the appellants have succeeded substantially in this appeal, we think the appellants should be awarded a substantial portion of the costs. They have failed only on the question of interest. Accordingly, we order that the appellants should have 85% of their costs of this appeal.

46 **Outcome:**

Chao Hick Tin J
Warren Khoo L H J
Yong Pung How CJ

BV Peter (Chia Kim Huat with him) (Ramdas & Wong) for the
appellants
Noor Lila Abdul Hamid (Seah Chwee Lim & Associates) for the
respondent
