

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1997] SGHC 291

Suit 1423/1991, 1426/1991, 1443/1991

Between

Grace Development Pte Ltd
Another

... Plaintiff

And

Kassim Syed Ali and Other
Actions

... Defendant

GROUND OF DECISION

Land — Sale of land — Contract; Land — Development — Developers of
commercial and industrial property

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**Grace Development Pte Ltd and Another v Kassim Syed Ali
and Other Actions**

[1997] SGHC 291

Suit 1423/1991, 1426/1991, 1443/1991
S Rajendran J
07 November 1997

1 **S RAJENDRAN J**

2 Cur Adv Vult

3 The defendants in these three suits and various other purchasers (collectively referred to as `the purchasers`) had contracted with Adelphi Development Pte Ltd (ADPL) in 1982/93 for the purchase of shop units in a building to be called the `Adelphi`, that ADPL intended to build at the former Adelphi Hotel site that they owned at the Coleman Street/North Bridge Road junction.

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2.The contract for the construction of the Adelphi was awarded by ADPL to OCK Construction Pte Ltd (OCK). It was to be built in two phases. Construction work on Phase I of the project, comprising the podium block consisting of the shop units and basement car park, started in 1980. Phase II would comprise the tower block which would house a hotel.

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3. ADPL, however, encountered financial difficulties which affected the progress of the construction. By 1988 construction work came to a halt. By that time the amount owing to OCK by ADPL was about \$18.5m. In order to try to ameliorate the losses, the shareholders of OCK entered into negotiations with ADPL and the United Overseas Bank, the financiers of ADPL, that ultimately resulted in the shareholders of OCK agreeing to purchase the Adelphi site and project for \$77.5m. A company called Grace Development Pte Ltd (the first plaintiffs) was incorporated for this purpose. On 24 August 1988, ADPL gave the first plaintiffs an option to purchase the site. After obtaining in-principle approval from Arab Bank Ltd to finance the purchase, the first plaintiffs, on 15 September 1988, exercised the option. While negotiating the purchase of Adelphi, the first plaintiffs were, simultaneously, negotiating with DBSL Building Pte Ltd (`DBSL`, the second plaintiffs) for the sale of the tower block and the unsold shop units in the Podium Block to DBSL.

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4. The negotiations for the purchase of Adelphi and the negotiations for the sale of the tower block to DBSL were conducted by Ong Han Cheong (Ong), a shareholder of OCK and a director of the first plaintiffs. He was also the managing director of OCK and had been the Project Manager of the Adelphi project from the time work on the project commenced. Ong was therefore familiar with the history of the project. With the passage of time, however, Ong's recall of detail was, understandably, hazy and much of his evidence was based on the documentation shown to him. Ong testified that as there was, in 1988, a glut of hotel rooms in Singapore, DBSL had doubts whether another

hotel so close to Raffles City would succeed. DBSL was therefore prepared to pay a higher price if the tower block was converted from hotel use to office use.

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5. ADPL had, on 10 December 1987, in fact obtained in-principle approval for the conversion of the tower block from hotel to office subject to the consent of those persons who had already contracted to buy units in the project. The approval, however, lapsed on 1 July 1988. DBSL was prepared to give the first plaintiffs time to obtain approval for the conversion.

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6. The sale and purchase agreement between the first plaintiffs and DBSL was entered into on 19 October 1988. By this agreement the first plaintiffs sold Adelphi (less shop units already sold) to DBSL for \$78m. The purchase price for the shop units was agreed at \$350 psf. By cl 30 of the agreement DBSL reserved the right to require the first plaintiffs to take steps to convert the hotel component to office premises and further shop units. It was also provided that, upon DBSL exercising this right, the first plaintiffs were to use its best endeavours to obtain the consent of all the purchasers of the sold units to the conversion as well as obtain the approval of the building authority for the amended plans. If the approval of the building authority for the conversion was obtained, the purchase price was to be adjusted upwards to \$520 psf for the shop units and office units to be purchased by DBSL. DBSL exercised its right under cl 30 on the same day as the sale and purchase agreement was signed.

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7. By a deed of assignment dated 19 October 1988 (the Adelphi assignment) ADPL assigned all its interests in the sale and purchase agreements entered into with the defendants and other purchasers of shop units to the first plaintiffs absolutely. Soon thereafter the other creditors of ADPL moved in and a compulsory winding-up order was made against ADPL on 28 April 1989. In October/November 1988 notice of the Adelphi assignment was given by ADPL and the first plaintiffs to the defendants and all other purchasers of shop units in the Adelphi. The first plaintiffs also informed the purchasers that OCK was being re-appointed as the main contractor to complete the project.

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8. Under the terms of the sale and purchase agreement between ADPL and the purchasers, the purchase price was payable progressively until completion in accordance with a schedule set out in cl 4(1) and (2) thereof. Progress payments would fall due and payable within 14 days after receipt by the purchasers of the vendor's notice in writing that a particular stage of the construction has been completed or that a particular event had occurred. Every such notice would also be supported by a certificate of the vendor's architects confirming the matters stated in the vendor's notice. Up to the time the first plaintiffs entered into the picture, all notices issued on behalf of ADPL by its solicitors, M/s Jing Quee Chin Joo & Teck Hui (JQCJ), to the defendants under cl 4 of the sale and purchase agreement had been met.

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9. On 14 December 1988, M/s Harry Elias & Pnrs (HE & P), the then solicitors for the first plaintiffs, requested payment of the sum due and payable under cl 4(1)(i) of the sale and purchase agreement. The defendants were asked to make the cheque payable to `Arab Bank Ltd for account of Grace`. The defendants complied as directed.

12

10. The conversion from hotel/shopping to office/shopping

13 As early as 1980, ADPL had ideas of converting the use of the tower block from hotel to office. This is apparent from a letter written by JQCJ to the Controller of Housing requesting approval to include in the sale and purchase agreement amended clauses (32 and 33) to the effect that the purchasers are deemed to have knowledge of the vendor`s intention to apply to convert the hotel component of the project into office space. The Controller of Housing, by letter dated 24 October 1980, gave approval for the said amendments.

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11. Although approval was obtained, cll 32 and 33 were in fact not included in its amended form in 50 out of the 148 sale and purchase agreements that were entered into by ADPL. The defendants were amongst those whose sale and purchase agreement did not include the amended cll 32 and 33. There was no admissible evidence given in court to explain the reason for the omission. All that can be said from the material available in the ADPL files was that the omission was as a result of some miscommunication between ADPL and JQCJ.

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12. On 19 January 1983 (some two weeks after the sale and purchase agreements were signed) JQCJ wrote to M/s Rajah & Tann (R & T), who were acting for the defendants, explaining that cll 32 and 33 had been `inadvertently omitted` from some of the sale and purchase agreements entered into and sought confirmation that the two clauses `shall be deemed to have been included` in the sale and purchase agreements of the defendants. R & T replied saying that their clients could not agree.

