IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1995] SGCA 83

CA 10/1995

Between

Straits Engineering
Contracting Pte Ltd

… *Appellant*

And

Merteks Pte Ltd

… *Respondent*

GROUNDS OF DECISION

Contract — Discharge — Breach; Contract — Discharge — Breach

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

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Straits Engineering Contracting Pte Ltd v Merteks Pte Ltd

[1995] SGCA 83

CA 10/1995
Karthigesu JA; L P Thean JA; Yong Pung How CJ
29 November 1995

1 Cur Adv Vult

2 (delivering the judgment of the court): ***The facts***

3 The respondents, Merteks Pte Ltd, are engaged in the business of ship repair, mechanical engineering and fabrication work. In 1988, they acquired a workshop at Loyang estate and commenced business. Subsequently, they decided to acquire a site with a seafront to expand their business, and in November 1989 they applied to the Jurong Town Corp (JTC) for an industrial site with a waterfront for the carrying out of ship repairs, ship building and engineering works. Their application, however, was unsuccessful. They then looked around for a site with such facility in the open market and in early March 1990, discovered that a company called Nicol & Andrew (Far East) Pte Ltd (the company) occupying a site with a seafront facility was up for sale. The company was wholly owned by the appellants, Straits Engineers Contracting Pte Ltd, and had an issued and paid-up share capital of $1m divided into 100,000 shares of $10 each.

4 Sometime in March 1990, the respondents` managing director, Arthur Teo (Teo), a marine engineer by training, and Alan Chan (Chan), another of the respondents` directors, arranged a meeting with one Ambrose Lim (Lim), the managing director of the company. They had a general discussion on the facilities and business of the company. Lim indicated that the owners had in mind a price of $5.5m and he informed Teo and Chan that the lease of the site held by the company from JTC had about 20-odd years left. Although Chan felt that the place was small compared to what they had applied for to JTC, it was nevertheless suitable. Upon request, Lim also showed Teo and Chan a set of accounts of the company ending March 1989, which were the latest accounts available then.

5 Teo and Chan themselves had an interest in shipping. Together they owned a company, Petroships Pte Ltd (Petroships), which managed a fleet of vessels, and the respondents are a wholly-owned subsidiary of Petroships. The vessels were in turn owned mainly by Teo and Chan through separate companies. Teo and Chan wanted to acquire the company as they were interested in the company`s physical facilities and seafront and hoped to upgrade the capacity of the respondents so that it would join the `upper league` and do higher value work.

6 A few days after the first meeting, Teo and Chan visited the company`s site again and found that the premises suited their needs. A second meeting was arranged for 29 March 1990 at the office of Petroships at the Port of Singapore Authority building. Present thereat were Teo and Chan representing the respondents, and Lim and one David Toms (Toms), the managing director of the appellants, representing the appellants. The purpose of the meeting was to discuss the sale by the appellants to the respondents of all the shares in the company. Obviously there was a great deal of discussion on the price at the

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meeting. Toms wanted $5.5m for those shares but Teo and Chan counter-offered $4.2m. Eventually both parties agreed to the price of $5m. The accounts of the company were also produced at the meeting in which the net current assets of the company were shown to be worth $2,277,718.

7 The upshot of their discussions was that an agreement in writing was made between the appellants and the respondents on the very day, 29 March 1990. It was prepared by Chan after consulting Frankie Tan, the financial adviser for the respondents. The agreement (the March Agreement) contained only four clauses which were as follows:

> *It is agreed between Straits Engineers Contracting Pte Limited (the vendor) and Merteks Pte Ltd (the purchaser) that:*
>
> *1 The vendor has agreed to sell and the purchaser has agreed to purchase the whole of the issued and paid-up shares in Nicol & Andrew (Far East) Pte Ltd, incorporated in Singapore for $5,000,000 (Singapore Dollars Five Million).*
>
> (2) The completion date shall be within 60 days or such other date as mutually agreed.
>
> (3) The vendor agrees to hold the purchaser fully indemnified against any liability to any debts, obligations, guarantees, business contracts, litigation, and such other liabilities that may arise before the completion date.
>
> (4) The purchaser shall pay the vendor $10,000 on signing this contract.

8 The March Agreement was signed by Toms on behalf of the appellants, and by Chan on behalf of the respondents, and their signatures were witnessed by Lim and Teo respectively. It was agreed by both parties that the March Agreement constituted a binding contract.

9 On 4 April 1990 the respondents received a draft agreement from Lim, which had been prepared by the appellants` then solicitors, M/s Ann Tan & Associates. The draft set out the terms of the March Agreement and also

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contained two provisions, which the respondents felt were contrary to the March Agreement and which caused them some concern. They were as follows:

> *3(b)(2) In addition, the purchaser shall pay the vendor the audited difference of the sum between sundry creditors and sundry debtors, if any, as at 28 May 1990, a list of which is annexed hereto as Sch 1;*
>
> (4) (a) It is understood and agreed that the vendor shall be responsible for payment of the company`s trade creditors and enjoy the benefit of payments from the company`s trade debtors as at 28 May 1990, as set out in Sch 2 annexed hereto. These debts shall be utilized for payment of all creditors, any insufficiency arising therefrom is the responsibility of the vendor.

10 On the following day, Teo and Chan discussed the draft with their solicitor, Chan Kam Foo and with Frankie Tan. As they felt that it was necessary to clarify the two provisions in the draft, they went to see Mrs Ann Tan at her office. Mrs Ann Tan explained that according to her clients` instructions, the appellants would be selling the company to the respondents without any trade debtors and trade creditors, ie on completion the company would have only fixed assets without any current assets and liabilities. To that Tan remarked that the current assets belonged to the company and could not be taken out or given away. Mrs Ann Tan suggested to Teo and Chan that they could put up a proposal on the matter. Accordingly, on the next day, Teo and Chan prepared a draft and handed a copy to Lim. On 11 April 1990, Teo wrote to the appellants as follows:

> *Further to the agreement signed on 29 March 1990, we will be pleased to know when we can meet to finalize the sale and purchase arrangements as drafted and handed to your representatives on Friday, 6 April 1990.*

11 Again, on 17 April 1990, the respondents reminded the appellants and pressed for an early date when they could meet, as they would like to show to their bank the details of the transaction at an early date. The next day, the appellants replied as follows:

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> *There is already in existence an agreement on our part to sell and your part to buy our above company for S$5m.*

12 We do not agree with your new proposals on how to finalize the sale and purchase arrangements, which is contrary to our written agreement.

