IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1994] SGHC 186

Suit 1542/1990

Between

Alrich Development Pte Ltd

… Plaintiff

And

Rafiq Jumabhoy (No 2)

… Defendant

GROUNDS OF DECISION

Civil Procedure — Amendments; Contract — Misrepresentation — Action for rescission; Land — Sale of land — Conditions of sale; Legal Profession — Conflict of interest

Version No 1: 29 Oct 2026 (23:45 hrs)

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Alrich Development Pte Ltd v Rafiq Jumabhoy (No 2)

[1994] SGHC 186

Suit 1542/1990
Chao Hick Tin J
19 July 1994

1 Cur Adv Vult

2 The plaintiffs, Alrich Development Pte Ltd (Alrich), are real estate developers and the defendant is the owner of the property at lot 41-44, TS 26, known as No 36, Ewe Boon Road (36 EBR). This is an action for specific performance of a sale and purchase agreement constituted by an option dated 8 June 1990 given by the defendant to one Madam Ho Poh Lin (HPL) and exercised by the plaintiffs as the nominee of HPL. The option relates to 36 EBR. The principal defence raised is one of misrepresentation.

3 **Background**

4 I think I should at the outset identify the major personalities involved and recount the events from the very beginning so that the issues raised in this action may be more readily understood.

5 The plaintiffs, Alrich, were incorporated in 1980. Alrich`s original shareholders were Lim Chong Siong (LCS) and Eddie Chong Keng Wee, with each holding 100,000 $1 shares. They were also the directors. Pursuant to

Alrich`s application, on 16 October 1987 Alrich received clearance from the Controller of Residential Property to enable the company to acquire and retain residential property and was required by the Controller to amend its memorandum and articles of association so that only Singaporeans could be shareholders and directors of the company.

6 Before the clearance was obtained, LCS and Eddie Chong transferred 195,000 shares in the company to one Seetoh Oi Ling (STOL) and 5,000 shares to one Peter Wan Siew Teck (Wan). At that time LCS was only a permanent resident in Singapore. He became a citizen in March 1993. Both STOL and Wan became directors of Alrich on 1 September 1987. Thereafter, LCS assumed the office of the general manager of Alrich. Wan has been associated with the company from the beginning. Wan did not have to pay for the 5,000 shares transferred to him. Neither did STOL pay for her shares. At the time, on record, Alrich had an accumulated loss of over $2m. LCS stood as a guarantor for all facilities from the bank. He continued to do so even after he ceased to be a shareholder and director.

7 STOL has been living with LCS as man and wife since 1984. She has given him a child. Earlier between 1973 and 1981, LCS was living with HPL as man and wife. HPL has also given LCS two boys, a pair of twins.

8 One Simon Cornelius (SC) is an estate agent. SC knew Wan since 1978 and renewed their acquaintance in 1988. SC knew the defendant even before 1978. In this judgment I shall refer to the defendant as `RJ` and the wife of `RJ` as `Mrs RJ`. Four other property brokers were also involved in this matter: Donald Han, KC Ting, SL Tan and Madam YL Tan. The extent of their involvement will be described as I go along.

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9 Ewe Boon Road and Keng Chin Road were at all material times a residential area. Sometime in 1988 and early 1989 SC was trying to interest Wan, and consequently Alrich, to purchase properties in the Ewe Boon Road area. He identified in particular 38 EBR and the neighbouring properties. In fact, the owners of 38 EBR had asked SC to find a buyer for their property. SC brought Wan to see the area. Through SC`s efforts Alrich decided to buy 38 and 40 EBR. The options to those two properties were obtained in July 1989.

10 Also around that time SC approached RJ to make an offer on behalf of Alrich to purchase the adjacent 36 EBR at a price of $1.4m. RJ was living there with his family. The offer was later increased to $1.6m. SC also told RJ that Alrich was about to or had purchased the two neighbouring properties at 38 and 40 EBR. Both Mr and Mrs RJ did not accept those two offers.

11 In September/October 1989 SC met Mrs RJ by chance. He again raised the question of the sale of her husband`s property. On his own initiative, and without checking with Wan, he increased the offer to $1.8m as he was confident that Wan would agree with what he was doing. That was also refused by the RJs. SC kept Wan informed of all that.

12 In the meantime in August 1989 Mrs RJ had her first encounter with Wan. She said it occurred on a day in August 1989 when she was leaving her residence at 36 EBR in a girlfriend`s car. As she was about to enter the car she was interrupted rather abruptly by Wan who introduced himself as being from Alrich. At that point she was familiar with both the names as SC had mentioned those names to her before when SC was trying to persuade her husband to sell their home to Alrich. Mrs RJ alleged that Wan behaved rather aggressively as he said he could not understand why the RJs did not want to sell their property.

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He also remarked that it would not be comfortable living next to a construction site, and that anything could happen.

13 Wan did not deny that he first met Mrs RJ around that time. He was then in the vicinity and he saw Mrs RJ leaving her house. He introduced himself and left a calling card with her. However, he denied that there were any unpleasant exchanges with Mrs RJ on that occasion. It was asked: would a person behave aggressively or make a threat and yet leave his calling card. I do not think I need make a determination on this point as it could be a matter of perception. I do not think anything in this action really turns on that incident, though rightly or wrongly it did leave a mark in the mind of Mrs RJ.

14 In November 1989 Alrich`s application to the competent authorities to develop No 38 and 40 EBR into a block of walk-up flats was refused. There is some evidence to suggest that the competent authorities did informally indicate to Alrich that if 38 and 40 EBR were to be developed jointly with the neighbouring property, No 6 Keng Chin Road (6 KCR), the application might have a better chance of success, even to the extent of being permitted to build beyond low rise to medium rise (up to ten storeys).

15 Following that Alrich began to look at 6 KCR which was a bigger piece of land than 38 and 40 EBR combined. Alrich claimed that they could not afford such a big development. Thus they approached one Lam Chung Ho (Lam) from Hong Kong for the purpose of entering into a partnership - to share the risk. According to Wan an understanding was reached with Lam just before Christmas 1989. Lam secured the option to 6 KCR on 12 January 1990 and exercised it in Hong Kong on 30 January 1990. The acceptance was conveyed to the vendors` solicitors on 8 February 1990. However, notwithstanding the earlier informal indication, an application to the competent authorities for a

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medium rise development, from two to 12 storeys, on Nos 38 and 40 EBR and No 6 KCR (hereinafter collectively referred to as `the three plots`) was rejected on 12 February 1990.

16 As a result it was decided to dispose of the three plots together. Lam allegedly assigned his rights to 6 KCR to Alrich without so much as a scrap of paper to record what was their understanding. Wan said it was a gentleman`s agreement. Alrich sold the three plots to Toa Corporation on 16 March 1990 at an overall price of $260 psf.

17 However, Wan claimed that Lam insisted on being paid at $308 psf in respect of 6 KCR. His solicitor corrected him and said it was $288, giving credit to the 10% deposit already paid by Lam. The reason would appear to be this: as 38 and 40 EBR would not themselves be able to fetch $260 psf, Lam wanted a bigger share of the profits. Wan said Alrich acceded to Lam`s demand. On 18 July 1990 Alrich issued a cheque for $3,605,106.71 in favour of Lam, the bulk of which represented profits due to him from the sale.

18 Sometime in February/March 1990 the RJs approached one David Lawrence, the Managing Director of Richard Ellis, an international firm of estate agents and valuers, to sell their house. By then, the RJs had decided to get a new place for their residence. They appreciated that the whole Keng Chin/Ewe Boon area would be the subject of redevelopment. Lawrence assigned one Donald Han (Han), a marketing executive with Richard Ellis, to attend to it. At the time Han knew that Alrich was trying to sell the three plots. He spoke to Wan suggesting that perhaps Wan should consider incorporating 36 EBR with the three plots and sell them off as one bigger parcel. Eventually Wan showed interest but said that the price must be right.

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19 Han negotiated with Wan and Mrs RJ on the price. This carried on for about a week. Han could not remember what was the initial and other offers that Wan made. Wan said RJ initially asked for $2.5m; his offer then was $2.3m. Later RJ asked for more, at $2.7m. Han said finally Wan agreed to the price of $2.7m, but asked for a six-month completion date. Wan also told Han that the solicitors for Alrich would be M/s Chong Yeo and Partners.

20 On 16 March 1990, Lawrence wrote a letter to RJ (DB1) advising him to accept the $2.7m offer, even though the offer was coupled with a six-month completion date. RJ was a little concerned about the long completion date. RJ seemed to entertain some doubts whether the buyer was really able to pay. But RJ finally agreed to all that and named M/s Adrienne Chew to be his solicitors. Everything seemed to be agreed, subject to contract. M/s Adrienne Chew faxed a draft contract to Han who in turn faxed it to Wan on 19 March 1990. Because of RJ`s concern whether the buyer was really able to pay there was inserted in the draft a clause requiring the buyer to furnish a guarantee; this was only a proposal. There was no response or comment at all from Wan as to the contents of the draft contract.

21 It would appear that sometime in the second half of March 1990, Wan wanted to see the road interpretation plan and some other plans relating to 36 EBR. Those were eventually furnished to Wan. Han`s recollection on this aspect was somewhat unclear. But Han said that it was finally understood that Alrich would hand over their cheque on 31 March 1990 to close the deal. At the very last minute Alrich withdrew. Han said Wan told him that Alrich was not proceeding with the deal because their Hong Kong joint-venture partner was pulling out. He said he remembered this reason given by Wan `vividly`.

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22 When Mrs RJ was told by Han of the withdrawal she was upset and intimated to Han that she would not want to sell the property to Alrich and that Han should explore with other buyers. RJ was similarly disappointed and told David Lawrence of his feeling that he would not sell the property to Alrich except at $2.7m. RJ got the impression from Lawrence that this sentiment was conveyed to Alrich. Han said he himself never spoke to Wan on it after that.

23 Wan denied that there was any firm offer to buy at $2.7m. He said that Alrich signed the agreement to sell the three plots to Toa Corporation on 16 March 1990 and thereafter he was no longer interested in 36 EBR. If that was the case why did Wan carry on the negotiation with Han? According to Wan the agreement to sell to Toa Corporation was reached on 12 or 13 March 1990. Wan conceded that he had never at any time told Han that the agreement with Toa Corporation was to be signed on 16 March 1990 and that Han should come back to him on 36 EBR before that date.

24 Considering all the evidence, in particular that of Han and what was stated in DB1, I find that there was at the end of March 1990 an agreement in principle by Alrich to purchase 36 EBR at $2.7m, subject to contract. While Han could not recall some of the details, I find that he is generally a truthful witness. Ordinarily this event should be quite irrelevant to an option granted more than two months later by RJ. I am referring to it because it has a bearing on the central issue in this action.