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13. By letter dated 2 August 1988, JQCJ informed R & T that at a meeting between ADPL and R & T's clients, R & T's clients had indicated their willingness to consent to the hotel component being converted to office space. JQCJ requested R & T for written confirmation of such consent. R & T in their response dated 6 August denied that their clients had consented to the change but stated that their clients would consent on condition that ADPL agreed to compensate them by an abatement in the purchase price. The abatement that R & T sought was the aggregate amount of the remaining progress payments payable under the respective sale and purchase agreements which, at that stage, was 35% of the purchase price.

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14. On 18 May 1989 the first plaintiffs entered into a loan agreement with DBSL for DBSL to finance the project in place of Arab Bank Ltd and in connection therewith entered into a deed of assignment that same day with DBSL by which

the first plaintiffs assigned to DBSL, inter alia, all its rights under the Adelphi assignment and under the sale and purchase agreements entered into with the purchasers of shop units. All the purchasers of the shop units (including the defendants) were, on 20 May 1989, notified by the first plaintiffs of the re-assignment by Arab Bank Ltd and the assignment to DBSL and told that unless otherwise notified by DBSL they were, with immediate effect, to pay all amounts falling due under the sale and purchase agreements to DBS project account no 27-042163 for the account of the first plaintiffs (the project account). None of the defendants took issue with this notice.

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15. On 5 December 1988, the first plaintiffs wrote to the purchasers stating:

In view of the current economic outlook of the hotel industry, we are contemplating and considering a proposed conversion of the building project, ie The Adelphi, to an office cum shopping complex instead of its present approved plans as a hotel cum shopping complex. We understand that the previous registered proprietors, Adelphi Development Pte Ltd, had been in communication with you as purchasers of the abovementioned unit in the Adelphi in respect of your agreement to such proposed conversion of the Adelphi.

We would like to reassure that any proposed conversion of the Adelphi to office usage would not in any manner affect or change the physical plans, layout or specifications of the unit purchased by you as such conversion is intended only for the hotel premises of the building project.

We would also like to point out that bearing in mind the strategic location of the Adelphi within a prime commercial district, the conversion of the said building project to an office cum shopping complex would be clearly beneficial to all parties interested in the said building project and would in all probability, in our view, enhance the value of the whole building.

Under the circumstances, we would like to invite you to signify your agreement to the proposed conversion of the Adelphi to an office cum shopping complex to enable us to consider positively

and take such other necessary steps as may be required to effect the proposed conversion and bring the project to a timely and speedy completion.

As a decision would have to be taken whether to proceed with any proposed conversion aforesaid on or before 15 December 1988, we would appreciate your response prior to 15 December 1988.

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Several of the purchasers, including the defendants herein, did not respond to this letter.

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16. On 16 December 1988, HE & P, acting for the first plaintiffs, wrote to R & T offering a 20% discount off the purchase price in exchange for the purchasers' consent to the conversion. R & T, on behalf of the defendants in these three suits as well as the purchasers of 24 other units replied on 22 December 1988 that their clients wanted a 30% discount in return for their consent.

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17. The first plaintiffs found this offer unacceptable. By letter dated 5 January 1989, HE & P appealed to the Permanent Secretary, Ministry of National Development (PS (MND)) for a waiver of the condition that they obtain consent from the purchasers for the conversion. Amongst the reasons advanced was that the proposed conversion would not affect the podium block where the shop units were located; the majority of the purchasers had entered into sale and purchase agreements where (by cl 32, and 33) they had agreed not to raise any objections to such a conversion; cl 9 of the sale and purchase agreement

stipulated that the purchasers had a right to be consulted only if changes were proposed to the plans, specification and construction pertaining to *the* units only; as share values had not been determined, the question of the share value (of each unit holder) being affected would not arise; the proposed 309 room hotel in that location would not be economical to operate and that the best use of the site would be as office premises.

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18. This appeal was rejected on the grounds that r 2 of the Planning (Development) Rules 1981 required the developer to obtain the purchaser's consent.

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19. By letter dated 14 February 1989 HE & P made further submission to PS(MND) on the scope of r 2(3) of the Planning (Development) Rules 1981 [now r 3(3)]. HE & P in a further letter informed PS (MND) that of the 227 units in the podium block only 51 units did not have the conversion clauses (cll 32 and 33). Of these 51: (a). purchasers of three units had consented;

24 (b). purchasers of 29 units were negotiating for a discount in the purchase price in exchange for their consent;

25 (c). purchasers of 15 units had not responded;

26 (d). purchasers of three units were objecting to the conversion; and

27 (e). purchaser of one unit was seeking rescission of his sale and purchase agreement.

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On 6 September 1989, PS(MND) informed HE & P that the first plaintiffs' appeal for waiver of purchaser's consent was granted. The formal approval of the Chief Planner was obtained on 31 January 1990.

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20. TOP for Phase I

30 On 15 December 1989, Temporary Occupation Permit (TOP) was issued by the building authority for the podium block and basement floors. This area was described in the TOP as: basement storey B5 to B2, B1 (excluding hotel area) and first to fourth storey (excluding hotel area). The shop units were all within this area.

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21. HE & P, by letter dated 27 December 1989 to R & T, gave notice of the issue of the TOP and forwarded a certified true copy thereof and a copy of the architects' certificate confirming completion of the area described in the TOL. The architects' certificate was headed: 'Proposed New Adelphi Complex on Lot 212 TS 10 at North Bridge Road (Shopping Complex under Phase I)'. HE&P, in their letter, drew attention to cl 14(1)(k) of the sale and purchase agreement and gave notice to the respective purchasers to pay the instalment due

thereunder and to take possession of the respective unit after all sums then outstanding to the first plaintiffs had been paid. HE & P asked that cheques in payment be drawn in favour of `The Development Bank of Singapore Ltd project account no 27-04216-3 for account of Grace Development Pte Ltd`.

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22.The defendants made payment as requested and in early 1990 duly took possession of the respective units that they had purchased. Thereafter in compliance with a request by HE & P pursuant to cl 18 of the sale and purchase agreements, the defendants, on various dates in 1990, forwarded to the first plaintiffs the sum of \$500 as deposit under cl 18 of the sale and purchase agreement.

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23.On 14 March 1990, soon after the defendants had taken possession of their respective units, R & T wrote to HE & P to say that their clients had been informed that the first plaintiffs were arranging to convert the hotel into offices and asked for a response to their letter of 22 December 1988 in which R & T had asked for a 30% discount for their clients in exchange for their clients` consent to the proposed conversion. HE & P rejected this claim.