13 Please note that on 28 May 1990, the sale will be completed upon your giving us a cashier`s order for the sum of S$4,990,000 made in our favour. In exchange, we shall hand over to you the following:

> *(1) The 100,000 shares of the company together with the transfer forms duly executed;*
>
> (2) The title deeds relating to the property;
>
> (3) As at 28 May 1990, you will get a clean company, ie a company without any trade creditors or trade debtors as at that date.

14 In response, the respondents wrote to the appellants on 4 May 1990 stating:

> *The agreement of 29 March 1990 was reached on the basis of the balance sheet, as at 31 March 1989, of Nicol & Andrew (FE) Pte Ltd, tabled at the meeting.*

15 The net worth was S$2,277,718 for which the price of S$5m was agreed on. The agreed price was more than double the net assets value. In terms of 88/89 earnings, the P/E ratio ran in the hundreds.

16 The scheduled completion would not be helped by the attempt in your letter dated 18 April to read irrational ideas into that part of the agreement that provided the buyers with a simple and customary safeguard.

17 On 25 May 1990, M/s Ann Tan & Associates, representing the appellants, asked the respondents to complete the purchase by 4pm on 28 May 1990 by delivery of a cashier`s order in the sum of $4,990,000 in exchange for

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the certificates for the 100,000 shares in the company, together with the transfer forms duly executed and the title deeds to the property. The letter further warned that should the respondents fail to complete on 28 May at 4pm, they would be in breach of the March Agreement and the appellants would be entitled to forfeit the deposit of $10,000 without prejudice to their rights to take whatever legal remedies available to them. In response, Chan Kam Foo & Associates replied on 28 May 1990 stating, inter alia, that the respondents were ready to complete the transaction in accordance with the March Agreement subject to the appellants withdrawing item (3) of para 3 of their letter dated 18 April 1990.

18 The parties subsequently did not resolve their disagreement, and on 12 June 1990, the respondents instituted an action against the appellants in the High Court claiming specific performance and damages for breach of contract. In defence, the appellants counterclaimed a declaration that it was an express term of the March Agreement that they would sell the shares on the basis that the company would be free of trade debtors and trade creditors. Notwithstanding that the action had been commenced, the parties` solicitors continued with their negotiations with a view to seeking an amicable solution. By then, the solicitors acting for the appellants were M/s Donaldson & Burkinshaw. The privilege attaching to such negotiations was waived by the parties at the trial and documents relating thereto were produced and admitted. Between July and September 1990, there were discussions on a certain option `C`, which was mentioned in the letter dated 17 July 1990 from M/s Donaldson & Burkinshaw and which read as follows:

> *That completion of the sale and purchase takes place as planned within a reasonable time but not later than the end of July 1990 by payment of $4.5m to the vendor, and that the difference of $400,000 to $500,000 be paid to M/s Donaldson & Burkinshaw to be held as stakeholders, pending the outcome of adjudication by the court or arbitration by an arbitrator on the disputed issue.*

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19 Following a meeting on 24 July 1990, the respondents` solicitors replied to M/s Donaldson & Burkinshaw on 26 July, stating:

> *As our clients have indicated to you that they would go for option C, we are instructed by our clients to request for permission to proceed with the completion audit so that the matter could be completed soonest - possibly August 1990.*

20 However, the proposal fell through apparently as the appellants did not agree to a completion audit which the respondents required and which, according to them, was essentially procedural in nature, to ascertain the current net worth of the company, since about four months had elapsed from the last financial year; the appellants, on the other hand, objected to this need for a completion audit. Interestingly, while the parties` solicitors were trying to resolve their differences in order to reach a settlement, the appellants had secretly entered into an agreement on 9 June 1990 to dispose of their shares in the company to an Indonesian party, Cakrawala Nasantara Purnama Agung (CNPA) for a sum of only $4m, with a proviso allowing the appellants to back out upon paying interest to CNPA at 15% pa. That sale was eventually completed on 27 July 1990, thus rendering it impossible for the appellants to carry into effect any settlement that might be reached with the respondents.

21 The central issue before the trial judge was what was agreed between the parties at the meeting on 28 March 1990 when the March Agreement was signed. The parties` evidence on this meeting differed. Teo and Chan said that the parties did not agree on any terms other than those stated in the agreement and that there was no mention by anyone on behalf of the appellants that the company was to be sold without trade debtors and trade creditors. They were prepared to accept any negligible trading losses as indicated by Toms. They recalled that they had been told by Toms that the accounts for the year ending on 31 March 1990 would only be marginally different from the preceding year`s

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accounts and would show trade losses of about $50,000 to $100,000. Chan remembered that the figure of $70,000 was mentioned. In addition, Teo said that although the 1990 accounts had yet to be prepared, the respondents were keen on purchasing the company as it would integrate with and expand their business and that of Petroships. Moreover, in the course of negotiations it was understood that the respondents would be buying the entire business of the company by acquiring all the shares in the company from the appellants. Both Teo and Chan, however, denied that Toms mentioned a sale of a `clean company` or words to that effect. Teo further testified that on 28 May 1990 the respondents were ready and willing to complete the transaction in accordance with the March Agreement.

22 On the other hand, Toms stated that he had agreed to sell the company to the respondents, but it was on the basis of a clean company, namely, without trade debtors and trade creditors. He maintained that there was a clear understanding on that point. At that time, the company accounts showed a credit balance in its favour and the appellants owed the company more money than what was owed to them by the company. Toms denied that he had represented that the accounts for the year ending 31 March 1990 would be only marginally different from those of the preceding year and that the trade losses would be about $50,000 to $100,000. Toms further testified that when the appellants bought over the company in September 1985 from its previous owner, it was on the basis that the company had no trade debtors and trade creditors. Since 1985 he had also sold three other companies on a similar basis. Toms further referred to the fact that in cl 3 of the original draft of the March Agreement the words `asset reduction` were found just immediately after the words `business contracts` which were deleted at his insistence, as those words were not only

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inappropriate in that context but would not have been consistent with a sale without trade debtors and trade creditors.