25 Sometime in April 1990 another property agent KC Ting advertised 24 Cable Road for sale. Mrs RJ contacted Ting as she was looking for a new home. Ting came to her home to pick her up to go and see 24 Cable Road. She told him the reason why she was looking for a house. At that point in time she knew through Donald Han that the three plots had been bought and subsequently sub-

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sold by Alrich to Toa Corporation. Mrs RJ told Ting of that. They talked about the properties in her neighbourhood and Mrs RJ mentioned to Ting that No 8 Keng Chin Road (8 KCR) was owned by one Helen Loh and her mother. Ting corrected her by saying that the owner was one Mrs Khoo.

26 Mrs RJ saw Ting a second time some days later when she went to see 24 Cable Road a second time with her husband. In the car Ting was talking about 8 KCR and that it belonged to Mrs Khoo. RJ invited Ting to his office to talk about the idea of amalgamating 36 EBR with 8 KCR. RJ was and is the managing director of Scotts Holding, a public listed company. As Scotts Holding was in the property business RJ said he would check out and get back. RJ spoke to his father who was and is the chairman of Scotts Holding. As RJ`s own property would be involved in the proposal, his father advised against the idea. So RJ told Ting he was not interested. KC Ting denied that the RJs went with him to see the Cable Road property a second time.

27 **Events relating to action: plaintiffs` version**

28 We come now to the events in May/June 1990 which is at heart of this action. First, the plaintiffs` version. On 19 May 1990, a Saturday, one SL Tan (SL), a property broker, and his wife viewed a property at No 11 Keng Chin Road which a broker-friend of his, Mdm YL Tan (YL), told him was available for sale. He also took the opportunity to look around the vicinity. They passed 36 EBR which they thought was quite pretty. Just at that moment an Indian lady came out of the gate of 36 EBR to dispose rubbish into the dustbin. SL`s wife approached the Indian lady to enquire of the name and phone number of the owner of the property. The lady went into the house and came out with a piece of paper with a name and telephone number written on it.

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29 The following Monday, 21 May 1990, SL`s wife called Mrs RJ to fix an appointment for SL to see the property. An appointment was set for 23 May 1990 at 3pm. SL went alone. He indicated to Mrs RJ that he was buying for a client. He was shown round the house. According to SL, Mrs RJ said the minimum sale price for the property was $2.5m. No other conditions were mentioned by her. Neither did she ask if the buyer was a developer.

30 I should at this point indicate that Mrs RJ in her evidence said that she asked if the buyer was a private buyer and SL affirmed that. She said she even asked if the buyer was Alrich and SL Tan replied in the negative. He informed her that he would bring the client to see the property later.

31 After that viewing, SL told his contacts, including YL, of the availability of 36 EBR for sale. YL got in touch with Wan who said the price at $2.5m was too high. She also told him that another property at Dalvey Road was also available for sale.

32 On receipt of that information from YL, Wan passed it to LCS. LCS rang up HPL to ascertain if she was interested in buying the house as an investment. HPL said `yes` and gave LCS full authority to proceed. She told LCS that there should be a nominee clause. LCS in turn instructed Wan to negotiate at $2m with a nominee clause.

33 On 26 May 1990 YL went over to Wan`s office to discuss the various properties. She was persuading Wan to take 36 EBR. They also discussed its rental potential.

34 On 28 May 1990 YL told SL that she had a potential buyer and asked SL to fix an appointment for the buyer to look at the premises. SL made an

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appointment for 29 May at 4pm (I should pause here to note that there is a dispute as to this date). YL told Wan, who was the potential buyer, of the appointment. Wan accepted the appointment. Then on 29 May 1990, at about noon, Wan called YL to say that he could not keep the appointment as he was `quite busy that day`. Wan asked YL to view the house for him. Wan told YL that he knew the layout of the house because a friend of his was the previous owner and he was familiar with it. YL was asked to see if there was any leak. She was also requested to check the flooring to see if it was in a good condition. He authorized her to offer up to $2m. Wan did not ask YL to alter the date of the appointment to suit his own convenience. Wan said it did not occur to him to make such a request.

35 I should at this juncture state that YL first met Wan in February 1990 when she placed an advertisement in the newspaper to sell some properties, including those at Yarwood and Holland Road areas. LCS came with Wan. However no deal was struck on that occasion.

36 At about 4pm on 29 May 1990 YL met SL outside 36 EBR. Mrs RJ had not returned home as yet. The maid allowed them in and they looked around the house. Soon Mrs RJ returned. SL told Mrs RJ that YL represented the buyer. Both were shown round the house by Mrs RJ. On Mrs RJ`s enquiry if the buyer was buying for own occupation, YL said she did not know but maybe it was. YL also told Mrs RJ that the buyer was looking at a property at Dalvey Road. Initially YL offered $1.95m.

37 Then she raised it to $2m. Mrs RJ thought $2m was low but would nevertheless consider it.

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38 SL said that on that day Mrs RJ never asked if Alrich would be involved in the purchase. SL claimed that at the time he did not know Alrich or who were the shareholders or directors of that company. He denied telling Mrs RJ that the buyer was HPL, an elderly lady. He never represented that the buyer was a genuine purchaser for own occupation.

39 Sometime towards the end of May 1990, Mrs RJ contacted Ting to ask him to sell 36 EBR at a price above $2.2m. Ting said Mrs RJ did not give any specific instructions `as far as (he) could recall`. On 2, 3 and 5 June 1990 Ting inserted an advertisement in ***The Straits Times*** for the sale of 36 EBR. He got only two responses, one of which was from Wan who first mentioned $1.9m and then increased the offer to $2m. Wan said he saw the advertisement in the newspaper.

40 In the afternoon on 4 June 1990, YL told SL that her client was prepared to raise the offer to $2.025m, subject to an eight-week option period but the overall completion date would remain within the normal 14 weeks. Because of the long option period YL told SL, after some discussions between the two, that her client was agreeable to a 2% instead of the usual 1% option fee. When SL made this offer known to Mrs RJ she was not very enthusiastic. Instead, according to SL, she even offered him an incentive to obtain a better price: for every $25,000 beyond $2.025m she would pay SL $1,000.

41 On 5 June 1990, YL told SL that her client was not prepared to increase the offer further. This was conveyed to Mrs RJ who after some discussion with SL, accepted the offer. She named Michael Hwang as her lawyer. An hour later, Mrs RJ called SL asking him to place her acceptance on hold as another broker (Ting) was bringing a client to view the property in the afternoon. Later at about 4pm Mrs RJ rang to inform SL that the other broker (Ting) and client never

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showed up and that she would sell to SL`s client at $2.025m with the other terms. SL called YL to get the particulars of the buyer and the buyer`s solicitor.

42 On the morning of 6 June 1990, Wan called YL and gave her the buyer`s name and NRIC number and the name of her solicitor, one Mr Gill of SP Pillai. YL in turn conveyed this information to SL who in turn conveyed it to Mrs RJ. Mrs RJ said her lawyer would be Lyn Wee. YL said that at about 11.30am, Wan called her to ask her to tell the owner to instruct his solicitor to insert the phrase `and/or nominee` in the draft option. YL spoke to SL on the nominee clause. On being asked by SL, YL answered she did not know why the buyer wanted that clause but said it was not an unusual clause. YL asked SL to request the owner`s solicitor to fax the draft option to YL. SL conveyed the request to Mrs RJ who asked for the reasons. SL gave her the answer which YL gave him. Mrs RJ said she would inform her lawyer about it.

43 At about noon that day, YL received a draft option from Allen & Gledhill. She faxed it to Wan. She noticed two things were missing in the draft: (1) the nominee clause, and (ii) a clause for commission of the broker. YL informed SL, who in turn called up Mrs RJ. SL said that Mrs RJ told him she had already informed her solicitor of those two matters. Mrs RJ also asked SL to expedite the option that day as she had to attend a performance at the Drama Centre and if necessary to contact her at Row G, seat 15. He wrote that out on a piece of paper (exh P1).

44 At about 4pm, YL received a second draft of the option. Though the agent commission clause was there, the nominee clause was still missing. YL told Wan of the missing nominee clause and Wan said he would take it up with Gill. At about 5pm, YL informed SL of the second draft. He did not ask her about the commission clause.

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45 SL said that at about midnight that day Mrs RJ paged for him. On his returning the call Mrs RJ told him that the brother of RJ, Asad, had the power of attorney to execute the option. She also gave SL the hotel at New Jersey, USA, where she could be contacted; alternatively SL could contact one Mary at her husband`s office.

46 On the morning of 7 June 1990 YL was informed by Wan that he had requested Gill to ask for an extension in the option validity period: from 1 August to 8 August. Wan explained the change on the ground that double `eight` represented good luck. It would be more auspicious. So that morning when SL rang up Lyn Wee to ascertain if the option was ready he was told by her that Gill had requested for an extension of the option validity period.

47 The next day SL had an indication from Lyn Wee that the seller had agreed to the one-week extension for the option period. In the course of that day arrangement was made for the deal to be closed at the office of Asad at 4pm. All parties were present at the appointed time except for Lyn Wee who was otherwise detained on some other urgent matters. The option was executed by Asad in the presence of the legal officer of the company of Asad. The cheque in payment of the option fee was drawn by LCS on his own account.

48 YL denied having said to Mrs RJ that the buyer was an elderly lady. She did not know the name of the buyer until 6 June 1990 and to date she has not met HPL.

49 SL denied that RJ had ever talked to him over the phone from the United States. He admitted that Mrs RJ told him that RJ might call him and SL did give his telephone number to Mrs RJ. However, he denied that Mrs RJ asked him to wait for a few minutes for a call from her husband. He also denied that he had

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at any time represented to Mrs RJ that the buyer was an elderly lady, that the buyer was going to use the property for own occupation and that Alrich was not involved in the transaction.

50 Gill`s evidence on this aspect is that on 7 June 1990, he made amendment to the option of Allen & Gledhill to insert the nominee clause. Later he made another amendment to provide that the solicitors for the buyer should hold the 10% deposit as stakeholder. It was only after 4.21pm that day that Gill asked Allen & Gledhill to extend the option validity period from 1 to 8 August: see 1BC 27. So SL could not be correct when he said that on the morning of 7 June 1990 he spoke to Lyn Wee about the extension of the validity period of the option. It must be on 8 June.

51 **Defendant`s version**

52 I now deal with the defendant`s version. Mrs RJ said that SL and YL came to see her house not on 29 May but on 1 June 1990. I would state right away that nothing really turns on this point, whether it was 29 May or 1 June. I do not propose to make a finding on it. YL told Mrs RJ that she represented the buyer and that the buyer wanted to remain anonymous. Mrs RJ did not know that YL was an estate agent. YL asked for details regarding the fixtures and fittings which would be left behind. YL confirmed that the buyer, an elderly lady, was buying it for her own use. After making some calculation on her personal calculator, YL eventually offered $2m. YL also mentioned that the buyer was in a dilemma between choosing 36 EBR and the property at Dalvey Road. However Mrs RJ could not remember if on that day she herself had brought up the name Alrich.