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24.Work on the tower block was meanwhile proceeding apace and on 28 September 1990 the architects issued the Certificate of Practical Completion for the whole project. On 20 November 1990, the first plaintiffs` surveyors applied

to the Chief Planner for permission for strata sub-division of the Adelphi. On 11 January 1991, the Chief Planner gave notice of grant of written permission for strata sub-division into 304 strata units.

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25. Certificate of Statutory Completion for Phases I and II

36 On 4 February 1991, the Building Control Division notified the architects that the first plaintiffs' application for Certificate of Statutory Completion (CSC) was approved and the CSC dated 2 February 1991 was enclosed. The architects in turn informed OCK that CSC for the project (Phases I and II) had been obtained and forwarded the CSC to OCK. On 5 February 1991 HE & P forwarded a certified true copy of the CSC to R & T and requested payment of the instalment of 5% of the purchase price falling due under cl 4(2)(a) to the DBSL project account.

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26. The defendants failed to pay. Instead R & T, by letter dated 20 February 1991, described HE & P's notice as 'bad and ineffectual' and informed HE & P that they had instructed their clients not to comply with the notice. The reason given for this stand was that the first plaintiffs had in 1989 assigned all its right title and interest under the sale and purchase agreements to DBSL and accordingly, in the absence of any indication that HE & P were giving the notice on behalf of DBSL, HE & P had no authority to give the notice. R & T also advanced another reason for refusing to comply. This was that the defendants were entitled to withhold payments for the purposes of setting-off sums due to

them under cl 14(2) of the sale and purchase agreement as liquidated damages for having failed to complete the sale and purchase by 31 December 1990. The letter ended with R & T giving notice that their clients (by which they referred to all the purchasers for whom they were acting) had instructed them: `to institute proceedings against [the first plaintiffs] to recover damages for flagrant and deliberate breach of inter alia covenants as to user in the respective sale agreements.` No objection was taken, at this stage, on the adequacy of the CSC.

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27. HE & P by letter dated 21 February 1991, responded to the following effect:

(a). it was clearly stated in the notice of the DBSL assignment that in view of the DBSL assignment, all moneys to be paid under the sale and purchase agreements had to be paid to the project account;

39 (b). R & T's clients had made their respective payments to the said project account when the TOP was issued;

40 (c). R & T's clients should make the necessary payments under cl 4(2)(a) as there were still further progress payments under cl 4(2)(b) for their clients to look to in application for a set off for liquidated damages for late completion; and

41 (d). the first plaintiffs were not in breach of the covenants as to user in the respective sale and purchase agreements as the first plaintiffs had constructed and delivered the shop units which R&T's clients had contracted to purchase.

42

28. By their letter of 26 February 1991 R & T added another ground in support of their clients' refusal to pay further instalments. This was that the first plaintiffs had given no indication as to when title would be issued and added that as their clients understood that the first plaintiffs had not even applied for title to be issued their clients were entitled to protect their position by withholding payments.

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29. In the ensuing correspondence HE & P pointed out that title had in fact been applied for and the first plaintiffs expected title to be issued shortly. HE & P also forwarded to R & T a copy of a letter from DBSL dated 4 March 1991 wherein DBSL ratified all acts of the first plaintiffs in issuing notices calling for payment of progress instalments.

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30. Under cl 17 of the sale and purchase agreement the purchasers were required to contribute towards the cost of survey fees incurred by the vendor. On 8 March 1991 the first plaintiffs requested the purchasers for their contribution. The defendants and other purchasers represented by R & T did not comply with this request.

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31. On 21 March 1991, the first plaintiffs were informed by the Commissioner

of Buildings that the schedule of share value allotments submitted by the first plaintiffs' surveyors on 24 January 1991 had been accepted and filed under s 7 of the Land Titles (Strata) Act (Cap 158, 1988 Ed). The Adelphi project had been 'under construction' since early 1980. The first plaintiffs had taken over the project from ADPL in October 1988 and within a relatively short period of slightly over two years had completed the project.

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32. Notice to complete

47 On 15 April 1991 HE & P, on behalf of the first plaintiffs, issued notices to complete to the various purchasers. Attached to each notice to complete were the following documents: (a). the duplicate subsidiary Certificate of Title for the particular unit;

48 (b). the completion account for the said unit; and

49 (c). a copy of the architects' certificate stating that CSC for the project (Phases I and II) had finally been obtained.

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In the completion account the first plaintiffs credited to the defendants the liquidated damages payable for late completion.

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33. Litigation

52 On 23 April 1991 R & T forwarded to HE & P, by way of service, two writs of summons (Nos 797 and 798 of 1991) on behalf of two of the purchasers. In their letter R & T intimated that writs from their other clients would be filed soon. The plaintiffs in the two writs that were filed alleged, inter alia, that the Adelphi project constituted a `building scheme` which limited its main use to a hotel and which use was designed to `enure for the common benefit of all purchasers of shop units, including the plaintiffs`.

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34. On 27 April 1991 R & T wrote to HE & P in response to the notices to complete issued to R & T's clients. In the letter R & T informed HE & P that the wilful breach of contract and adversarial stance adopted by the first plaintiffs had left their clients no choice but to commence litigation and, pending the determination of the suits, their clients would not proceed with completion.

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35. On 13 May 1991 HE & P gave notice to R & T that the first plaintiffs were invoking cl 30 of the Revised Singapore Conditions of Sale incorporated in the sale and purchase agreements and gave ten days` notice to complete. R & T's response, on 14 May 1991, was as follows:

Taking into consideration all the circumstances surrounding the dispute between our respective clients, we totally and unequivocally reject your clients` notices to complete. Despite this, should your clients proceed further in this matter, they would certainly do so at their own peril. We are of the view that your clients have only one realistic course of action to take in the existing circumstances ie to reach an amicable out-of-court settlement with our clients as early as possible.

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The first plaintiffs rejected this suggestion for an out-of-court settlement. On 3 June 1991 R & T wrote to HE & P as follows:

2 Our clients` position has always been that your clients` purported notices to complete are bad and ineffectual in law. Our clients will strongly resist completion based on the purported notices. 3 We are instructed to place on record that our clients have the financial means to complete the respective transactions. It is however not reasonable to expect our clients to complete the existing sales with your client which is a company with an issued and paid-up capital of \$2 and with no other substantial assets. Should our clients complete the purchase it is clear that they will be unable to recover damages from your clients when their claim(s) are upheld. 4 If a reasonable method of payment and preservation of our clients` rights pending determination of the existing and future suits is proposed by your clients, our clients would be amenable to completion.