23 **The decision below**

24 The trial judge examined two interrelated factual issues, namely, whether there was any discussion or understanding on 29 March 1990 that the sale of the company would be on the basis of a `clean company` without trade debtors and trade creditors, and whether the two words `asset reduction` were included in para 3 of the original draft agreement tendered by Chan to Toms on 29 March 1990 for discussion and whether those two words were deleted on the insistence of Toms. The trial judge was of the view that if Toms had intended that the sale was to be on the basis without trade debtors and trade creditors, then it was strange that he had not incorporated it into the March Agreement, especially when there was such an express clause to that effect in the 1985 agreement when the appellants bought over the company. It was also odd that whilst Toms had insisted upon the deletion of the words `asset reduction` he had not seen it fit to ask for an explicit term to convey his intention that the sale was to be without trade debtors and trade creditors. In any event, the trial judge was not satisfied that the words `asset reduction` was found in the original draft of the March Agreement for the following reasons. First, Toms seemed to be uncertain as to the exact words which he alleged had been deleted from the draft. Secondly, at no time until the commencement of the trial did Toms inform his counsel that he had the two words deleted from the draft, although the dispute as to whether the sale was to be on the basis of a clean company without trade debtors and trade creditors arose barely a week after the execution of the March Agreement. If it were true that Toms thought that Teo and Chan were trying to `sneak in to buy on intercompany debts` he could hardly have forgotten about this crucial fact until the commencement of the trial. Accordingly the trial judge

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found that this was merely an afterthought. Even if those two words had been there and were later omitted, the trial judge was of the opinion that cl 3 could not be interpreted to mean or indicate that the sale was to be without trade debtors and trade creditors. He was reinforced in his finding by the subsequent agreement made between the appellants and CNPA where there was not present any clause to indicate that the sale was to be on the basis of a `clean company` without trade debtors and trade creditors, although Toms testified that the sale was such. The trial judge also found it hard to accept Toms` explanation that he had not paid any attention to the clauses in the agreement which was made with CNPA. Further, he found that at times Tom was confused and uncertain about what he said and at other times he was just trying to rationalize on an ex post facto basis. The trial judge found that Toms was an unreliable witness. In conclusion, the trial judge held that there was no agreement that the sale would be on the basis of a `clean company` without trade debtors and trade creditors, and in the circumstances, the appellants were in breach of the March Agreement.

25 At the trial, the appellants contended for the first time that the respondents did not have the necessary funds to complete the purchase on 28 May 1990. Although this point had not been pleaded by the appellants, the trial judge dealt with it and concluded that there was no evidence to suggest that the respondents did not have the funds to complete the purchase, and that on the contrary the Petroships group being a very substantial company could have easily raised the sum needed.

26 Turning then to the question of damages, the respondents submitted a set of calculations projecting the revenues and profits of the company in the next ten years. They claimed a total of $9,562,415 as loss of profits. However, the trial judge held that the projected profits were highly speculative and decided to

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award damages on the basis of loss of a chance of making a profit instead and took 15% of the projected profits of the company as representing the value of the loss of the chance. This amounted approximately to $1,430,000. We shall discuss the trial judge`s decision on this issue in some detail in a moment.

27 **The appeal**

28 Three main issues have been raised before us. The first is whether it was a term of the agreement made between the appellants and the respondents that the sale of the entire issued shares of the company was on the basis that on completion the company would have no trade debtors and creditors; in other words the current assets and liabilities of the company would be for the account of the appellants. Counsel for the appellants contended that the terms of the agreement were partly oral and partly in writing, and that it was part of the oral agreement that the sale of the shares of the company to the respondents would be on the basis that the company would have no trade debtors and trade creditors.

29 It was not disputed that the March Agreement constituted a binding contract. As to whether there was a further oral agreement, the only evidence emanating from the parties themselves was that of Toms, which was in direct contradiction to the evidence of Teo and Chan. The trial judge rejected Toms` evidence on the ground that he was not a reliable witness. We have no reason to disagree with this finding. We ourselves also find it difficult to accept the testimony of Toms. If, as Toms alleged, he had intended that the company would be sold on the basis that the trade debtors and trade creditors would be excluded, then it is strange that he had not expressly provided for it in the March Agreement. Indeed, there was an express clause to that effect in the 1985 agreement when the appellants first acquired the company. Yet it was odd that

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Toms did not see fit to include explicitly a similar clause in the present transaction. It did not make any sense to us that in order to reflect his intention he insisted merely on the deletion of the words `asset reduction`, assuming that those words were originally in the draft of the March Agreement. After all, he had had previous experience of such a provision in an agreement, not once but four times, and this point cannot be overemphasized. Moreover, Mrs Ann Tan, the appellants` then solicitor, testified that after the March Agreement had been signed, Toms spoke to her but did not point to anything in the March Agreement which suggested that it was to be a sale on the basis of a clean company, although he instructed her to prepare a more detailed draft agreement on that basis. Thus at most, the concept of a `clean company` without trade debtors and trade creditors occurred to Toms only after the March Agreement had been signed.

30 We find ourselves in agreement with the trial judge that it was never a term of the March Agreement that the sale of all the shares in the company would be on the basis that all the trade debtors and trade creditors would be excluded and that the presence or absence of the words `asset reduction` in the original draft of the March Agreement could not derogate from the fact that a plain reading of cl 3 or of the entire March Agreement could possibly suggest otherwise. We agree also with the trial judge`s finding that when Teo and Chan agreed to buy the shares of the company at $5m, they had taken into account the fact that the company had a net asset value of $2,277,718, and were willing to accept a slight depreciation in the value of the company at the date of completion.