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53 I should mention that at this time RJ was not in Singapore, having left Singapore on 20 May 1990 on an extended business trip to Japan and USA. Mrs RJ was scheduled to leave Singapore on the morning of 7 June 1990 to join him in USA. In anticipation that 36 EBR might be sold while he was away, RJ executed a power of attorney in favour of his brother Asad.

54 Mrs RJ said that it was in late May 1990 that she asked Ting to sell 36 EBR for $2.2m. She told him that the buyer should not be Alrich otherwise the price would have to be $2.7m. She could not recall if she also said the same to SL.

55 On 4 June, Ting called to offer $2m. Mrs RJ said she would consider and get back. Then she spoke to SL with a view to getting YL`s client to improve on her offer. Later that day SL reverted to Mrs RJ to say that the buyer would offer $2.025m with an eight-week option and 2% option fee. On her query as to why the buyer asking for such a long option period, she was told that the buyer had her money in `ACU saving bonds`, with a maturity date yet to come.

56 Mrs RJ had been keeping her husband informed over the telephone of the developments on the sale of the house. She gave a fairly detailed account to him. RJ could not understand why Mrs RJ was saying `ACU saving bonds`: to him it had to be either a savings account or ACU bonds. He asked her to check with Michael Hwang. Later that evening, she called her husband again to say it was ACU fixed deposit. He queried her whether the buyer was connected with Alrich and why the option period was so long. He asked why the buyer could not take a bank loan. RJ was not quite satisfied and wished to talk to SL the next day. In Mrs RJ`s own mind she thought that perhaps Ting`s client was Alrich (see exh P9) as Ting was familiar with Alrich.

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57 On the morning of 5 June 1990, Mrs RJ told SL that her husband would like to speak to him. Shortly thereafter Ting called to say that his buyer would like to see the house in the afternoon. Later Ting rang to say that his buyer would not be coming and called off the appointment but stated that the offer of $2m stood. She went back to SL and asked for his telephone number so that she could pass it to her husband. That evening on 5 June 1990 Mrs RJ paged for SL. He responded and told her that he was on his way to get some medicine for his child who was sick. He asked Mrs RJ to call half an hour later. Mrs RJ got back to her husband who gave her the precise matters on which he wanted answers from SL: to confirm that the buyer was an elderly lady not connected with Alrich and the reason for the eight-week option. A little later Mrs RJ called SL at home and told him what information her husband wanted from him and that he should wait for his call. A short while later her husband called to say that he had spoken to SL briefly and was comfortable with what he was told by SL. He instructed her to proceed with the sale.

58 On 6 June 1990 Mrs RJ called SL to give him the name of her lawyer - Lyn Wee of Allen & Gledhill. She said that in her conversation with SL that day, SL never raised the question of a nominee clause. She also told SL that she was leaving Singapore the next morning for USA and gave him her contact number there.

59 The evidence of RJ corroborated that of Mrs RJ in the material particulars though he was a little confused as to the timings his wife spoke to him as there were numerous calls between them during the period. Mrs RJ also got the phone calls mixed up. RJ said his wife reported to him of the client of SL and the offer by YL of $2m. She also informed him that she was told that the buyer was an elderly lady. Mrs RJ also reported to him of the client of Ting who wanted to see the house.

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60 On 4 June at 10.25am, Newark time (10.25pm Singapore time), his wife called to say that the buyer was one Mdm Ho and that she would pay $2.025m. She also told him that the buyer had nothing to do with Alrich; SL had confirmed that to her. She told him the buyer wanted an eight-week option because the buyer`s money was tied up in `ACU savings bonds`. RJ said there was no such thing and asked her to check. RJ also told her that he would like to speak to SL once everything was confirmed.

61 On 5 June at 6.57am, Newark time (6.57pm Singapore time), Mrs RJ spoke to him to confirm that: the buyer was a private buyer who did not want to take a loan; Alrich was not involved; the eight-week option was because the buyer`s money was tied up in ACU deposit. RJ asked her to prime SL on the points he would be raising with him. She was to call RJ again when SL was home. A short while later she called RJ to say SL was home and was expecting his call. RJ dialled the given number from his hotel room by IDD. The person who answered the called acknowledged that he was SL. The person confirmed all that RJ wanted to know. He was satisfied. It was a short conversation. After that conversation RJ called his wife and instructed her to proceed with the sale.

62 It was RJ`s evidence that he felt Wan and Alrich were playing the market, offering low (at July/August 1989) and then high (March 1990) and then backing out. He decided that he would not sell to Alrich except at $2.7m.

63 Lyn Wee, the solicitor for RJ, told the court that she first spoke to SL on 5 June 1990. She got her instructions from client later that day. On that day SL called her several times to expedite the preparation of the option. He gave her the name and fax number of YL. Lyn Wee was quite certain of this because she mentioned the matter in a note she sent to Michael Hwang on 5 June 1990.

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64 Lyn Wee next spoke to SL on 6 June 1990 in the afternoon when she was given the name and NRIC number of the buyer. On that day SL did not mention to her anything about the nominee clause. It was only on 7 June 1990 at about 2pm when she got a fax from Gill that she noticed that Gill had amended her draft and inserted a nominee clause. At about 5pm that day she got another fax from Gill (1 BC 27) requesting the validity period of the option be extended from the 1 to 8 August 1990.

65 **Events after the option**

66 On 5 July 1990 Lyn Wee spoke to Gill requesting him to sound out whether HPL would be willing to cancel the option on the payment of some compensation by RJ. At that juncture no figure was mentioned. Gill did not get back to her.

67 On 9 July 1990 Lyn Wee called Gill again and left a message. Gill returned the call and said that the client was reluctant to accept the proposition; furthermore he stated no figure was mentioned by the seller. The same day Lyn Wee told Gill that RJ was prepared to offer $25,000.

68 On 17 July Lyn Wee called Gill again who said that the client was reluctant to cancel the deal. Lyn Wee said RJ was prepared to increase offer to $50,000. On each occasion she spoke to Gill the latter said the client wanted the house for residential purposes.

69 On 30 July 1990 at 2.28pm, Lyn Wee faxed a letter to Gill making an inquiry as to whether the option holder was prepared to accept a compensation of $100,000 for the revocation of the option. Lyn Wee asked for an urgent reply in writing. The next day at 3.40pm Lyn Wee faxed to Gill to say that RJ would

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like to speak directly with HPL on the inquiry and requested for the telephone number of HPL. There was no answer to both faxes.

70 Towards the end of July 1990 there was an incident where an unknown boy was seen vandalising 38 EBR. Mrs RJ sent her maid to reprimand the boy who retorted that his father had bought both 36 EBR and 38 EBR. The maid reported this to Mrs RJ who became quite disturbed by what she was told. Mrs RJ thought about it for a few days and could not understand how it could happen. She decided to call SC to find out as she thought SC was familiar with Alrich. SC was upset with Mrs RJ and asked why didn`t she ask the person to whom she had sold her house to. Mrs RJ informed SC that the person to whom her husband had sold the house to was one Madam Ho. SC then told Mrs RJ that he saw the option executed by Asad at the office of Alrich, that LCS had shown it to him at a lunch meeting on 19 July 1990, and that the option to HPL had been transferred to Alrich.

71 Mrs RJ notified her husband of what she heard. According to RJ this was after the $100,000 informal inquiry was made and after Allen & Gledhill had written to Gill to ask for the contact number of HPL so that RJ could speak directly with HPL. Mrs RJ arranged for SC to come to the house to meet her husband a day or two later. SC related to RJ what LCS said to him on 19 July 1990, that Alrich had bought 36 EBR and the adjoining property which RJ assumed was 8 KCR. RJ felt he had been duped. He checked the copy of the option which Asad had executed and discovered for the first time the nominee clause which he knew nothing about.

72 On 6 August 1990, Allen & Gledhill wrote a letter to SP Pillai & Co revoking the option granted to HPL. On the same day in the afternoon a cheque for the option fee of $40,500 was sent by Allen & Gledhill to SP Pillai & Co.

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Even later that same day, Chua Hay & Wee, who took over from SP Pillai & Co, notified Allen & Gledhill that they were now acting for HPL and rejected the revocation of the option, returned the cheque of $40,500, forwarded the nomination form and acceptance form duly executed together with a cheque for the balance of the 10% deposit sum. The nomination form was executed by LCS on behalf of HPL pursuant to a power of attorney given by HPL to LCS in 1983. The acceptance form was accepted by Alrich, the nominee of HPL.

73 As a result of this recovation of the option by the defendant, Alrich did not proceed to complete the purchase of 8KCR, as without 36 EBR, 8 KCR could not attain condominium status.

74 The foregoing is the setting which led to the present action by Alrich for specific performance of the sale and purchase. I have dealt with the disputed facts in some detail because I think they are important.

75 **Explanation for the informal offers**

76 RJ explained as follows why he made the three informal offers to HPL to revoke the option. On 25 May 1990 RJ had entered into a contract to purchase 7 Brizay Park (7BP) which he intended would be his family`s new home. He wished to dispose of 36 EBR as he felt he could not afford to hold on to both properties. Completion date for the purchase of 7BP was to be 15 August 1990. There was a tenant at 7BP and the tenancy was due to expire in September 1990. However a change of circumstances arose. The tenant of 7BP, the general manager of Finnair, one Mr Dan Morn, wished to stay on for another two years at a rent of $9,000 per month plus some travelling benefits which his airline would give to RJ. The physical condition of 7BP was not good and was quite

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run-down. The cost of renovating the premises was estimated to reach as high as half a million dollars. RJ said:

> *I thought the best thing was to rent it out, stay on in Ewe Boon Road, do all the planning for the renovation of 7BP so that at the end of the rental period I could renovate it, move in, and then sell off Ewe Boon Road at that point. With that I asked my wife to see if Mdm Ho would allow us to back out of the option at a price.*

77 Because the RJs found no way to contact HPL and to discuss with her, the inquiries had to be channelled through solicitors. The tenant of 7BP was pressing for an answer. At the time he was also talking to some people who seemed to think that his property might be worth $2.1m or $2.2m. So he did not mind making the propositions. He denied that the three inquiries, particularly the last, had anything to do with the information which SC had imparted to him. He wanted to meet HPL, the buyer, because he was not sure if the informal inquiries were conveyed to HPL. And because there was no agreement from HPL to revoke the option, RJ had to refuse the extension requested by Finnair. He denied that he made any of the informal offers having heard that Alrich had obtained the option to 8KCR.