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HE & P responded on 12 June 1991 to say that there was nothing bad or ineffectual about the first plaintiffs` notice to complete and that the refusal to complete by R & T`s clients was wrongful. HE & P further stated in this letter:

We believe the law is very clear in this respect in terms of your clients` obligations to complete the sale and purchase albeit they may choose to do so under protest in view of their purported claims.

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There was no response from R & T.

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36. On 5 July 1991 the first plaintiffs commenced proceedings against the defendants in these three actions. At the same time the first plaintiffs also commenced 19 other actions against the other purchasers who had refused to complete. All of them were clients of R & T.

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37. On 16 September 1991 the first plaintiffs applied, under O 81 of the Rules of the Supreme Court 1970 (RSC) for specific performance in each of the three actions. On 11 October 1991 the defendants applied to strike out the first plaintiffs' claim under O 18 r 19 RSC. Both the applications for specific performance and the applications to strike came up for hearing before the then senior assistant registrar, Mr Chan Seng Onn (the SAR). The SAR accepted Mr VK Rajah's submission that, in view of the DBS assignment, DBSL was the right party to sue and accordingly dismissed the application for summary judgment and ordered that the writ of summons/statement of claim be struck out.

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38. On the application of the plaintiffs, the SAR permitted the parties to make further written submissions. These submissions were on the issue whether the DBSL assignment was an absolute assignment or whether it was by way of charge only. On 4 August 1992 the parties appeared before the SAR and he informed them that he remained of the view that the DBSL assignment was an absolute assignment.

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39. The first plaintiffs then tendered a letter from DBSL wherein DBSL gave its consent to be joined (or substituted) as a plaintiff to the action and asked for leave to make the necessary amendments to the writ and the statement of claim to make DBSL a co-plaintiff. Mr Rajah objected and, for the first time, raised the ground that cl 14(1) of the sale and purchase agreement had not been complied with in that a proper architects' certificate had not been sent to the defendants. He argued that as a consequence the notice to complete was not valid. The SAR accepted this submission. The SAR held that the defect in the notice to complete could not be cured by an amendment to the statement of claim and accordingly refused to grant leave to amend. The first plaintiffs appealed against the decision of the SAR.

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40. On 30 November 1992 Lai Siu Chiu J heard and allowed the appeal. She held that in the light of form 34 filed by DBSL the assignment can only be by way of a charge and was not an absolute assignment. She also held that it was more than arguable that the first plaintiffs were entitled to maintain the proceedings in its name and that, at worst, the first plaintiffs must join DBSL as a co-plaintiff. The defendants appealed. In the meanwhile the first plaintiffs again applied for DBSL to be joined as a party to the actions. This time the defendants, perhaps because of Lai Siu Chiu J's comments, did not object and the application was granted.

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41. On 18 August 1993 the matter came up for hearing before the Court of Appeal. The parties proceeded on the basis that the joinder of DBSL to the proceedings had cured any defect. The only issue before the Court of Appeal was whether the DBSL assignment was an absolute assignment. This was relevant for the purpose of determining who was to pay costs. The Court of Appeal decided that the DBSL assignment was an absolute assignment and awarded the costs of the appeal to the defendants. The Court of Appeal further ordered that the action and the remaining issues, namely, the issues relating to architects' certificate, the CSC, the first plaintiffs' authority to issue the notice to complete and the alleged breach of obligation to complete the project as a hotel-cum-shopping centre, proceed to trial.

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42. In its statement of claim, the first plaintiffs sought an order of specific performance requiring the defendants to complete the sale and purchase by paying into the project account: (a). all principal sums outstanding, together with contractual interest therein;

65 (b). all sums due under cl 17 as contribution towards government survey fees; and

66 (c). all sums due under cl 13 as maintenance and service charges from the time the defendants took possession;

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less the amounts payable to the defendants by the first plaintiffs as liquidated

damages for late completion and an abatement in the purchase price for such shortfall in area as exceeds the 5% margin permitted under cl 26 of the agreement.

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43. The thrust of the first plaintiffs' claim for specific performance was that they are ready, able and willing to convey to the defendants the property that the defendants contracted to purchase, namely, the units described in the First Schedule to the respective agreements. In the three suits (Suit Nos 1423 of 1991, 1426 of 1991 and 1443 of 1991) which are before this court, the defendants raised similar defences as to why the first plaintiffs are not entitled to specific performance. Mr Rajah also informed the court that the parties had agreed that the outcome of these three cases will bind the 19 other suits instituted by the first plaintiffs against the other purchasers and the two suits commenced by two of the purchasers against the first plaintiffs. It was also agreed that for the purposes of the trial the documents referred to will predominantly be the documents relating to Suit No 1426 of 1991.

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44. At the commencement of the hearing, Mr Shanmugam, who appeared for DBSL, informed the court that DBSL was not interested in the substantive dispute between the parties. The reason why DBSL was in court was because the defendants had raised the question of locus. DBSL was particularly concerned about allegations made by the defendants that DBSL was in conspiracy with the first plaintiffs. Mr Shanmugam told the court that Mr Rajah had now assured him that no allegations of conspiracy would be made at the

trial and in view of that assurance there was no need for DBSL to be present at the hearing. Mr Shanmugam sought and was granted leave for DBSL not to be present in court during the hearing.

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45. When Mr Davinder Singh closed his case, Mr Rajah informed the court that he would be making a submission of no case to answer and confirmed that the defendants would not be leading any evidence. He also informed the court that the defendants would not be submitting on the authority point and would not be proceeding with the counterclaim.

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46. The thrust of Mr Rajah's submission was that the notice to complete was invalid because: (a). the architects' certificate enclosed was defective; and/or

72 (b). the first plaintiffs were in breach of its obligations under the sale and purchase agreements and in breach of its fiduciary duties when it delivered a unit in an office-cum-shopping unit and not a hotel-cum-shopping unit.

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Mr Rajah submitted that as the notice to complete was defective completion could not take place and he asked that the court, from the evidence adduced, to fix the abatement of purchase price to be allowed and/or damages payable to the defendants as a result of the plaintiffs' breach of duty (both contractual and fiduciary) to the defendants.

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47. The architects' certificate

75 Clause 14(1) of the sale and purchase agreement requires that the notice to complete be accompanied by the certificate of the vendor's architects that the Temporary Occupation Licence or Certificate of Fitness for Occupation (COF) has been obtained for the said unit. It was not in dispute that the reference to COF in cl 14(1) was a reference to the CSC. The CSC that was issued in this case was addressed to the first plaintiffs and read as follows:

This is to certify that the new building(s)/building works described in the Schedule hereunder have been completed in accordance with the provisions of the Building Control Act 1989, and the regulations made thereunder and that occupation thereof is hereby permitted.

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In the Schedule the building was described as proposed ten storey shopping/office complex with five basements - the Adelphi at 1 Coleman Street.