31 The second issue is whether the respondents had failed to show that they were ready and willing to perform their obligation to pay the contract price on 28 May 1990, the contractual date of completion. It was submitted by counsel

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for the appellants that no evidence was adduced to show that the respondents had sufficient funds to make payment of the balance of the purchase price. This point was not raised in the pleadings, but notwithstanding that, it was argued before the trial judge and he dealt with it in his judgment.

32 It is clear that the respondent bore the onus of proving that they were ready and willing to complete the transaction. Readiness and willingness implies not only disposition but capacity: ***De Medina v Norman*** (1842) 9 M & W 820 at 827;152 ER 347 at 350. In ***Forrestt and Son v Aramayo*** (1900) 83 LT 335, the plaintiffs contracted with the defendants to build and deliver f o b at the port in London a steam launch by a fixed date, but was late by three months in effecting delivery. However, the defendants had not prior to the fixed date named the vessel for taking delivery of the launch. To a claim for the balance of the purchase price the defendants sought to deduct an amount representing liquidated damages. It was held by Bucknill J that as the defendants were not ready and willing to take delivery before the plaintiffs were able to deliver the launch, the defendants were not entitled to the agreed damages. His decision was affirmed on appeal. Lord Halsbury LC said at pp 837-838:

> *The sole point which I intend to decide upon this appeal is that whenever there are concurrent obligations the party who seeks to recover against the other must show that he has always been ready and willing to perform the obligation upon him. It is immaterial whether the obligation is express or is implied;* ***expressio eorum qu[oelig] tacite nisunt nihil operatur****. In a contract for the sale or manufacture of a chattel, the one party must be ready and willing to deliver, and the other to accept delivery. The difference between the two acts is quite immaterial. The one party in this case is bound to build the launch, and the other to accept it when built; the one is bound to finish the launch, and the other to provide a vessel to receive it. It is common ground that neither party has performed that obligation. The law has been well ascertained and accepted for many years upon this subject.*

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33 The factual situation in the instant case is somewhat different. Under the March Agreement the appellants and the respondents were under concurrent obligations to complete the sale and purchase of the shares: the appellants were obliged to deliver to the respondents the share certificates and duly executed transfer of the shares and the respondents to pay the balance purchase price, and the contractual date of completion was 29 May 1990. On 4 April 1990, Lim sent to the respondents a draft of an agreement setting out the detailed arrangements for completion and in it had incorporated provisions for a clean company without trade debtors and trade creditors sale. This, in turn, attracted a counterproposal from the respondents drafted by their solicitors. The appellants subsequently insisted on a sale on the basis of a clean company without trade debtors and trade creditors. It was the appellants` insistence on such a term that was the main stumbling block to the parties getting together to work out the details for completion. In effect, by insisting, up to the date of completion, that the sale was to be on the basis of a clean company without trade debtors and trade creditors, the appellants had indicated unequivocally that they would refuse to complete on the terms of the March Agreement. As such, the appellants` intimation of non-performance of their obligation dispensed the respondents from the performance of their obligation to tender the purchase price. There was nothing to suggest that the respondents had not intended to complete the transaction but for the new term introduced by the appellants. In such circumstances, it would be futile and nugatory for the respondents to tender the balance purchase price with a view to completing the purchase in terms of the March Agreement. Such tender would have been rejected by the appellants. In our judgment, such insistence by the appellants relieved the respondents from showing that they were ready and willing to perform their obligation to complete.

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34 In ***Peter Turnbull And Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd*** (1953-1954) 90 CLR 235, the plaintiffs agreed to purchase a quantity of oats from the defendants f o b Sydney. The plaintiffs were obliged to nominate a ship to load the oats in the month of January or February 1951 and to give 14 days` notice of such nomination. In January 1951 the defendants informed the plaintiffs that they could not supply the oats for delivery in Sydney but could do so in Melbourne and asked the plaintiffs to agree. As the plaintiffs had resold the oats, they sought agreement from their buyer and the latter refused. The defendants, on being informed by the plaintiffs that they could not agree, replied that they (the defendants) had no oats to deliver. The contract was not performed. The plaintiffs sued for damages. It was held by the High Court of Australia that the intimation by the defendants that he had no oats for delivery in Sydney dispensed the plaintiffs from their obligations to nominate the ship and give notice of nomination under the contract, and the plaintiffs were entitled to succeed. Dixon CJ said, at p 245:

> *... I think that the plaintiff is entitled to succeed on the ground that, in so far as there was a non-fulfilment of the condition requiring the nomination of a February ship and the giving of 14 days` notice of the ship and shipping date, the defendant dispensed the plaintiff from such fulfilment.*

35 His Honour gave the reasons as follows, at p 246:

> *The defendant persisted up to 2 March that it could perform the contract only in one way, namely, by substituting a shipment by the same vessel in Melbourne for that in Sydney contracted for. By seeking the plaintiff`s help in an attempt to effect this substitution and at the same time persisting that it could not perform the contract according to its terms, the defendant clearly intimated to the plaintiff that it was useless to pursue the conditions of the contract applicable to shipment in Sydney and that the plaintiff need not do so.*

36 In ***Foran & Anor v Wright & Anor*** (1989) 168 CLR 385, the vendors and purchasers entered into a contract for the sale and purchase of land, and

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completion was due on 22 June 1983, of which time was of the essence. There was a special condition which required the vendor to obtain registration of a right of way before completion. On 20 June the vendors` solicitor told the purchasers` solicitor that the vendors would not be able to complete the sale on 22 June because the right of way had not been registered. Neither party attempted to complete the transaction on the due date. On 24 June the purchasers gave the vendors a notice of rescission. On the purchasers` claim for a declaration that they had rescinded the contract and for the return of the deposit, the vendors contended that the notice of rescission was invalid on the ground that the purchasers were not ready and willing to complete the purchase on the due date for want of funds. The High Court of Australia held that although the purchasers were required to show that they were ready and willing to perform, the fact that the vendors had intimated that they were unable to effect the right of way relieved the purchasers of the need to show more than that they were not incapacitated from raising the necessary funds and had not resolved against doing so. Brennan J said, at p 417:

> *The obligation of a vendor to deliver a conveyance and the obligation of a purchaser to pay the price on completion are mutually dependent and concurrent obligations in the absence of any contrary stipulation; each obligation is to be performed in exchange for the other:* ***Palmer v Lark*** *[1945] Ch 182 at pp 184-185. Where the respective obligations of parties to a contract are mutually dependent and concurrent, the primary rule is that neither party who fails to perform his obligation when the time for performance arrives can rescind for the other party`s failure at that time to perform his obligation. Each party`s obligation is conditional on performance by the other; neither can complain of non-performance by the other when the condition governing the other`s obligation goes unfulfilled. But if one party intimates to the other that it is useless for the other to fulfil his obligation and the other acts on the intimation, the party to whom the intimation is given is dispensed from a nugatory tender of performance. Lord Mansfield said in* ***Jones v Barkley*** *(1781) 2 Doug 684 at p 694:*
>
> *`The defendant pleads, that the plaintiff did not actually execute an assignment and release; and the question is, whether there*

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> *was a sufficient performance. Take it on the reason of the thing. The party must shew he was ready; but, if the other stops him on the ground of an intention not to perform his part, it is not necessary for the first to go farther, and do a nugatory act.`*

37 In any event, in the case at hand the trial judge found that the respondents were ready and willing to complete the purchase on the terms of the March Agreement. By mid-April 1990 the respondents had been in touch with its bankers to seek financing. There was indication of this from the respondents` letter to the appellants` solicitors dated 17 April 1990 in which there was some mention by the respondents of making financial arrangements with their bank. It seems to us that it was only due to the appellants` insistence up to the date of completion that the sale was to be on the basis of a `clean company` without trade debtors and trade creditors that the respondents did not make any firm arrangements with its bankers. In fact, there was evidence adduced on behalf of the respondents to suggest that there was approval in principle from the bank. Moreover, Petroships was a substantial company, both in terms of assets and revenues, and the accounts as at 28 May 1990 showed that that company and its group had about $2.4 to $2.5m in cash. The respondents, did not appear to have an insurmountable difficulty in raising the remaining finance to complete the purchase. In our opinion, the trial judge was entitled on the evidence to conclude that there was sufficient evidence to show that the respondents were ready and willing to complete the purchase. In our judgment, the respondents had discharged the burden of showing that they were ready and willing to complete the transaction.

38 We now come to the third issue, the quantum of damages awarded by the trial judge, which essentially is the principal point of appeal raised by the appellants. The trial judge approached the question of damages as follows:

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> *The principle to be borne in mind in determining quantum is that damages are to compensate the plaintiff for the breach. As stated in* ***Engell v Fitch*** *(1869) LR 4 QB 659 at p 666 the basic object of damages is to put the plaintiff `so far as money can do it, in the same position as if the contract had been performed`. But the damages to be awarded `should be such as may fairly and reasonably be considered either arising naturally, ie according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it`:* ***Hadley v Baxendale*** *(1854) 9 Exch 341. Damages are based on loss to the plaintiff and not on gain to the defendant:* ***Tito v Waddell (No 2)*** *[1977] CH 106.*

39 This approach is undoubtedly correct. The trial judge went on to consider the projected profits given by the respondents and he also examined the evidence of the various witnesses relating to the viability of marine companies. He considered also the profit and loss of the company and the respondents` over the last two years. He was critical of the figures in the projection provided by the respondents and said as follows:

> *It seems to me that the figures postulated by Merteks are highly speculative. In coming to that view, I have noted that Teo said he had good business contacts. It was essentially a theoretical exercise, based on inadequate data. There was no proper study or business plan indicating how Merteks intended to expand its business and obtain a bigger share of the market. Neither was there any manpower planning or proper costing. It was based on assumptions though I would accept that for calculations of such a nature, some assumptions may be inevitable.*

40 Having said that the trial judge nonetheless held:

> *I accept that on acquiring Nicol & Andrew the capacity of Merteks to undertake repair jobs would be substantially enhanced. I also accept that having a seafront would be a great advantage. ...*

41 He then proceeded to examine the various factors operating for and against the enhancement of the capacity of the respondents by the proposed acquisition, and, immediately following such examination, he said:

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> *In the circumstances of the case, there can be no doubt that Merteks is entitled to damages for the breach. Straits knew that Merteks was seeking to acquire Nicol & Andrew to expand its business. The problem is in determining the appropriate quantum. I recognize that I could not fairly use the profit margin which Merteks had in fact achieved (without Nicol & Andrew site) in the last few years as a guide without substantial adjustments. Obviously, had Merteks acquired Nicol & Andrew, its capacity would have been greatly enhanced.*

42 However, while there is some evidence that following the breach, Merteks tried to obtain an alternative seafront site without success, one cannot completely rule out that it could well succeed in the future though this would in turn depend upon numerous factors like the price, the size and location, etc, of the new site. Having considered all the material that is before me, including the factors I have listed above, I am not persuaded that the award in damages in the present case should be based on a straight mathematical calculation as projected by Merteks. That would be grossly excessive. The element of uncertainty is really that much greater in the instant case than say in a case where the court is required to assess the loss of earnings of an individual where we know his past working experience. I am conscious of the remarks of Vaughan Williams LJ in ***Chaplin v Hicks*** [1911] 2 KB 786 that `... it may be that the amount (of damages) ... will really be a matter of guesswork. But the fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages for his breach of contract.` Accordingly, I think the damages I should award here should be more in the nature of compensating Merteks for the loss of a chance or opportunity to make profits rather than that they should be based upon the projected profits stretching over ten years as advanced by Merteks. ... But I think it would not be inordinately low or inordinately high if I were to adopt, bearing in mind the contingencies mentioned, something like 15% of the projected profits of Merteks as the measure of damages.

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43 On that basis he gave judgment for the respondents in the sum of $1,430,000, being approximately 15% of the projected profits.