78 **Mysterious Lam**

79 At this stage I will deal with a number of factual disputes which arose in the course of the evidence. First, the question whether Lam was in fact a genuine buyer of 6 KCR and a genuine joint-venture partner of Alrich in seeking the development of the three plots. Lam was not called by the plaintiff to testify. At the request of counsel for the defendant, the company name and address and residential address of Lam were given by the plaintiffs to the defence counsel, who instructed a firm of solicitors in Hong Kong to check them out. The searches show that there was no such company and the residential address was incomplete. When the plaintiffs` counsel were informed of these results, he

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could not give further particulars to locate either the company or Lam in Hong Kong. I should mention here that when Alrich was negotiating the contract to sell the three plots to Toa Corporation, the solicitor for the latter asked for clarification on the status of Lam who had lodged a caveat against the property. The solicitors for Alrich persistently failed to answer the question.

80 Another relevant factor is the complete lack of documentation between Alrich and Lam on the supposed joint-venture and the subsequent assignment by Lam of his rights to 6 KCR to Alrich. We were told that this was a gentlemen`s agreement between them. But we were also told that Lam was squeezing Alrich. Whereas Alrich sold the three plots at an overall price of $260 psf, Alrich were being pressured by Lam to pay Lam more in respect of 6 KCR. To put it mildly, it seems strange that under such circumstances what was agreed between them should be left unrecorded, only to be carried out as a matter of `honour`. Furthermore, was Lam really in a position to squeeze Alrich when he was not even a citizen and Alrich is a company which deals in real estate? There was every likelihood that the contract constituted by the option exercised by Lam could well be void, being contrary to the Residential Property Act.

81 Counsel for the defendant suggested that this person Lam in Hong Kong was really being used by Alrich so that part of the profits of Alrich could be removed from Singapore and be treated as the capital gain of Lam and thus not be subject to tax. If the entire profits were to go to Alrich, there was certainly a high risk of those profits being treated as income of Alrich and be subject to tax. I wish to make it clear that I am making no ruling on the tax question. But it seems to me that this concern certainly had a bearing on how Alrich went about arranging the transaction. It was clear that on their own 38 and 40 EBR could not qualify for condominium status. Neither could 6 KCR on its own. What justification was there for Lam to ask for a bigger share of the profits? Why

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should Alrich succumb to the pressure, if it really did exist? If there was a genuine joint-venture between Alrich and Lam, I have no doubt that there must be some documents recording that. After all, it was a large development. Why was Alrich so coy about answering the question on the status of Lam? These are some rather strong points which cast doubts on the bona fides of the alleged joint-venture between Alrich and Lam and which lend strong support to the defence suggestion that Lam was just a name being used by Alrich. Of course, this issue is not directly connected with the sale and purchase of 36 EBR.

82 **Is HPL a genuine buyer?**

83 The second issue which requires determination is the question whether HPL is really a genuine buyer of 36 EBR. The defendant alleges that her name was being used to obtain the property for Alrich, which though in form is not owned by LCS is in fact so owned by LCS and that HPL is no genuine buyer.

84 HPL is a Singapore citizen. However since 1981 she has been a resident in Montreal, Canada. She first knew LCS in 1973, and not long thereafter began to live together as man and wife. Out of their cohabitation two children (twins) were born in 1975. In 1981 HPL went over to Montreal and has since become a hotelier.

85 LCS`s family, who are from Indonesia, are well off. They wanted to diversify into the hotel business. LCS`s sister, one Joanne Lum, is also there. The first hotel which HPL managed was the Pavilion in which she owned 25%, LCS 25% and LCS`s father 50%. It would appear that the Pavilion was bought over from third parties by LCS`s father. Later the father sold his 50% share in the Pavilion to HPL and LCS equally. Not long after that HPL and LCS sold their interests in the Pavilion to other buyers. Half of the proceeds of sale went

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to LCS. The other half was used by HPL to buy Shangri-la Hotel, which she now manages. Joanne Lum was the secretary of Shangri-la Hotel. When LCS was asked if he had lent money to HPL to enable her to buy the 25% share in the Pavilion, he said he could not remember.

86 In 1983 she gave a power of attorney to LCS so that the latter could buy and sell property on her behalf in Singapore. Three to four properties were allegedly bought and sold by LCS on her behalf. Everything was left to him. She made no payment whatsoever. Neither was there any real accounting between them.

87 HPL has known Wan for as long as she has known LCS. In December 1989 she returned to Singapore. Wan took her to see the Ewe Boon Road area. Wan told her that 38 and 40 EBR belonged to Alrich and that Alrich was then negotiating to buy 6 KCR and that the three plots combined would qualify for condominium status. Wan also informed her that the owner of 36 EBR was asking for a ridiculous price.

88 Sometime on 24 January 1990 Wan faxed to HPL (1PB29) a site plan, a concept plan and a feasibility study on a project at the three plots. The letter went on to state that Alrich was trying to sell the three plots at $16,500,000, yielding a profit of more than $6,000,000. That sale price was based on the assumption that the authorities would approve a medium-rise development. Both HPL and Wan claimed that the letter of 24 January 1990 was an invitation to HPL to participate in a joint-venture with Alrich to develop the three plots. She said she took the position that unless the authorities were prepared to grant approval for medium-rise she would not participate. She admitted that she never replied to the fax.

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89 HPL said that in the second half of May 1990 LCS called her to inquire if she was interested in buying 36 EBR, although the owner was asking for $2.5m. Much of her evidence corroborated that of LCS. LCS told her that the correct price would be $1.8 to $2m and that it would be a good investment at that price level. She was interested provided it was not more than $2m. She said she had a credit of $300,000 with LCS from a previous purchase and sale of 53 Chancery Lane. They also discussed about the possible rental which could be obtained from the property. As she would be coming back to Singapore with her two children in the first half of August 1990 she asked that the exercise of the option be timed accordingly. She claimed that she asked LCS to put in a `and/or nominee` clause as that was her practice so that she could do a sub-sale if appropriate. I should at this juncture observe that this claim of `practice` is not quite true. In cross-examination she could not produce any instance where she had used a nominee clause.

90 According to HPL, in early June 1990, LCS rang to inform her that the option to 36 EBR had been secured for $2.025m. In early July, when she was in Romania, LCS rang her up from Italy to tell her that he had rejected two verbal offers of $25,000 and $50,000 to revoke the option on 36 EBR. She agreed with what he did.

91 On 1 August 1990, HPL rang LCS from Canada. On that day her two children had already returned to Singapore to be with their father (LCS). In their conversation, LCS told HPL that Alrich had secured an option to purchase 8 KCR and if it could be combined with 36 EBR, the two lots could acquire condominium status. LCS suggested to HPL that they should therefore combine the two pieces of land for development and that their respective shares should follow the land areas of the two plots. Profits were estimated at $8m. HPL was interested in the proposal as she felt it would give her better returns. LCS also

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told her that Gill had received an offer of $100,000 to revoke the option. HPL answered that in view of the joint venture proposal, she was not interested.

92 The next day, 2 August 1990, HPL rang LCS to say that she could not come to Singapore as planned because an urgent matter had arisen in Florida, which required her presence there. She asked LCS to exercise the option on her behalf as her attorney. Instead LCS suggested that it would be better that the option be exercised by Alrich for the purpose of the joint development. She was asked by LCS to ring up the solicitor, Stanley Hay, on 6 August 1990, to tell Hay that she was nominating Alrich to exercise the option. On 6 August 1990 HPL made the call to Hay.

93 When HPL was asked why she must exercise the option personally, she said as she was planning to come to Singapore in early August 1990, she thought why not timed it as such. In other cases, LCS exercised the options on her behalf as she did not plan to return to Singapore.

94 HPL was informed of the dispute with the defendants in this matter only in September/October 1990.

95 Looking at the entire circumstances, in particular their past and present relationship, the children they have together, how LCS had been buying properties for HPL and the financial arrangement between them (specially in respect of 53 Chancery Lane and 36 EBR), there is no doubt in my mind that this relationship between them is still an extremely close one even though they are now no longer living together as man and wife. She has been treated very much like a daughter-in-law by LCS`s family, someone close. It seems to me clear that LCS was making use of HPL`s name to indulge in investment in residential properties, which LCS could not himself do at the relevant time,

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being a non-Singaporean. Everything relating to the purchases and sales were arranged by LCS; full powers are given to LCS. She said `I don`t keep tab of my accounts with LCS`. She was not sure as between herself and LCS who was owing money to whom (NE83). In relation to the purchase of 36 EBR she also said `I had no idea how the purchase of 36 EBR was to be finalised. I left it to him. He would do everything, as was with No 53 Chancery Lane`. This is perfectly understandable in view of their relationship

96 On paper it was Alrich which exercised the option to buy 36 EBR. Effectively, it was LCS who was buying because even though on record LCS does not hold a single share in Alrich, STOL is holding 971/2% of the shares of Alrich and STOL is to all intents and purposes the wife of LCS. As will be elaborated later, LCS is to all intents and purposes the real `boss` and owner of Alrich.

97 The fax of 24 January 1990 (1PB29) was referred to essentially to show that HPL was a serious investor and was always looking out for investment opportunities in Singapore. But the fax appears to be more in the nature of a communication informing HPL what Alrich intended to do with the three plots. Nowhere did Alrich ask HPL to join in a joint venture. It was really to let HPL know how much Alrich would be making out of the deal. It will be recalled that Wan said Lam was a joint venture partner in the proposed development of the three plots. Then why was there a need to have HPL as another partner? Of course, I have, for reasons given above, disbelieved the claim that Lam was truly a joint venture partner. Similarly I have considerable doubts on the claim that HPL was to be a joint venture partner in relation to the proposed development of the three plots.

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98 I find that there was no genuine joint-venture between HPL and Alrich to develop 36 EBR and 8 KCR. On LCS`s own evidence, Alrich obtained an option to purchase 8 KCR even before LCS had consulted HPL on the proposed joint venture. Even at the time when the option was exercised on 23 July 1990, HPL was not consulted. A sum of $52,000 was also paid to the tenant of 8 KCR as being 10% of the agreed compensation for the tenant to vacate the premises. Still HPL was not asked, though she was just a phone-call away. Yet they tried to say that in relation to the development of the three plots, HPL had an independant mind.

99 It stands to reason that if HPL was not merely a nominee there must surely be at least some prior consultations with her. LCS even rejected the $25,000 and $50,000 inquiries without consulting her. Plainly HPL had really no say. The brain behind it all was LCS and Wan was his trusted lieutenant. LCS admitted that at the lunch on 19 July 1990 he told SC that Alrich had obtained the option to 36 EBR (NE 127). This was before LCS allegedly spoke to HPL on the joint venture and before Alrich exercised the option on 8 KCR. In my judgment, LCS and Wan wanted very much to acquire both 8 KCR and 36 EBR. They realized that after the earlier pull-out by Alrich it was most unlikely that the RJs would sell their property to Alrich at a lower price. So Wan made use of YL. His very convenient last minute excuse to avoid the appointment with Mrs RJ on 29 May or 1 June 1990, is telling. Why did Wan not shift the appointment? Why did he not want to see the place later even though I accept that he knew the layout of the house as the previous owner was a friend of his and he had visited the house before? Why the long option period? It was obviously to buy time to acquire 8 KCR. Wan has admitted that Alrich would not be interested in 8 KCR without 36 EBR.