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48. The architects' certificate which HE & P forwarded with their notice to complete was addressed to OCK and it read:

CSC for the Adelphi Complex (for Phase I and II)

After twelve reminding [sic] including complying to [sic] all the requirements which are requested by Mr Anson Seah, we are finally able to obtain CSC for your retention and action.

We are also enclose [sic] herewith the final bill for the above project.

Sd: Anthony Lim Meng Shein

Lee Sian Teck Chartered Architects.

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Mr Rajah submitted that this letter did not comply with the requirements of cl 14(1) in that: (a). the letter was addressed to OCK and not to any of the defendants as purchasers or the first plaintiffs as vendor;

79 (b). it was clearly written by the architect for the purpose of obtaining payment of his fees and not ostensibly for the purpose of requiring the defendants as purchasers to make payment of the balance of the purchase price;

80 (c). it was written without reference to the terms and conditions of the sale and purchase agreement between the first plaintiffs and the defendants, in particular without making any reference to cl 14(1);

81 (d). it was written without reference to the units purchased in the Adelphi Complex;

82 (e). it made reference to Phases I and II of the Adelphi Complex, a reference not found in the sale and purchase agreements.

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In urging the court to hold that the letter did not satisfy the requirement of cl 14(1), Mr Rajah cited numerous authorities and submitted that this court should ask itself the question: was the letter tendered by the first plaintiffs' architects

on its face clear, readily understandable and unambiguous, such as to plainly show that it was intended to comply with the contractual requirements spelt out in the sale and purchase agreements? The answer to that question, Mr Rajah submitted, was an unequivocal 'No'.

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49.Mr Singh submitted that under cl 14(1) all that was required was the confirmation of a fact, namely, that CSC had been obtained for the said unit. No opinion or assessment by the architects was called for. Mr Singh submitted that a distinction should be drawn between cases dealing with situations where an assessment or an opinion by the architects is called for and cases such as the present where all that is required is the simple confirmation of an objective fact. The authorities relied on by Mr Rajah, he submitted, dealt with expressions of opinion and were accordingly not relevant to the situation under cl 14(1).

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50.I accept that submission of Mr Singh. In my view, so long as it could fairly be said that by that letter the architects have given the confirmation required, cl 14(1) would have been complied with. I do not think that the fact that the letter from the architects does not specifically refer to the terms of the sale and purchase agreement or that in writing it the architects also had in mind a desire to collect their fees, makes any difference. Similarly, I cannot see why the fact that the architects' certificate makes reference to the project being built in two phases should invalidate the certificate. Equally, I do not see why the fact that the letter was addressed to OCK, the main contractors for the project, should detract from the fact that in the letter the architects (however ungrammatical the

language employed may have been) state that CSC for the Adelphi Complex had been obtained - indeed, under cover of the letter, the architects were forwarding the CSC itself (which was addressed to the first plaintiffs) to OCK.

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51. The only point raised by Mr Rajah that gives rise to some difficulties is the fact that cl 14(1) requires the architects to state that CSC has been obtained for `the said unit`. The architects did not say that. What the architects said was that they had obtained CSC for the Adelphi Complex. Can the failure of the architects to state separately that for each shop unit CSC has been obtained invalidate the architects` certificate?

87

52. The statutory authority under which CSCs are issued is the Building Control (Administration) Regulations 1989 (the 1989 Regulations). Prior to 1989, the governing regulations were the Building Control (Administration) Regulations 1979 (the 1979 Regulations). Under the 1979 Regulations CSCs were referred to as Certificate of Fitness for Occupation (COF). Mr Singh submitted that the scheme under the 1979 Regulations (reg 20) was for a COF to be issued to the developer to cover the whole complex. COFs in respect of individual units in the complex would not be issued to the developer. Such a COF will be issued only where the unit holder submits plans in respect of his unit which requires a COF to be issued in respect of that unit. Mr Singh submitted that the scheme for the issue of a CSC under the 1989 Regulations (reg 104) is the same. He submitted that as it was not possible for the first plaintiffs to have obtained anything but a CSC for the whole complex and that as the CSC that was obtained

covered all the individual units in the complex, the architects' certificate in question complied with the requirements of cl 14(1).

88

53.Mr Singh submitted that in construing any contract, even if it be a contract in statutory form, a common sense approach must prevail. He drew attention to the case of **Orchard Twelve Investments Pte Ltd v Golden Bay Realty Pte Ltd** [1986] SLR 272 , relied on by the defendants, where, the court was prepared to disregard some of the words in the statutory form of contract in order to give the contract commercial efficacy. This appears at p 280 of the judgment of LP Thean J:

The second sentence of cl 14(2) provides (insofar as material) 'If the vendor shall fail to give the said notice to complete on the date fixed for completion the vendor shall pay '

Mr Price argues that the words 'on a date fixed for completion' are grammatically and logically a nonsense and give rise to uncertainty which uncertainty renders the whole of the sentence ineffective. This argument I am unable to accept. It is clear to my mind that the 'date fixed for completion' means the date 'fixed' in the preceding sentence and the words 'for completion' are meaningless and ought not to be present; I think they were inserted in error.

89

Mr Singh also cited the case of **Mt Elizabeth Hospital Ltd v Allan Ng Clinic for Women** [1994] 3 SLR 639 as one where the court took a practical approach in the construction of a contract for the sale of a commercial property. He pointed out that, in that case, although the Sale of Commercial Properties Rules 1985 provided that except with the written approval of the Controller of

Housing, there can be no amendment, deletion or alteration to the option or the sale and purchase agreement prescribed, the Court of Appeal nevertheless upheld the validity of an option that was not in the prescribed form. The court did so on the basis that although the option was not in the prescribed form it did not contain any terms that were inconsistent with the prescribed form.

90

54.Mr Rajah submitted that whatever the position under the Building Regulations may be, it was, under cl 14(1), incumbent on the vendor to forward to the defendants a certificate by the architects that the CSC issued covered the unit/s purchased by the defendants. Mr Rajah submitted that in the absence of such a statement, the requirements of cl 14(1) had not been met. Such confirmation by the architects, he submitted, would serve as the confirmatory link, as a preclude to completion, between the CSC which was issued for the whole complex and the unit itself.

91

55.Mr Rajah submitted that what the first plaintiffs were doing was urging the court to re-write cl 14(1) by deleting the words `the said unit` therein and inserting the words `the building or parts thereof` in order to suit the architects` certificate issued in this case. He submitted that if the court were to accede to this would be sitting in judgment of the executive and would be second-guessing the executives` reasons for the requirements in cl 14(1). The court, he submitted, would not and could not sanction a modification which was clearly inconsistent with the rules. Mr Rajah cited the case of **Golden Bay Realty Pte Ltd v Orchard Twelve Investments Pte Ltd** [1991] 3 MLJ 65 [1991] SLR 18 in

support of his submission that because cl 14(2) is contained in a contract which is in a statutory form, the court should not be too ready to tamper with it.