44 It was submitted on behalf of the appellants that, the respondents` profit projections having been rejected, it was wrong for the trial judge to award damages based on a percentage of a totally unreliable base and in the absence of any acceptable evidence of likely loss of real profits. It was also submitted that quite apart from the trial judge`s reasons for rejecting the respondents` profit projections, the projections were also wrong in principle on the ground that no allowance was made for the following: costs of funds for the acquisition; provision for repayment of sums borrowed; amortization of goodwill; discount for future projected profits to the net present value; distinction between the company`s profits and the respondents` profits; and restrictions contained in the lease. On the loss of chance of the making of a profit, counsel submitted that there was no guarantee that the company would make a profit. Accordingly, there was no basis for awarding a sum representing such loss of chance. Hence, the respondents had not suffered any damage and only nominal damages should have been awarded.

45 These arguments of counsel were formidable and at first blush were extremely attractive. However, on a further reflection, we find we are unable to accept them entirely. It is necessary to examine closely that part of the trial judge`s judgment dealing with the quantum of damages. For this purpose we have quoted in extenso the relevant portions of his judgment. On a close examination of his judgment and looking at it on the totality, we find that the trial judge did not reject ***for all purposes*** the profit projections produced by the respondents. He found that the projections were highly speculative and therefore could not adopt them ***for the purpose of assessing actual loss of profits*** of the respondents. To award to the respondents loss of profits based on such

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projections would be grossly excessive. We agree with the trial judge, and do not think that anyone can fault him on that.

46 Nonetheless, the trial judge found that the respondents had suffered a real loss occasioned by the breach of contract by the appellants, and once more he referred to the profit projections and considered the various factors for and against the enhancement of the respondents` capacity by the proposed acquisition. Again, on a close examination of his judgment it is clear to us that the trial judge found that there was a real chance of the respondents making a profit if they had been successful in the acquisition. On the authority of ***Chaplin v Hicks*** [1911] 2 QB 455 he awarded to the respondents damages for the loss of a chance of making profits.

47 In ***Chaplin v Hicks*** [1911] 2 KB 786, the plaintiff in response to the defendant`s advertisement submitted an application for engagement as an actress. Out of some 6000 applicants she was among the 50 selected and was placed on the short-list of 50 applicants, from whom only 12 would be finally selected for the promised engagements. Appointments were then given to these 50 applicants to present themselves for the final selection. However, the letter of appointment reached the plaintiff too late and her subsequent request for another appointment was turned down. She sued the plaintiff for damages for breach of contract on the ground that by reason of the breach she had lost the chance of being selected for an engagement. The jury awarded her Â£100 as damages for the loss. The Court of Appeal upheld the award. Before the Court of Appeal it was conceded that there was a breach of contract, and the only question was one of damages. It was held that notwithstanding the uncertainty of her winning the competition for the engagement damages were assessable. Vaughan William LJ dealt with the question of damages as follows, at pp 791-792:

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> *... It was said that the plaintiff`s chance of winning a prize turned on such a number of contingencies that it was impossible for any one, even after arriving at the conclusion that the plaintiff had lost her opportunity by the breach, to say that there was any assessable value of that loss. It is said that in a case which involves so many contingencies it is impossible to say what was the plaintiff`s pecuniary loss. I am unable to agree with that contention. I agree that the presence of all the contingencies upon which the gaining of the prize might depend makes the calculation not only difficult but incapable of being carried out with certainty or precision. The proposition is that, whenever the contingencies on which the result depends are numerous and difficult to deal with, it is impossible to recover any damages for the loss of the chance or opportunity of winning the prize. In the present case I understand that there were 50 selected competitors, of whom the plaintiff was one, and 12 prizes, so that the average chance of each competitor was about one in four. Then it is said that the questions which might arise in the minds of the judges are so numerous that it is impossible to say that the case is one in which it is possible to apply the doctrine of averages at all. I do not agree with the contention that, if certainty is impossible of attainment, the damages for a breach of contract are unassessable.*

48 Later, he continued at p 792:

> *... But from first to last there were, as there are now, many cases in which it was difficult to apply definite rules. In the case of a breach of a contract for the delivery of goods the damages are usually supplied by the fact of there being a market in which similar goods can be immediately bought, and the difference between the contract price and the price given for the substituted goods in the open market is the measure of damages; that rule has been always recognized. Sometimes, however, there is no market for the particular class of goods; but no one has ever suggested that, because there is no market, there are no damages. In such a case the jury must do the best they can, and it may be that the amount of their verdict will really be a matter of guesswork. But the fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages for his breach of contract.*

49 Similar pronouncements were made by Fletcher Moulton LJ at p 795:

> *... He says that the damages are difficult to assess, because it is impossible to say that the plaintiff would have obtained any prize. This is the only point of importance left for our consideration. Is expulsion from a limited class of competitors an*

> *injury? To my mind there can be only one answer to that question; it is an injury and may be a very substantial one. Therefore the plaintiff starts with an unchallengeable case of injury, and the damages given in respect of it should be equivalent to the loss. But it is said that the damages cannot be arrived at because it is impossible to estimate the quantum of the reasonable probability of the plaintiff`s being a prizewinner. I think that, where it is clear that there has been actual loss resulting from the breach of contract, which it is difficult to estimate in money, it is for the jury to do their best to estimate; it is not necessary that there should be an absolute measure of damages in each case.*

50 Farwell LJ, the third member of the court, was also of the same opinion that damage resulting from the loss of a chance of winning a competition was assessable. He began with the following approach at p 798:

> *Then comes the question as to the ascertainment of the amount. In actions for unliquidated damages this is ordinarily for the jury, and to my mind it is not correct to say that the present is an exceptional case. It is contended that the amount of the plaintiff`s loss is so entirely a matter of pure chance as to be incapable of assessment. I cannot for this purpose draw any distinction between a chance and a probability. ... The two words `chance` and `probability` may be treated as being practically interchangeable, though it may be that the one is somewhat less definite than the other. The necessary ingredients of such an action are all present; the defendant has committed a breach of his contract, the damages claimed are a reasonable and probable consequence of that breach, and loss has accrued to the plaintiff at the time of action.*

51 He concluded thus, at pp 799-800:

> *... It is clear upon the authorities that damage resulting from the loss of a chance of winning in a competition is assessable. ... I see no difficulty in the assessment of damage in the present case. It was a question for the jury, and, that being so, this court is not entitled to interfere with their finding.*

52 We have quoted in some detail these judgments, as that case is ***the*** authority on award of damages for loss of a chance in both contract and tort. It has been repeatedly cited with approval in subsequent cases.