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100 I may add here that from all his evidence Wan does not strike me as a person in whom I could place full faith in what he says even giving due allowance to the fact that a witness might still be telling the truth though there may be some inconsistencies in his evidence.

101 I am not satisfied with the explanation offered by HPL as to why the option period was set for so long. She had already given a general power of attorney to LCS. The option could have been exercised by LCS on her behalf at any time. What was so special about this property that she felt a need to exercise the option personally. She did not say there was anything special. The whole thing looks well planned. The only probable explanation is that Alrich hoped through a long option period to be able to negotiate for the acquisition of 8 KCR, which they eventually did.

102 **Were representations made?**

103 I now come to the crux of this action: did SL make the representations to Mrs RJ that the buyer was an elderly lady who intended to use the property as a private residence? Did SL represent that the buyer was not Alrich? Did SL repeat these representations in the telephone conversation (which conversation was denied by SL) which RJ had with SL from New Jersey, USA on 5 June 1990? Did YL on 29 May or 1 June make the representation to Mrs RJ that the buyer was an elderly lady who intended to use the house as a private residence?

104 Both SL and YL denied having said those things to Mrs RJ either on 19 May, 29 May or 1 June, or at any time thereafter. On the other hand, Mrs RJ alleged that SL said those things on 19 May, 1 June and during the subsequent telephone conversations she had with him on 4 and 5 June 1990. Mrs RJ also claimed that on 1 June, YL said that the buyer was an elderly lady who intended

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to use the house as a private residence. Mrs RJ was not sure if she mentioned the name Alrich on 1 June. Which version is more likely to be the truth?

105 To my mind it seems quite natural that after Alrich backed out of their oral commitment to buy No 36 EBR at $2.7m, the RJs were very upset with Alrich. Admittedly at the time $2.7m was a very good price. I would not be surprised if they had resolved not to sell to Alrich except at the price of $2.7m even though the property as a house was actually worth less than that. Even KC Ting`s evidence shows that the RJs were upset by Alrich backing out of the deal in March 1990.

106 As I see it, it is quite normal for a potential buyer to ask why the owner is selling the property. Similarly, it would be quite normal for a seller to ask a buyer if he is buying for own occupation or for renting out. More so, I would imagine in the present case that Mrs RJ would ask SL and YL who the buyer was and what the buyer intended to do with the property after the purchase. Both SL and YL denied having said that the buyer was an elderly lady. But YL told this court that in answer to a query by Mrs RJ on 29 May she said she was not sure if the buyer intended to use the house for occupation but `maybe so`. If Mrs RJ was concerned that her property should not fall into the hands of Alrich, as I think she was, such an answer would obviously not be satisfactory and she would have pursued it in order to satisfy herself that the buyer was in fact a private buyer not connected with Alrich.

107 A point which bears on the question of credibility relates to the date on which YL requested SL who in turn asked Mrs RJ to include a nominee clause in the option. Both SL and YL claimed that YL raised the nominee clause with SL and SL in turn raised it with Mrs RJ in the morning of 6 June 1990. If they had done so it would certainly have raised an alarm in the mind of Mrs RJ. If,

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as they asserted, that Mrs RJ had agreed to it she would have spoken to Lyn Wee to inform or consult her. But Lyn Wee was not told at all by Mrs RJ. Their evidence is also not supported by what appears on the record. If Mrs RJ had told SL that she had no objection, that fact would have been conveyed to Wan and Wan would have informed Gill of it and Gill would have referred to that in his letter in order to ensure that Allen & Gledhill would have no objection to the inclusion of the nominee clause. Gill said that Wan spoke to him on the nominee clause on 7 June 1990 and it was only on that day that he suggested to Allen & Gledhill that a nominee clause be inserted. Of course that same morning Mrs RJ had left Singapore for USA. YL and SL knew of that; so would Wan. Allen & Gledhill received the amendment only at about 2pm.

108 It will be recalled that according to HPL, right from the beginning she instructed LCS that she wanted a nominee clause. Was Wan waiting for an opportune moment to raise it? All considered I do not accept SL and YL`s evidence that they raised the nominee clause with Mrs RJ on the morning of 6 June. I find that unlikely.

109 I come next to the telephone call allegedly made by RJ from New Jersey to SL in Singapore. SL admitted that he did give his home telephone number to Mrs RJ who said that RJ might call him from the USA. But he denied having received any call from RJ. Now we have in evidence the hotel bill from New Jersey which shows that RJ did make a brief call from New Jersey to SL`s home telephone number. There is no clear evidence to show how long was the duration of the call. By comparison with other telephone calls on the hotel bill it would seem that the duration of the call was probably of one to two minutes; certainly less than two minutes. But what this shows is that a call was indeed made by RJ. He did speak to someone on the other side of the line. Was that someone SL or a member of his family? RJ said that that someone confirmed

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he was SL. Let`s assume for a moment that SL was not at home and that it was someone else in the house who picked up the call. Wouldn`t RJ have left a message? It was not SL`s evidence that he got any such message from any of the members of his family. RJ was obviously anxious to speak to SL. If he had not spoken to SL on that occasion, wouldn`t he try again or ask Mrs RJ to check so that he could call again? Of course, that was not the scenario as related by Mrs RJ. On her evidence she first spoke to SL to make sure that he was home before calling her husband to call SL at home. On a careful analysis of the facts, I am inclined to find that RJ did on 5 June 1990 speak to someone at the other end of the line who confirmed that he was SL.

110 The next issue is what exactly was spoken between SL and RJ. The evidence of RJ and Mrs RJ was that Mrs RJ, pursuant to instructions of RJ, had already primed SL as to the points on which RJ would like to hear his answers. The conversation between RJ and SL was admittedly brief. In view of the fact that SL had been prepared, it is not impossible that the confirmation which RJ sought could have been given within that short duration of time. They were not friends. So the conversation was likely to be brisk and businesslike.

111 Considering all the evidence, and in particular those factors which I have identified above, I find, on balance, that SL did make the misrepresentations to Mrs RJ on 23 May and subsequently in the telephone conversations with Mrs RJ up to 5 June 1990. I also find that there was that telephone conversation on 5 June 1990 between RJ and SL wherein SL confirmed those matters he told Mrs RJ. Similarly I find that YL did on 29 May or 1 June 1990 represent to Mrs RJ that she represented a buyer who was an elderly lady and who intended to buy the property for her own occupation. In view of this representation it would be completely out of place for Mrs RJ to ask YL if Alrich was involved as that would mean Mrs RJ did not believe what YL was saying, that she represented a

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private buyer. It would be insulting and as a seller you do not go round doing that. There is no necessity for me to make a finding whether SL or YL knew of the scheme of Wan/Alrich.

112 Looking at the matter in its totality, I have very little hesitation in coming to the conclusion that everything surrounding the purchase of No 36 EBR from RJ was orchestrated by Wan, with LCS giving general instructions at the rear. While the RJs have made some errors in their evidence on the dates of the telephone calls, and there are some minor inconsistencies in their evidence, I find that they are generally reliable witnesses. I accept their evidence that they were upset with Alrich and would not sell the property to them except at $2.7m. I find that Wan knew very well that if he should appear at the appointment on 29 May or 1 June he would be recognized. He knew that the RJs were upset with him when Alrich backed out of the deal at the last minute at the end of March 1990. He knew that if he should appear he could probably only obtain the property at $2.7m or at somewhere near that. So he worked through YL and KC Ting to get No 36 EBR at the best possible price, hopefully very much below $2.7m. The only way to achieve that was to use a name which the RJs did not know, HPL. He knew that by using HPL the RJs would not suspect. I have little doubt that if the RJs had known that it was Alrich who were buying, they would certainly not have sold the property to Alrich at $2.025m. Wan and LCS knew that. This web of misrepresentations was created to achieve their objective. The misrepresentations induced RJ to sell to HPL at $2.025m.

113 I would like to add that in assessing the credibility of the RJs, I have taken into account the three informal offers they had made to have the option revoked on payment of compensation to HPL. As I see it, RJ made the offers at a time when he thought that HPL was the genuine buyer and for the reasons he has given. Given their strong feelings I do not see the RJs taking the matter

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sitting down and making any of the offers of compensation if they had in fact known that HPL was the undisclosed agent of Alrich. They would undoubtedly have gone to see their solicitors for advice on possible recourse; in which event the dispute between the parties would certainly have surfaced a month or a couple of weeks earlier.

114 I have also taken into consideration the further suggestion that RJ made the three offers because RJ knew in early July 1990 that 8 KCR was available; RJ wanted to get 8 KCR and develop it together with 36 EBR. Thus his offers to HPL to revoke the option. I am not persuaded that that could be so. I am satisfied that they felt rather strongly about Alrich as a result of the disappointment caused by Alrich in March 1990. They would not have sold to HPL - a person whom they had not met - without the representations being made.

115 It is true that on 6 August 1990 RJ did not give any reason when he sought to revoke the option. At that point in time all he had was what SC told him. In consultation with his solicitors RJ took the risk of revoking the option but gave no reasons for the action he took. I accept the submission of RJ`s counsel that `when the defendant rescinded the option, he did not have the evidence that has since become available, and he was therefore not in a position to make any positive assertions at that time.` Counsel relied upon the law as stated in ***Chitty on Contracts*** (26th Ed) para 1709:

> *If a party refuses to perform a contract giving therefor a wrong or inadequate reason or no reason at all, he may yet justify his refusal if there were at the time facts in existence which could have provided a good reason, even if he did not know of them at the time of his refusal.*

116 I am conscious that there are some inconsistencies in the evidence of the RJs as there are in the plaintiffs` witnesses` evidence. These have been

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highlighted in the plaintiffs` and the defendant`s submissions. I have reached my conclusions after carefully analysing and weighing the evidence. I am satisfied that Lam was being used as a front. Alrich knew that they would have difficulties getting the property from RJ so it made use of `HPL`. Alrich effectively belonged to LCS. The representations were made. The misrepresentation did induce RJ to sell 36 EBR to HPL at a price of $2.025m.

117 **The law**

118 The case on point is ***Archer v Stone*** . This case is strongly relied upon by the defendants. The headnote reads:

> *If, in negotiations for a contract, an agent makes a false representation as to the name of his principal, knowing that, if he disclosed the true name the other party would not enter into the contract, the court will not order specific performance of the contract.*

119 A signed a contract for the sale of a house to B. Before signing, he asked, `Are you buying for C, or his nominees?` B answered `No`. He was, in fact, buying for nominees of C, to whom he afterwards assigned his contract. He and they brought an action for specific performance.