92

56. Although ***Orchard Twelve*** was a case under the same statutory form of contract as the present one, the issue there was whether the provision for liquidated damages under cl 14(2) was penal in nature and therefore void and unenforceable as it was an unconscionable provision. That case turned on the question whether it was open to a court to strike out as unconscionable a term in a form of contract prescribed by the minister under statutory authority. There was no such question in this case. The plaintiffs here were not seeking to strike out the requirement for an architects' certificate in cl 14(1). In fact, the question of modifying cl 14(1) does not even arise in this case. The issue here is no more than whether the architects' certificate in question complies with the requirements of cl 14(1).

93

57. Clause 14(1) required that the notice to complete to be accompanied by the certificate of the vendor's architects that the (TOL or) COF has been obtained for the said unit. The building regulations only envisage the issue to the developer of a CSC for the whole complex or parts thereof if the development was in phases. The regulations did not envisage the developer of a building complex obtaining CSCs for each unit in that complex. In any event no such CSC was ever issued. What the architects stated in the present case - that a CSC had been issued for the Adelphi Complex - was a statement reflecting the true state of affairs.

94

58. As noted earlier, the first plaintiffs had, on 5 February 1991, through HE & P, forwarded a certified copy of the CSC to the defendants. At the time the architects' certificate was sent to the defendants, the defendants therefore already had with them a copy of the CSC. It was clear and unambiguous from the terms of the CSC that the CSC was for the whole of the Adelphi Complex. It was clear from the CSC that occupation of 'the 10-storey shopping/office complex with five basements at No 1, Coleman Street' was permitted. The architects' statement in the letter to the effect that CSC for the Adelphi Complex had been obtained, would, unless it was a legal requirement that a separate CSC in respect of each unit be obtained, obviously, cover each unit in the Adelphi Complex. To rule that the certificate was invalid because the individual unit number had not been specifically spelt out would, in the circumstances, be an artificial and unrealistic way of viewing the matter. Quite clearly, the CSC for the whole complex would cover the individual units within that complex. For all practical purposes the effect of the architects' certificate stating that CSC had been obtained for the Adelphi Complex was that CSC had been obtained for all units in the said complex.

95

59. I rule that whilst the architects' certificate could, in certain respects, have been more elegantly drafted, it was nevertheless a document that substantially complied with the requirements of cl 14(1) and the notice to complete was not rendered invalid by reason of the defects alleged. It is pertinent to note, in passing, that the defendants raised no objections to the certificate until very recently. Had they objected to the sufficiency of the certificate in a more timely

way, the first plaintiffs would have had the opportunity of trying to put matters right.

96

60. I now turn to consider the second head of Mr Rajah's submission that the notice to complete was invalid because the first plaintiffs were in breach of their obligations both contractual and fiduciary when they delivered units in an office-cum-shopping centre and not in a hotel-cum-shopping centre.

97

61. Breach of contract

98 Mr Rajah submitted that it was a fundamental rule that the purchaser of a property is entitled to have what he contracted to buy and cannot be compelled to take something else. He submitted that by delivering a unit in an office-cum-shopping complex, the first plaintiffs had fundamentally altered the subject matter of the sale and purchase agreement and the defendants, as purchasers, were not getting substantially what they bargained for. The defendants could not therefore be forced to complete without an abatement in the purchase price. In support of this proposition, Mr Rajah relied on the case of **Tarval Pty Ltd v Stevens & Ors** [1991] NSW Title Cases 80-004.

99

62. The purchaser, in the **Tarval** case, had contracted to buy a unit in a building yet to be constructed. In the sale and purchase agreement the vendor had bound

itself to the purchaser to transfer a unit in a '22 and 23 storey residential flat building'. After the agreement had been entered into the vendor, without the consent of the purchaser, procured the rezoning of the lower ten storeys into commercial office space and only the top eight storeys remained as residential. The vendor submitted that there were no words in the contracts for sale which created an obligation to transfer a unit 'in a wholly residential flat building'. It was submitted that the contractual obligation was to deliver the property described in annexure A and that the contractual obligation had been satisfied in that the unit the vendor sought to deliver conformed with the physical dimension and configuration of the particular home unit described in annexure A. That submission was rejected. Handley JA held:

The description of the property sold is 'home unit premises' on the 19th floor of 'The Chelsea' and the property sold is further described by reference to the annexed plan, annexure D. As a result, in my view the unit contracted to be sold is described as, 'A home unit in a 22 and 23 storey residential flat building'.

There is every reason for treating this description as a condition and a fundamental one in the contract of sale

100

The judge went on to say:

*At common law the description of the property contracted to be sold in a contract for the sale of land was, as I have said, an essential term of the contract. The consequences of this description being treated as essential were explained by Menzies J in **Travinto Nominees v Vlattas** (above) at pp 27-28 as follows:*

*' **Williams on Vendor and Purchaser** (4th Ed.) (1936) at pp 34-37 sets out the chief duties of a vendor at common law: 1 to show a good title to the property sold; 2 to produce land corresponding substantially in all respects with the description contained in the contract and available to be transferred to the purchaser in fulfilment of the contract; and 3 To hand over to*

the purchaser on completion all deeds and other muniments of title relating solely to the property purchased.

This case concerns the second of these duties.

At common law, any difference, however trivial, between the land described in the contract and the land produced constituted a defect which entitled the purchaser to rescind.

*Where there was only a slight difference, the Courts of Equity began to interfere and introduce the principle of compensation for deficiency: see Erskine LC in **Halsey v Grant**. Unless the deficiency was so substantial as to give the purchaser something entirely different from what he had contracted, equity would order specific performance on giving compensation for the deficiency`*

101

63.In **Ayles v Cox** [1852] 16 Beav 23, certain properties described as being `copyhold of the same manner` was sold at an auction. It turned out that the properties were partly freehold and partly copyhold. Condition 5 of the sale conditions provided as follows:

That, if any mistake or error be made or discovered in the description of the premises, or any other error whatever shall appear in the foregoing particulars, such mistake or error shall not annul the sale, but a compensation or equivalent shall be given or taken, as the case may require; such compensation or equivalent to be settled by the Master, in case the parties differ.

102

Sir John Romilly MR rejected the application for specific performance and held:

The fifth condition of sale, which provides for compensation, is inapplicable, when the thing sold turns out to be of a different nature from that contracted to be sold. The contract is different, and I am of opinion, in this case, that the thing proposed to be forced on the purchaser is different from that sold. The fifth condition would apply, if the property had turned out to be larger

or smaller than represented in the condition of sale, but not when the property sold is totally different from that which the vendor has.