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53 Under this head of damages the amount awarded is unavoidably a lump sum which, in the opinion of a trial judge, is fair and reasonable, after taking into account various contingencies. ***Chaplin v Hicks*** was a case which was tried with a jury and the amount was awarded by the jury. It was therefore not manifest whether it bore any relation to the amount which the plaintiff would have earned from the engagements, had she been successful in the competition. However, in those cases where the trials were before a judge without a jury the amount awarded under this head of damages was also a lump sum essentially based on the subjective assessment of the trial judge taking into account all the contingencies and uncertainties in the factual situation before him. An examination of the cases subsequent to ***Chaplin v Hicks*** eminently bears this out.

54 In ***Domine v Grimsdall*** [1937] 2 All E R 119 the execution creditor sued the defendant bailiff for a breach of duty occasioned in the course of the latter`s levying execution and recovered a sum representing the loss of the chance that the debtor might have made a payment on account of the judgment debt but for the default on the part of the bailiff`s assistant. The approach adopted by Atkinson J in assessing this amount, after having referred to ***Chaplin v Hicks*** and taken into account the various relevant facts, was as follows, at p 128:

> *Test it in this way. A sum of Â£25 was mentioned in the evidence as the price of some, at any rate, of the furniture which had been sold. Assuming that that was 40% on the appraisement value ... there was surely a very good chance of a payment of Â£18 or Â£19, sufficient to take that furniture out of the levy, if, as they say, they knew that that very afternoon they were going to get Â£25 for it. I have to do the best I can, and the mere fact that it may be difficult, according to the case to which I referred, does not relieve me, and would not relieve a jury of the duty of doing one`s best with it. I propose to allow Â£15 for the loss of the chance of a payment on account by the course taken by Palmer [the bailiff`s assistant]. I think the chance was at least worth*

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> *that. I can well understand the plaintiff thinking that it was worth a good deal more, but I have not the slightest doubt myself that it was worth at least that.* ***Otter v Church, Adams, Tatham & Co*** *[1953] 1 Ch 281 was a case where a client brought an action against her solicitor for professional negligence for wrongly advising her as to her son`s interest in certain property, thus depriving him of the opportunity of increasing his interest in the property by executing certain assurance during his lifetime. In considering the measure of damage Upjohn J took into account various factors, and said, at p 290-291:*
>
> *Bearing all those factors in mind, what is my duty? It is difficult to estimate damages when one has to speculate upon the action which Michael would have taken had he known the truth, but that difficulty is no bar to the assessment of damages. That was finally established in the well-known case of* ***Chaplin v Hicks****.*

55 I have to make up my mind as best I can, and I do so by awarding the plaintiff in her capacity as the administratrix of Michael Â£6,500.

56 In ***Hall v Meyrick*** [1957] 2 QB 455, the plaintiff sued her solicitor in negligence for failing to warn her that her marriage would revoke the will made in her favour by her then intended husband. The marriage took place, and two years later the husband died intestate. One of the questions for decision before Ashworth J was the claim for damages for loss of the chance or opportunity of securing those benefits under the revoked will which she would have obtained by procuring a fresh will to be executed by her husband, had she been so warned. Ashworth J said, at p 471:

> *This was indeed the alternative way in which the plaintiff`s claim was put, namely, that, owing to the absence of any warning, the plaintiff failed to take any steps either before or after her marriage to Hall to obtain under a new will by him the same benefits as he was willing to confer on her in December 1949; in other words, the loss which she has sustained is the loss of the chance or opportunity to secure those benefits. Expressed in this way, the claim seems to me to be one which may be said to fall within both parts of the rule in* ***Hadley v Baxendale*** *9 Exch 341.*

57 The learned judge approached the question of quantum thus, at p 471:

> *It does not by any means follow that the plaintiff is on this footing entitled to the full difference between the value of her interest under a will leaving everything to her and the value of her interest on intestacy. It is at this point that the effect of the various contingencies to which Mr Beney referred must be taken into account. The more the contingencies, the lower the value of the chance or opportunity of which the plaintiff was deprived.*

58 And he concluded thus at p 472:

> *Any assessment of damages in a case of this sort is bound to appear somewhat arbitrary, but I have endeavoured to find a figure which fairly represents the plaintiff`s loss after giving due allowance for all the uncertainties. The sum for which I give judgment in favour of the plaintiff is Â£1,250.*

59 There was an appeal to the Court of Appeal and the appeal was allowed but on the procedural ground of amendments to pleadings which had the effect of taking away from the defendant the benefit under the Limitation Act.

60 Again, in the case of ***Cook v Swinfen*** [1967] 1 WLR 457 where the client claimed against her solicitor damages for professional negligence occasioned in divorce proceedings, the High Court awarded, inter alia, Â£160 for the loss of her chance of obtaining maintenance for her son and also Â£200 for the loss of her chance of obtaining a more favourable outcome of the proceedings. The award of Â£160 was made in relation to the period of maintenance for her son but the award of Â£200 was essentially one of subjective determination thereof by the trial judge based on his assessment of the plaintiff`s chances of success. On appeal these awards were affirmed. On the award of Â£200, Lord Denning MR said, at p 460:

> *The second item is the unfavourable outcome of the divorce suit. She lost when she might have won. What damages should be obtainable? That depends on what were the prospects of a successful outcome. The judge said that even if the case had been fought, the probabilities were that the husband would still have got a divorce on the ground of desertion. That may be true. But there was quite a chance that both might have got decrees;*

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> *the husband on the ground of the wife`s desertion; the wife on the ground of the husband`s adultery. There was an outside possibility of the wife herself getting a decree. She is entitled to general damages for the loss of the chance of a more favourable outcome. For the simple reason that it does affect a person`s standing to be found the guilty party instead of the innocent party. The judge assessed the damages on this loss at Â£200. That was essentially a matter for him. I do not think we should interfere with the figure of Â£200.*