120 North J in his judgment answered the question succinctly as follows (at p 35):

> *It is clear to my mind that the statement that, if Stone had known the property was to be bought by Smith or any of his party he would not have sold, is true, and I am satisfied that all the parties concerned knew this, and put their heads together to outwit Stone. Under these circumstances I think the law is clear. It is true that a man may with impunity tell a lie in gross in the course of negotiations for a contract. But he cannot, in my opinion, tell a lie appurtenant. That is to say, if he tells a lie relating to any part of the contract or its subject-matter, which induces another person to contract to deal with his property in a*

> *way which he would not do if he knew the truth, the man who tells the lie cannot enforce his contract.*

121 Another case relied upon by the defendant is ***Australian Steel & Mining Corp Pty Ltd v Corben & Ors*** where one of the terms of the option granted was that `any reference to you herein includes your nominee and any person or company appointed by you in writing as your nominee shall have all your rights hereunder and may exercise this option and you may exercise this option on behalf of such nominee.` In exercising the option the grantee stated that the purchaser to be named in the contract would be Coorilla Developments Pty Ltd. In an action for specific performance, the grantors of the option defended the action on the ground, inter alia, that it was induced by false representation and they were entitled to rescind, which they did. The evidence showed that before the option was granted the agent in reply to a query told the vendors that the purchaser was a doctor (in medicine). The agent explained that it was necessary to take an option because the doctor was overseas and could not be contacted. Later the agent told the grantor that the buyer was `probably a Pitt Street farmer`. It turned out that the agent was acting for a doctor (not in medicine) who was in turn acting for a consortium comprising a number of corporations. At first instance the judge found that there were no material misrepresentations inducing the granting of the option. The Court of Appeal of New South Wales held that it was not correct to say that the representation must be the very ground upon which the transaction had taken place. Once it was shown that the representation was one of the factors which induced the contract, that was sufficient. The court went on to hold that even if the grantors had decided to sell before the misrepresentations were made, nevertheless, the position was still the same because the misrepresentation had the effect of inducing the grantors to persevere in a decision already reached.

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122 In ***Ashfind Pty v McDonald*** where the owner expressed sadness that her house might be pulled down the representation was made that the buyer did not intend to knock the house down but saw the house as ideal for him as he was extending his family and was in need of larger premises. Young J held that to succeed in having the contract avoided on the ground of misrepresentation, the defendant had only to show that the misrepresentation was but one factor which induced the contract. On the facts there he held that the owner was so induced.

123 ***Emmet on Title*** (19th Ed) states at para 4002 that a purchaser `may in equity rescind a contract for the sale of land on the ground of misrepresentation where a false statement of fact made by the vendor to the purchaser induced the purchaser to enter into the contract. Also vice versa.`

124 A representee in law would include, not only the person to whom the statement is directly made, but also any specific person whom the representor intended the representation to reach and influence. This would cover the case, in the words of 31 ***Halsbury`s*** L ***aws of England*** (4th Ed) para 1037:

> *Where one person makes a representation to another person, either with an express direction or authority to repeat it to a third person or with intent that it shall come to the third person`s notice and be acted upon by him.*

125 The Australian case ***Williams v Bulat*** was relied upon by the plaintiffs. There the defendants refused to sell their house to the plaintiffs for less than $200,000. Subsequently they advertised it for sale for $145,000. They entered into a contract of sale with H for $142,500. It later transpired that H was the undisclosed agent of the plaintiff. The defendants refused to transfer the house to the plaintiff who sued for specific performance. Ambrose J held that on the facts of the case the identity of the purchaser was not a matter sufficiently material to affect the validity of the contract and granted an order for specific

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performance. Of course in ***Williams v Bulat*** there was no question of any misrepresentations having been made.

126 Similarly in ***Nash v Dix*** 5 and in ***Dyster v Randall*** there were no express representations. In ***Dyster*** , Laurence J expressed the opinion that `mere non-disclosure as to the person actually entitled to the benefit of a contract for the sale of real estate does not amount to misrepresentation, even though the contracting party knows that, if the disclosure were made, the other party would not enter into the contract.` I do not think that Laurence J was addressing the problem discussed in ***Said v Butt*** . In view of the fact that in the present case there were misrepresentations, I need not go into that area of the law which was dealt with in ***Said v Butt*** .

127 In the light of the law on misrepresentation as I have outlined above and on the facts which I have found, the misrepresentations which Wan had so cleverly conveyed through YL and SL to Mrs RJ and RJ, had induced RJ to sell the property to HPL. I am satisfied that RJ would not have sold the property to HPL and consequently to Alrich at the price of $2.025m but for the misrepresentations made.

128 The point is made that as SL did not even know Alrich or Wan, how could he be the agent of Alrich? For the present purposes I do not think it matters so long as the misrepresentations originated from Wan, who knew that through YL and some others it would reach the ears of Mrs RJ and eventually RJ the owner. The target of the misrepresentations was clearly RJ. It does not matter that the misrepresentations were not made directly by Wan to RJ.

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129 Accordingly, I hold that RJ is entitled to repudiate the option granted to HPL and, if an agreement was nevertheless constituted by the acceptance of Alrich as a nominee of HPL, of that agreement.

130 **Residential Property Act (Cap 274)**

131 Another ground relied upon by the defendant to resist this action, concerns the Residential Property Act (the RPA) which I will now deal with fairly briefly. The defendant says that in view of the fact that LCS was at the material times a de facto director of Alrich, Alrich were a `foreign person` within the meaning of s 2(1) of the Act and were therefore prohibited by ss 3, 25 and 36 from acquiring 36 EBR or any interest therein. Accordingly, the alleged purchase by Alrich were null and void and/or void for illegality.

132 On the evidence, I am entirely satisfied that LCS was a de facto director of Alrich. While Wan was designated the director, he, in fact, took instructions from LCS. The evidence of SC shows quite clearly that LCS was the `boss` there. While Wan said that LCS often consulted him, I see from the general tenor of his evidence that the final decision rests with LCS. Even Wan called him the `boss`. LCS occupied the largest and best furnished room in the office of Alrich. He was and still is the financial backer of Alrich with bankers, having provided his personal guarantee for the debts of Alrich. He was and is effectively the man controlling Alrich, certainly not Wan or STOL. He made all the decisions though often after consulting Wan, as Wan was his man on the ground. It is significant that while Wan and STOL must sign jointly to operate the bank account of Alrich, the sole signature of LCS was sufficient to operate the account. STOL hardly attended to the business of Alrich. She acted as advised by LCS. To my mind, I have no doubt that the transfer of shares from

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LCS to STOL and Wan in 1987 was merely to satisfy the requirements of the RPA.

133 Of course in the present case Alrich has obtained the clearance of the Controller of Residential Property to acquire and retain residential property. But it was on condition that all its shareholders and directors are Singapore citizens. So the question is whether LCS had become a `director` of Alrich thus vitiating the approval granted to Alrich.

134 The Act does not define the term `director`. But I am unable to see any reason why that word should not bear the same meaning as that ascribed to it in the Companies Act. If any authority is required for this proposition, I would rely upon the following dictum of Lord Shaw in the Privy Council`s decision in ***Lennon v Gibson and Howes Ltd*** at p 711:

> *In the absense of any context indicating a contrary intention, it may be presumed that the legislature intended to attach the same meaning to the same words when used in a subsequent statute in a similar connection.*

135 I cannot find anything in the RPA to suggest that a contrary intention is intended.

136 The Companies Act provides a non-exhaustive definition of the term `director` to include `any person occupying the position of director of a corporation by whatever name called and includes a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act and an alternate or substitute director.` From this definition it seems to me clear that a person could be a `director` within the meaning even though he is not called or appointed as such. The definition does not talk of appointment but refers to the factual state of `occupying the position`. The definition could cover

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a de facto (though not appointed as such) director like LCS in the instant situation: see ***Re Lo-Line Electric Motors Ltd & Ors*** at pp 489-490. In the words of Mason RJ in ***Corporate Affairs Commission v Drysdale*** at p 242: `to say that a person occupies a position or office is to say something more than that he holds the position or office.` In so far as the present fact-situation is concerned, I would even go so far as to say that LCS was a director of Alrich within the second limb of that non-exhaustive definition.

137 In view of the fact that LCS was a de facto director of Alrich, Alrich could not be an `approved purchaser`; Alrich was truly a `foreign company` and a `foreign person` within the meaning of the RPA. It is now clear law that a `foreign person` cannot enter into an unconditional agreement to acquire an interest in residential property and such agreement, if entered into, would be illegal and unenforceable: ***Lim Xue Shan &*** A ***nor v Ong Kim Cheong*** and ***Tan Cheow Gek v Gimly Holdings Pte Ltd*** are authorities to that effect.

138 It would defeat the clear objectives of the RPA if an agreement entered into by such a company, which is a `foreign person` were not to be struck down. No `foreign person` is allowed to deal in those classes of residential property which fall within the RPA except with the approval of the Controller. The instant property 36 EBR comes within those classes. For this court to enforce the sale and purchase agreement constituted by the option of 8 June 1990 and the acceptance of Alrich dated 6 June 1990 would be to give judicial sanction to a scheme or arrangement which has as its main object the undermining of the RPA. I would accordingly hold that the sale and purchase agreement is illegal, void and unenforceable.

139 It is argued that the present case is different from the other cases because those other cases involved `foreign persons` who had never obtained clearance

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from the Controller of Residential Property. But I think it is vitally important to bear in mind the precise scope of the clearance given in the instant case. It reads:

> *The abovenamed company is given clearance to acquire and retain residential property* ***so long as***
>
> (4) all directors of the said company are and remain as Singapore citizens.

140 If, as I have found, that LCS had been acting all along as a director of Alrich and he was at the relevant times not a Singapore citizen, the clearance granted to Alrich must be deemed to have ceased to have effect or to have been invalidated. To suggest that on the facts before me, the clearance nevertheless stands until formally withdrawn by the Controller and the court ought to enforce the contract of purchase entered into by Alrich, would be to encourage wrongdoing or deceit and to reward those whose aim is to flout the law. I will not countenance that.

141 **Question of conflict of interest**

142 In the defence filed some other legal points (questions on locus standi to sue and non-satisfaction of the Statute of Frauds) are also raised on which counsel have made submission. In view of my decisions above, I do not propose to go into them. What I now propose to do is to refer to a number of procedural points which arose in the course of the trial. The first concerns the question of conflict of interest. It arose in this way. The trial of this action started on 19 April 1993 and continued for six days. It was adjourned for further dates on 26 April 1993. The hearing resumed on 2 August 1993 when the point was taken (formal motion was filed on 3 August 1993) by counsel for the plaintiffs that Allen & Gledhill should disqualify themselves from further acting for the defendant because of conflict of interests which arose in the meantime due to

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the fact that one Johnny Cheo, formerly from Shook Lin & Bok, has joined Allen & Gledhill and become a partner.