It is impossible to enter into a consideration of the different motives which may induce a person to prefer property of one tenure to another. The motives and fancies of mankind are infinite; and it is unnecessary for a man who has contracted to purchase one thing to explain why he refuses to accept another.

The sale was of copyhold, and the reference to the Master was to inquire into the title to copyhold property; and it turns out to be freehold. I am of opinion that the vendor cannot compel the purchaser to complete his contract.

103

64. In **Lee v Rayson** [1917] 1 Ch 613, condition 4 in the agreement for the sale of a property provided: 'if there be any misstatement or error in the description of the premises, no compensation shall be allowed, nor shall the same annul the sale'. The agreement gave details of the rentals receivable from various houses on the property separately let on 99-year terms. These details were incorrect although the total sum payable was correct. The purchaser refused to complete and brought an action for rescission of the contract and repayment of the deposit. The vendor counterclaimed for specific performance. Eve J held that as the property which the vendor offered to convey was substantially different from that which the purchaser had contracted to buy, condition 4 would not apply and the purchaser was entitled to rescission and a return of his deposit. In so doing, Eve J said at p 619:

what the court has to do in such a case as I have here to deal with is to decide whether the purchaser is getting substantially that which he bargained for, or whether the vendor is seeking to put him off with something which he never bargained for, and in arriving at a conclusion on this question the court is bound to consider every incident by which the property offered to be assured can be differentiated from that contracted for. If the sum of these incidents really alters the subject-matter, then the

purchaser can repudiate the contract; if, on the other hand, the subject-matter remains unaffected, or so little affected as to be substantially that which was agreed to be sold, then the purchaser must be held to his contract.

104

65. In **Siti & Anor v Lee Kay Li** [1996] 3 SLR 310, the vendor had not fulfilled his obligation to pay maintenance charges up to the date of completion and had asked that the maintenance charges payable by him be set off in the completion account. The solicitors for the purchaser refused this request. The Court of Appeal, while critical of the purchaser's solicitors for being so uncompromising, nevertheless held that as the vendor had not, by the completion date, paid the maintenance charges, the vendor was in default of his obligation under the sale and purchase agreement and was accordingly not entitled to issue the notice to complete. The defendants also relied on **Pagebar Properties Ltd v Derby Investment Holdings Ltd** [1973] 1 All ER 65. **Pagebar** was cited with approval by the Court of Appeal in **Siti** as appears in the following passage of the judgment of LP Thean JA (p 323):

*Hence, on 15 September 1995 when his solicitor gave the notice to complete, the vendor was in breach of an obligation under the agreement and had not rectified the breach. In these circumstances, he was not entitled to give the 21 days' notice to complete under condition 29(2). In **Pagebar Properties Ltd v Derby Investment Holdings Ltd** [1973] 1 All ER 65, the vendor gave the purchaser a notice to complete making time of the essence in respect of completion. At the time he gave the notice he was in breach of the contract in not having disclosed the existence of a tenancy which was discovered only on the date of completion. It was held that he was in breach of an obligation which ought to have been performed on the date he gave the notice. He was in default and was not entitled to serve the notice to complete, and the notice was invalid.*

105

It would seem to be a clear proposition of law from the case of ***Siti*** and ***Pagebar*** that the party giving the notice to complete must be ready and able to comply with all his contractual obligations on the date of completion. If the party is not so ready the notice would be ineffective.

106

66. From the outset the Adelphi Complex was envisaged as a hotel-cum-shopping complex. This was the evidence of Ong. The sale and purchase agreement also reflects this position. The sale and purchase agreement unequivocally states: 'this is a hotel cum shopping complex' and gives details as to which floors are to house the shops and which floors are to house the hotel. The number of shop units is given therein as 117 (subject to variation) and the number of hotel rooms is given as 343. The plan attached to the sale and purchase agreement besides delineating the unit sold also sets out the various levels of the complex and the hotel component of the project. Ong, in his evidence, also confirmed that the spirit of the agreement was to deliver a shopping unit in a hotel-cum-shopping complex. Mr Rajah, relying on ***Tarval*** and the cases cited above, submitted that these facts led to the conclusion that the sale and purchase agreement was an agreement for the sale of a shopping unit in a hotel cum shopping complex and in failing to deliver such a unit the first plaintiffs were in breach of the agreement.

107

67. Mr Singh sought to distinguish ***Tarval*** on the facts. He also highlighted the

fact that the defendants in this case had elected not to give evidence and so the factual matrix in which the agreement was entered into was not before the court whereas in **Tarval** evidence relating to the pre-contractual negotiations, the sales brochures and differences in value between the property contracted to be sold and the property as built were all before the court. He also pointed out that whilst in **Tarval** the building was intended to be wholly residential, in the present case there was, in respect of the hotel component, considerable ambiguities, for example, when was the hotel to be constructed, what was to be its quality, how long was it to be operation as a hotel and so on. Mr Singh submitted that in view of these uncertainties the description of the project as a 'hotel cum shopping complex' was not intended to be and was not part of the contractual description of the shop units contracted to be sold to the defendants. He submitted that the agreement was in essence an agreement to sell shop units in a commercial complex; the shop units had been built in accordance with the specifications enumerated in the agreement; and by delivering such a shop unit in an office-cum-shopping complex his clients had fulfilled their contractual obligations - a submission essentially similar to that made by the vendor in the **Tarval** case.

108

68.I cannot accept Mr Singh's submission in this regard. It is clear that what the parties had in mind and what the agreement contemplated was the sale of shopping units in a complex that was to be a hotel cum shopping complex. That being so, to adopt the words of Eve J in **Lee v Rayson** , it seems to me that the vendor was seeking to put the defendants off with something which the defendant never bargained for. It was, in my view, no answer to say that the hotel component was not defined clearly enough and therefore not intended to

be a contractual term. To the contrary, the descriptions of the hotel component given in the agreement and in the plan of the complex attached to the agreement, in my view, gave a sufficiently clear indication of the nature and size of the hotel. I am of the view that the first plaintiffs, by not delivering a unit in a hotel cum shopping complex as envisaged, were in breach of their contractual obligations. The fact that whoever purchased and managed the hotel component (in the absence of binding covenants as to use in the sale and purchase agreement) may, subsequently decide to convert the hotel to some other use does not, in my view, preclude the hotel component from being part of the contract but is a consideration that may well affect the damages payable for the breach.