61 In a slightly different case, ***Sanders v Parry*** [1967] 2 All ER 803, the defendant in breach of contract of service with the plaintiff left the service and took over a valuable client of the plaintiff. In a claim by the plaintiff the court awarded, inter alia, damages for the loss of the chance for retaining that client and awarded a lump sum. Havers J in making this award said, at p 809:

> *This breach by the defendant deprived the plaintiff of the opportunity of retaining Mr Tully`s work. It might well have been that he would have continued to handle the work, and that he would have kept it if the defendant had acquired a partnership in this firm or had remained an assistant solicitor with the firm. ... I am satisfied, therefore, that the breach of duty deprived the plaintiff of the chance of retaining Mr Tully as a client. I have to consider the figures. I estimate that the gross fees for 12 months would be Â£4,680. I was told that the figure put on office expenses was about 54%, so, therefore, profit for the 12 months` period would be in the neighbourhood of Â£2,000. Estimating as reasonably as I can, and doing the best that I can, I think that a proper sum to award in all the circumstances of the case would be Â£500.*

62 We now turn to ***McRae & Anor v Commonwealth Disposals Commission & Ors*** (1951) 84 CLR 377, which was the sheet-anchor of the appellant`s arguments. There, the Commonwealth Disposals Commission entered into a contract with the plaintiffs for the sale of an oil tanker including the contents wrecked on Jourmaund Reef approximately 100 miles North of Samarai. The tanker and the contents were sold `as and where they lie with all faults` and no warranty was given as to the condition, description, quality or otherwise. After the contract was made, the plaintiffs were unable to locate the

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tanker and it was subsequently found that there was no such tanker in the locality at the material time. The plaintiffs sued the Commonwealth Disposals Commission to recover damages for breach of contract and it was held that the plaintiffs could only recover the cost and expenses incurred in locating the tanker but not damages for loss of profit, and nominal damages were awarded. In their joint judgment, Dixon and Fullagar JJ said, at p 412:

> *In* ***Chaplin v Hicks*** *[1911] 2 KB 786, if the contract had been performed, the plaintiff would have had a real chance of winning the prize, and it seems proper enough to say that that chance was worth something. It is only in another and quite different sense that it could be said here that, if the contract had been performed, the plaintiffs would have had a chance of making a profit. The broken promise itself in* ***Chaplin v Hicks*** *[1911] 2 KB 786 was, in effect, `to give the plaintiff a chance`: here the element of chance lay in the nature of the thing contracted for itself. If there were nothing more in this case than a promise to deliver a stranded tanker and a failure to deliver a stranded tanker, the plaintiffs would, of course, be entitled to recover the price paid by them, but beyond that, in our opinion, only nominal damages.*

63 We would make two observations on this case. First, although the plaintiff in ***Chaplin v Hicks*** would have had a chance of being selected if the contract had been performed, her chance was one in four. Obviously it was in that sense their Honours meant when they said that the plaintiff there had a `real chance`. Secondly, the facts in the present case were far removed from those in ***McRae*** . What we have here is not a case of a mysterious tanker stranded in some part off the coast of Australia where no one appeared to know her state, condition and also her whereabouts, and no warranty as to condition, description, quality or otherwise was given. There, the Commission did not contract to deliver a tanker of any particular size or of any particular value or in any particular condition; nor did it contract to deliver any oil (see p 411). Here, there was a contract for the sale and purchase of all the shares of an operating company having a net worth of some $2.27m and holding a leasehold site with

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a seafront, which the respondents found would meet their needs commercially. The respondents and their related companies were involved in shipping business and the company with its facilities would probably offer a complementary role to the business of the respondents and their related companies. The trial judge found, and we agree with him, that on acquiring the company the capacity of the respondents to undertake repair jobs would be substantially enhanced and the seafront of the site which the company had would be of great advantage, and that the appellants knew that the respondents were seeking to acquire the company to expand its business. We therefore do not find ***McRae*** of any assistance.

64 The trial judge here, doing the best he could in the circumstances, has considered the various factors for and against the respondents and has come to the conclusion that the award of $1,430,000 was a fair and reasonable sum for the loss of the chance that the respondents might make a profit from the acquisition of the company. However, he did not appear to have considered also other relevant factors which, as the appellants before us contended, were not taken into account in the respondents` profit projections. These have been mentioned before, and it is unnecessary to repeat them. Suffice it here to say that they ought to have been taken into account, but unfortunately they were not brought to the attention of the trial judge. Having regard to this, we think that in the circumstances a fair and reasonable amount to be awarded to the respondents for the loss of a chance of making a profit would be a sum of $250,000, which is roughly about 2.5% of their projected profits. Adopting Atkinson J`s words in ***Domine v Grimsdall*** (supra), the chance the respondents had lost, in our assessment, is worth at least that amount, if not more. We accordingly vary the judgment below by reducing the amount to $250,000.

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65 We now come to the question of costs. On this we have no hesitation in coming to the conclusion that the appellants should bear the entire costs of this appeal. Our reasons are these. First, although the appellants succeeded in having the amount of damages reduced substantially they have not succeeded on the first two issues. Secondly, most of their arguments on the quantum of damages now raised before us had not been raised below. Finally, the conduct of the appellants was most reprehensible deserving the most severe censure. Having made a clear and binding contract, they sought to vary it unilaterally to gain better terms and eventually refused to honour their obligation. In this case, it must have been obvious to them that they had no defence at all on the question of liability. This entire litigation was solely contributed by them. In our judgment, the appellants should pay the costs of this appeal, and we so order. There will be the usual consequential order that the deposit in court be paid to the respondents to account of costs.

66 Order accordingly.

Karthigesu JA
L P Thean JA
Yong Pung How CJ

Michael Hwang and Tan Chuan Thye (Allen & Gledhill) and Lisa Chong (Lisa Chong & Pnrs) for the appellants
Anwarul Hague and Yoga Sharmini Yogarajah (Haridass Ho & Pnrs) for the respondents

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