143 When the present action was first commenced, the plaintiffs instructed Chua Hay & Wee to make a claim against the defendant. Sometime towards the end of September Shook Lin & Bok took over the conduct of the case from Chua Hay & Wee. The solicitor in Shook Lin & Bok who was in charge of the matter was Mr Wong Meng Meng. Mr Wong appeared for the plaintiffs at the hearing of an appeal against a decision of an assistant registrar who refused to grant an O 14 application. On 27 June 1991 Chua Hay & Wee were instructed to take back the case from Shook Lin & Bok.

144 The locus classicus on the subject would appear to be ***Rakusen v Ellis Munday & Clarke*** where it was laid down that there was no absolute bar on a solicitor in a case, where one partner in a firm of solicitors had acted for one side and another partner in that firm should wish to act for the other side in litigation. Each case would have to be determined on its facts and the court would intervene to stop such a practice if satisfied that the continued acting of one partner in the firm against a former client of another partner was likely to cause real prejudice to the former client. On the evidence before the court there, with separate undertakings given by the solicitors, it held that there was no real risk of prejudice. In the words of Buckley LJ (at p 845):

> *The whole basis of the jurisdiction to grant the injunction is that there exists, or, I will add, may exist, or may be reasonably anticipated to exist, a danger of a breach of that which is a duty, an enforceable duty, namely, the duty not to communicate confidential information ...*

145 Cozens-Hardy MR puts it in these words (p 835):

> *... in my view we must treat each of these cases, not as a matter of form, not as a matter to be decided on the mere proof of a*

> *(solicitor) acting for a client, but as a matter of substance, before we allow the special jurisdiction over solicitors to be invoked, we must be satisfied that real mischief and real prejudice will in all human probability result if the solicitor is allowed to act.*

146 Fletcher Moulton LJ referred to `such a probability of mischief that the court feels that, in its duty as holding the balance between the high standard of behaviour which it requires of its officers and the practical necessities of life, it ought to interfere.

147 The three appellate judges have used somewhat different terms to describe the test, which should be applied to determine whether the court should intervene. Buckley LJ`s test was based on risk while that of Cozens-Hardy MR on probability of breach. Fletcher Moulton LJ`s test would appear to be based on risk.

148 In ***Supasave Retail Ltd &*** A ***nor v Coward Chance (a firm) & Ors*** , the question that arose was whether a firm of solicitors, DLBP, could continue to act for the liquidators of two companies in two pending actions arising out of the affairs of those companies. The defendants in both actions are the same, namely, Coward Chance and a firm of accountants,Vice Marks Stead & Co (VMS). The liquidators of the two companies were accusing the defendants of knowingly participating in a fraudulent breach of trust by the directors. VMS were advised by a considerable period of time by the firm DLB. Subsequently the firm DLB merged with another firm,William Prior, to be known as DLBP. William Prior were the liquidators` solicitors. One Mr Wright in William Prior was dealing with the liquidators. The liquidators would like DLBP to continue to act for them. DLBP applied to court for directions whether the amalgamated firm could with propriety continue to act for the liquidators. VHS opposed the application. During the period while DLB were acting for VMS it was clear that highly sensitive confidential information would have been communicated to the

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firm for the purpose of conducting their defence. Browne-Wilkinson V-C said that what he had to determine was whether there was or was not `a reasonable anticipation of mischief flowing from the continued provision of legal services by the combined firm to the liquidators.` He was not prepared to take the approach of some jurisdictions in North America where the point was taken much further to the extent that the court would not permit a solicitor to continue to act where his partner had acted for the other side and where this would give rise to a possible perception of impropriety, irrespective of the substance of the matter. However, on the facts of the case before him, Browne-Wilkinson V-C was not satisfied that the measures proposed or taken, or the `Chinese walls`, as they called it, which had been or would be erected, would be completely effective to prevent any leakage. The problem there was in a sense special as these remarks of the learned judge show (at p 675):

> *No concrete steps have so far been taken to ensure that the staff, as opposed to the partners, were aware and are aware of the delicacy of the position. As I have pointed out, Mr Barker was unable to show me what steps had been taken to inquire of the members of the staff, qualified or otherwise, who in fact have information on the subject, so that particular care can be taken with them.*

149 In ***Re a firm of Solicitors*** , a firm of London solicitors were injuncted from acting for a defendant because that firm had earlier acted for the plaintiff in a related matter and were supplied with detailed information by the plaintiff earlier for a prolonged period of time. Parker LJ would appear to prefer the test propounded by Buckley LJ in ***Rakusen*** because that approach would exclude over-sensitivity and yet preserve the public confidence in the process of litigation. Parker LJ felt that the wall erected by the firm could not be regarded as `impregnable`. Another member of the court, Sir David Croom-Johnson, agreed broadly with Parker LJ that the court would act `if danger of a breach of duty may reasonably be anticipated` but this is not the same as `there should be

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no risk at all.` The third member, Staughton LJ, was also of the view that (at p 366) the correct test was `whether there is or is not a reasonable anticipation of mischief` but he felt that applying the test to the facts, he would have allowed the firm to continue to act.

150 The case relied upon by the plaintiffs is ***Martin v MacDonald Estate (Gray)*** , a case of the Canadian Supreme Court. This case does represent the stricter approach of some North American jurisdictions. I will take the pertinent facts from the headnote of the report:

> *The plaintiff brought an action against the defendant for an accounting. The defendant`s solicitor was assisted by a junior member of the firm, who was actively engaged in the file and was privy to many confidences disclosed by the defendant. Some years later the junior joined the firm which represented the plaintiff. The plaintiff had been represented by the same firm for some years, and as the matter neared trial was reluctant to change solicitors. Affidavits were sworn that the case had not been and would not be discussed with the junior. The junior also swore that she had not betrayed and would not betray confidences. The defendant obtained an order declaring the plaintiff`s firm ineligible to continue to act as solicitors of record for the plaintiff and removing the firm as solicitors of record. The decision was reversed on appeal. The defendant appealed further. The sole issue was the appropriate standard to be applied in determining whether the plaintiff`s firm was disqualified from continuing to act in the case by reason of conflict of interest.*

151 Two opinions were rendered in the case - one by Sopinka J (concurred by three others) and the other by Cory J (concurred by two others). In his opinion, Sopinka J made a brief but fairly comprehensive survey of the law prevailing in various countries. He felt that the traditional `probability of mischief` standard was not sufficiently high to satisfy the public requirement that there be an appearance of justice. He recognized that in determining the present issue there was a need to balance three competing values: (i) the maintenance of the high standards of the legal profession and the integrity of

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the judicial system; (ii) the right of litigants not to be deprived of their counsel without good cause and (iii) the desirability of permitting reasonable mobility in the legal profession. He said the appropriate test `must be such that the public, represented by the reasonably informed person, would be satisfied that no use of confidential information would occur.` Once it was shown that `there existed a previous relationship which was sufficiently related` to the case in hand, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant. The court should infer that solicitors who worked together would share confidential information unless it was satisfied on the basis of clear and convincing evidence that all reasonable measures had been taken to ensure that no disclosure would occur by the `tainted` solicitor to the other members of the firm who were engaged against the former client.

152 Cory J took a much stricter view. Of the three competing values he felt that the most important and compelling was the preservation of the integrity of the justice system. He concluded (at p 733):

> *Where a lawyer who has had a substantial involvement with a client in an ongoing contentious matter joins another law firm which is acting for any opposing party, there is an irrebuttable presumption that the knowledge of such lawyer, including confidential information disclosed to him or her by the former client, has become the knowledge of the new firm.*

153 It is clear that what Cory J advocated amounts to an absolute bar. He spoke from a very high pedestal. Admittedly the approach of Sopinka J is slightly more flexible. For my part I felt that one should not take too rigid or theoretical a view. Why should it be irrebuttable that lawyers who work together share each other`s confidence? I preferred the test propounded by Buckley LJ in ***Rakusen*** which was adopted by Browne-Wilkinson V-C in ***Supasave Retail*** and approved by the Court of Appeal in ***Re a firm of Solicitors*** .

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154 In my opinion the public interest in the administration of justice is sufficiently safeguarded on the test of `reasonable anticipation of mischief` or in other words `reasonable likelihood of mischief`. One should look at the real situation in its totality and not just the form.

155 Johnny Cheo left Shook Lin & Bok on 30 June 1993 and joined Allen & Gledhill as a partner on 12 July 1993. None of the solicitors in Allen & Gledhill handling the present case had spoken to him on the case and vice versa. Indeed they did not know that Johnny Cheo was involved at all. Mr Hwang who is the leading counsel/solicitor in the present case said that when Shook Lin & Bok were acting for the plaintiffs, he had only spoken to Mr Wong Meng Meng. Cheo filed an affidavit to depose as to his involvement in the case. He recalled that it was sometime in late 1990 when the plaintiffs instructed Wong Meng Meng to have the conduct of the plaintiffs` appeal to a judge-in-chambers relating to an application for summary judgment. He was only involed in the case on one occasion when Wong Meng Meng was otherwise engaged: he attended a meeting on behalf of Wong Meng Meng with some of the plaintiffs` officers, whose names he could not remember. Thereafter, he was asked by Wong Meng Meng to supervise one of the pupils to research the legal issues for the purpose of that appeal. He put up a memorandum to Wong Meng Meng based on the research of the pupil. He could not recall any confidential information being conveyed to him. The memorandum was exhibited to court in an affidavit filed by Wan. I had examined the memorandum and I, being fully conscious of the issues in this case, found nothing there which would support the application for an injunction.

156 In coming to my decision to dismiss the motion I was satisfied that there was no reasonable risk of mischief. I took the following circumstances into account.

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(i) The case was part-heard when the issue arose. The seventh witness (whom counsel then indicated would be his last) was about to be cross-examined and his cross-examination was anticipated to be completed within two to three days.

(ii) Cheo did not play a significant role when the case was being handled by Wong Meng Meng; there was no substantial involvement by him. Even if we were to apply the strict test propounded by Cory J in ***Martin v MacDonald*** , the involvement of Cheo in the case was certainly not `substantial`.

(iii) Undertakings given by solicitors of Allen & Gledhill who are involved in this case not to discuss or raise any matter with Cheo and a corresponding undertaking by Cheo.

(iv) The situation here is unlike those in ***Supasave Retail*** and ***Re a firm of Solicitors*** where it was a case of two firms merging and numerous people were involved and they were involved substantially. Here we have only Cheo and counsel for the plaintiffs expressly stated that he was not challenging what Cheo had deposed.

(v) The files of Shook Lin & Bok are now with Chua Hay & Wee. There is no way Cheo could have access to them to refresh his memory. If there is any confidential information in the file, I have no doubt that it would have been mentioned without the specific information being identified.

(vi) The defendant`s right to have a counsel of his choice.

157 In passing I would just wish to add that in the Practice Directions of the Law Society there is this reply (para 25[c]) which the Council of the Law Society gave to a member`s query:

> *The Council has replied stating that in the circumstances described in his said letter, the Council was satisfied that it was entirely proper for the member to act for the bank in the recovery proceedings, notwithstanding the fact that he had previously acted for the mortgagor and mortgagee in the securing of the banking facilities by a mortgage of the mortgagor`s property. There was no general rule that a solicitor who had acted for some person either before or after a litigation began cannot in any case act for the opposite party. In each case, the court has to be satisfied that mischief would result from the solicitor so acting. If there was no danger of any breach of confidence for the solicitor to act for the opposite party in a particular situation, then the question of a conflict of interest will not arise. The decision on*

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point is the English Court of Appeal case in ***Rakusen v Ellis, Munday & Clarke****.*

158 **Amendment to pleadings**

159 During the examination-in-chief of RJ, his counsel applied to amend the defence to include a further fact: that on 5 June 1990 RJ spoke to SL over the telephone from New Jersey, wherein SL confirmed to RJ the representations he made to Mrs RJ, namely, that the buyer was an elderly lady who intended to use the property for her own occupation, that Alrich was not involved in the purchase and that the buyer had asked for a long option period because her money was tied up in ACU fixed deposit. I granted the application.

160 Admittedly the application to amend was made late. But lateness per se cannot be an absolute bar to leave being granted. The test is whether any prejudice will be caused to the plaintiffs which cannot be compensated by an appropriate order as to costs. Counsel for the defendant emphasized that a party should not be penalized because of the errors or omission of his solicitors unless irreparable harm would be caused to the other side. I was fully aware that at that point in time SL had given his evidence and the plaintiffs had closed their case. But this point of the telephone conversation between RJ and SL was mentioned very much earlier in an affidavit of RJ filed on 7 September 1990 (1BA 47) during the O 14 proceedings. The point that there was this telephone conversation was put to SL in cross-examination and he denied having spoken to RJ. In view of this, it really would have made no difference whether at the point in time when the amendment was proposed SL had or had not completed his evidence. His evidence was he never spoke to RJ, who was then at New Jersey, USA, over the telephone. Moreover, the nature of the alleged representations was the same as those made to Mrs RJ. However, out of abundance of caution, in granting leave to the defendant besides granting leave

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to the plaintiffs to amend their reply, I also gave them liberty to recall SL if they thought it necessary: see ***Loutfi v Czaruikow Ltd*** .

161 A re-re-re-re-amended reply was filed by the plaintiffs pursuant thereto. However, the plaintiffs decided not to recall SL to testify on matters raised by the amendment.

162 **Calling of a witness by court**

163 At the end of the defendant`s case counsel for the plaintiffs asked this court to exercise its discretion in calling one Helen Loh to testify as a court witness. He said her evidence would be that the RJs had been talking to her and her mother with a view to getting them to vacate 8 KCR so that the RJs could purchase 8 KCR to develop it jointly with 36 EBR. Mr Hwang objected to the application. Mr Cheong submitted that Helen Loh would be a neutral witness. However, Mr Cheong had by then obtained a statement from her though earlier she was reluctant to speak or testify for any party.

164 Mr Cheong relied essentially on the Australian case ***Obacelo Pty Ltd & Anor v Taveraft Pty Ltd & Anor*** where the judge held that a court in a civil trial had the power to call a witness, even over the opposition of a party. However, he did not grant the application there because the party had not satisfied him that the particular individual would be likely to give evidence which would assist in the resolution of any critical issue.

165 However, the leading case on point is ***Re Enoch and Zaretzky, Bock & Co Arbitration*** , a decision of the Court of Appeal. That case concerned a motion to remove an umpire of an arbitration proceedings on various grounds,

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one of which was that he took upon himself to call a person as a witness. Fletcher-Moulton LJ said (at pp 332-333):

> *[T]here is an idea that an umpire, a person in a judicial position has the power, and, I suppose, the duty, to call witnesses in a civil dispute, whom the parties do not either of them choose to call. In my opinion there is no such power. A judge has nothing to do with the getting up of a case. The respondents` argument is based on a case in the Court of Appeal,* ***Coulson v Disborough****, in which there are certainly dicta which require to be carefully examined. The case itself presents no difficulty; nor does the decision. It was a case where, after the counsel for both parties had spoken at the conclusion of the case, the jury intimated to the judge that there was a person present to whom frequent reference had been made, and they would like him to be called as a witness. The judge called him as a witness, but obviously without any objection being raised by either party. ... One of the learned judges, the Master of the Rolls, Lord Esher, does, however, give utterance to a dictum which has been relied on by counsel for the respondents. He says this: `If there be a person whom neither party to an action chooses to call as a witness, and the judge thinks that that person is able to elucidate the truth, the judge, in my opinion, is himself entitled to call him.` If that means to call him when either side objects, I am satisfied that there is no basis for that dictum; but it must be remembered that there is no suggestion in the report or the judgments that the witness was called by the judge against the will of either of the parties. It certainly was not necessary for the decision; and the conseqences to which it would lead if so interpreted are such that I am satisfied that the Court of Appeal would never have given in the form of a mere dictum a decision so wide-reaching and so destructive of the fundamental principles of our laws of procedure. It does not purport to be based on any course of reasoning, and no authority was cited for it. I say that it would be destructive of the fundamental principles of our laws of procedure for the reason that if, according to the dictum, witnesses were called against the will of one of the parties, the civil rights of a man might be decided by evidence given by persons whose personal credibility and the accuracy of whose statements he would have no right to test by cross-examination; because the Court of Appeal laid down that if a judge calls a witness, neither party can cross-examine him as of right. Such a proposition may be most reasonable if the witness has been called with the assent of both parties, because he cannot be called a witness of either party. But it would lead to consequences which I do not like to contemplate if the dictum were supposed to apply to cases where a judge calls a witness to the facts of the case without the consent of the parties and*

> *then refuses, or has the power to refuse, to allow any cross-examination. I think, therefore, that the dictum refers only to cases where a judge has called a witness with the acquiescence of both parties, and has done so in order to get over the difficulty that if either party calls a witness he is supposed to be responsible for his personal credibility, though not for the accuracy of his statements, for it is well known that if a party calls a witness he may not attack his general credibility. ...*

166 But the dictum does not lay down, and in my opinion it is certainly not the law, that a judge, or any person in a judicial position, such as an arbitrator, has any power himself to call witnesses to fact against the will of either of the parties.

167 ***Re Enoch*** was mentioned with approval by the Court of Criminal Appeal in ***R v Harris*** , and by the Court of Appeal in ***Fallon v Calvert*** , though in the latter case the court felt that the situation of an Official Referee recalling a witness was different from that of a court or arbitrator calling an entirely new witness.

168 I should mention that in the later case of ***Clark Equipment Credit of Australia Ltd v Como Factors Pty Ltd*** , Powell J of the New South Wales Supreme Court, declined to follow ***Obacelo*** and instead regarded the rule laid down in ***Re Enoch*** as the law. It is of interest to note that in a much earlier criminal case, ***Titheradge v R*** , the High Court of Australia applied ***Re Enoch*** 19 in setting aside a conviction because the trial judge had on his own volition called a witness. Two members of that high Bench (Isaacs and Rich JJ) held that ***Re Enoch*** was applicable to both civil and criminal proceedings. I should mention that in ***Obacelo*** the judge felt that the decision in ***Re Enoch*** should be confined to its special facts.

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169 Counsel for the plaintiffs tried to argue that ***Re Enoch*** concerned the case of a judge who on his own volition wished to call a witness. Here one party has requested the court to exercise its discretion. So the situation is different. I am afraid I am unable to see how this fact could make a difference. I would have thought that all the more so this additional fact would demand that this court should not exercise its discretion, if there is such a discretion. If a party wishes to call a witness that party should call him. In civil proceedings, courts in Singapore decide cases on the evidence which the parties think fit to adduce before it. It is not inquisitorial.

170 The 14th edition (1990) of ***Phipson on Evidence*** still cites ***Re Enoch*** as the law. It states (at para 11-31) that `witnesses may be called by the judge in a civil case only with the consent of the parties and dicta to the contrary in ***Coulson v Disborough*** have been disapproved.` In my view that is a correct statement of the law. Accordingly, I refused the plaintiffs` request to call Helen Loh as a witness of the court.

171 In the alternative, Mr Cheong asked for the court`s leave to call Helen Loh as the plaintiffs` witness in rebuttal. We were then at a stage where the defendant had completed the calling of all his witnesses. It was clear to both parties, as indeed to the court, that Helen Loh could be a relevant witness: her evidence could well be helpful to one side and damning to the other or it could be neutral. However, both parties were not prepared to subpoena her as a witness as she was not prepared to talk to either of them. The party who calls her would have to call her at his own risk.

172 It seems to me settled law that evidence in rebuttal should only be permitted to a plaintiff (i) if a matter or development has quite unexpectedly arisen during trial which the plaintiff could not reasonably anticipate or (ii) in

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answer to evidence of the defendant in support of an issue, the proof of which lays upon the defendant: see ***Supreme Court Practice*** Vol 1, para 38/1/7. Evidence in rebuttal is not allowed to merely confirm the plaintiffs` case: see ***Jacobs v Tarleton*** (1848) 11 QB 421.

173 On the facts here I could not see any appropriate circumstances to warrant the exercise of my discretion. Quite clearly the plaintiffs chose not to call Helen Loh before they closed their case. They were not prepared to take the risk of calling her under subpoena when she was not willing to talk. This is too late now. This is not a circumstance where leave should be granted. I thus refused the application.

174 **Judgment**

175 In the result the plaintiffs` claim is dismissed. I grant an order in terms of the defendant`s counterclaim that Caveat No CV/36545B lodged on 7 August 1990 and Caveat No. CV/74284B lodged on 6 August 1991 against 36 EBR be removed and do so direct the Registrar of Titles, Singapore, to remove them. There shall be an order restraining the plaintiffs from lodging further caveats against 36 EBR. The defendant shall have the costs of this action.

176 Right at the beginning of the trial the parties have decided to ask the court to rule first on the question of liability, leaving the question of damages to be taken later. Therefore, I have made no determination on that. The Registrar shall fix further dates for the hearing on damages, if that should prove to be necessary.

177 ***Plaintiffs` claim dismissed.***

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Chao Hick Tin J

Patrick Wee and Cheong Yuen Hee (Chua Hay & Wee) for the plaintiffs
Michael Hwang, S Shanmugam and Francis Xavier (Allen & Gledhill) for the defendant

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