109

69. Mr Singh submitted, in the alternative, that even if the first plaintiffs were in breach of the agreement by not delivering a unit in a hotel-cum-shopping complex, the defendants' right to compensation, if any, was governed by condition 11 of the Revised Conditions of Sale. Condition 11 provides as follows:

The property is believed and shall be taken to be correctly described as to quantity and otherwise and is sold subject to all chief, quit, and other rents and out-goings and to all incidents of tenure, rights of way, and other rights and easements (if any) affecting the same and if any error, misstatement, or omission (not of a serious or vital nature nor considerably affecting the value of the property) shall be discovered in the Particulars Special Conditions or contract the same shall not annul the sale nor shall any compensation be allowed by or to either party in respect thereof.

110

He pointed out that condition 11 had not been pleaded by the defendants and submitted that this failure to plead condition 11 was a fatal flaw in the defendants' case for compensation. I cannot accept that submission.

111

70. Condition 11, in my view, protects a party who is in breach from having to pay compensation where:

(1) the breach occurred as a result of an error, misstatement or omission; and (2) where such error, misstatement or omission was not of:

(a) a serious or vital nature; or (b) such that the value of the property was considerably affected.

112

It seems to me, on a plain reading of condition 11, that as the first plaintiffs were in breach it was for the first plaintiffs, and not the defendants, to invoke the protection of condition 11. The first plaintiffs would have difficulties in overcoming the first hurdle in condition 11, namely, that the breach was as a result of any error, misstatement or omission. The simple fact is that the breach in this case did not occur as a result of any error, misstatement or omission but as a result of the deliberate act of the first plaintiffs, whatever the mitigating circumstances may be, in converting the tower block to office use and delivering a unit in an office cum shopping complex. Condition 11, in my view, provides no protection for such a deliberate act. Even if I am wrong in this, it would be difficult to categorise the delivery of a unit in an office cum shopping complex in place of a unit in a hotel cum shopping complex as anything other than an error, misstatement or omission of a serious or vital nature and so the first

plaintiffs cannot satisfy the second hurdle. Condition 11 would therefore not exempt the first plaintiffs from having to pay compensation.

113

71. Breach of fiduciary duty

114 Mr Rajah submitted that the vendor of property was, pending completion, a trustee for the purchaser. The vendor was therefore bound to manage and preserve the property with the same care as a trustee is bound to manage property subject to trust. He submitted that the first plaintiffs, by acting in their own self interest in converting the hotel component to office, were in breach of their fiduciary obligations to the defendants and were liable to account to the defendants for the profits arising from such breach.

115

72. Mr Singh did not seek to dispute the proposition that a vendor of property has, until completion, certain fiduciary duties towards the purchaser. He pointed out, however, that in the numerous authorities cited by Mr Rajah, the fiduciary duty recognised was the duty to preserve the property actually contracted to be sold. In none of these cases was the duty extended to include usage of adjoining properties. He pointed out that Mr Rajah's submission calling for the extension of the fiduciary duty to cover adjoining properties may have greater force if it was alleged that the units here were sold as part of a building scheme, but the defendants had not pleaded a building scheme and were not seeking to make out such a case. Mr Singh submitted that it was important that a clear line should be drawn between contractual duties and fiduciary duties of vendors.

116

73.I accept Mr Singh`s submission. The vendor`s duty to preserve property and safeguard the interests of the purchaser is, in my view, of a different genre from the vendor`s contractual duty, where the vendor is also a developer, to build the unit in accordance with the contract. To extend the concept of fiduciary duty of a vendor to include contractual duties undertaken by the vendor as a developer, would have far-reaching consequences in the building industry. In the absence of clear authority, I am not prepared to take so bold a step. The fiduciary duty of a vendor pending completion of the sale is to preserve the property as it was at the date of contract. It seems to me to be quite inappropriate to extend such a duty to property that is being developed in the manner suggested by Mr Rajah. The duty on a vendor/developer is not to preserve the property as it was but to develop the property in accordance with the terms of the contract entered into with the purchaser. Failure to develop the property in accordance with the contract would not be a breach of trust but would be a breach of contract. I therefore reject the defendants` claim for an account of profits based on the alleged breach of fiduciary duties.

117

74.Mr Rajah submitted, at great length, that as a result of the conversion the `share values` attributable to the units purchased by the defendants and the total amount of common property in the complex had been adversely affected. It is pertinent to note, in this respect, that the sale and purchase agreements do not give the defendants any specific entitlements with regard to share values or common properties. These are matters that are to be decided by the Building Management Unit of the MND. Any rights in respect of these matters can, if at

all, arise only if the first plaintiffs were under a fiduciary duty to the defendants to develop the Adelphi Complex as a hotel cum shopping complex as originally envisaged. As I have rejected that submission I need go no further into the matter.

118

75. Compensation for breach of contract

119 The defendants had for some time known of the first plaintiffs' wishes to convert the project to an office cum shopping complex and had been demanding a rebate of the balance of the purchase price in exchange for their consent. The MND waived the need to obtain such consent in September 1989 and the first plaintiffs were able to proceed with converting the tower block to office space. Although the first plaintiffs did not formally notify the defendants that they had obtained the waiver or that they were proceeding with the conversion, it would appear from R & T's letter of 14 March 1990 that the defendants knew that the hotel component was being converted to office use. As the defendants elected not to testify, it is not possible to say exactly when the defendants got to know that conversion work had begun. The possibility remains that the defendants knew of this even before they took possession of their respective units.

120

76. The defendants, on realising that the first plaintiffs were in breach of contract in failing to deliver units in a hotel cum shopping complex, were entitled either to treat the contract as rescinded or accept the breach and claim compensation

therefor from the first plaintiffs (*Siti & Anor v Lee Kay Li*). The defendants chose not to rescind the contract and have enjoyed continuous possession of the units from early 1990 to date. They have however, since taking possession, refused to make any further progress payments to the first plaintiffs.

121

77.Mr Rajah submitted that, in view of their breach, the first plaintiffs cannot complete the sale and purchase without an abatement in the purchase price to compensate for the breach and asked the court to assess the compensation payable. He submitted that even if the compensation payable was difficult to assess the court should not shrink from undertaking that exercise. He submitted that as the first plaintiffs were a company with no assets and had a paid-up capital of only \$2, any award of damages in excess of the instalment amounts that the defendants withheld, would be only of academic interest. He therefore invited the court to fix the amount of the instalments withheld by the defendants, namely, 30% of the purchase price, as the damages payable. He submitted that the court's task, in assessing damages at around that amount, was made easier by the fact that the first plaintiffs themselves had in December 1988 offered to pay to the defendants a rebate of 20% of the purchase price to obtain the defendants' consent to the conversion. This, he submitted, suggested that the first plaintiffs themselves assessed the damages at that amount. Mr Rajah also drew attention to the fact that the first plaintiffs, in a letter DBSL in December 1988, had made a provision of \$5.5m as compensation to obtain the consent to the conversion from the purchasers of shop units. This sum, he submitted, also provided a yardstick as to the appropriate quantum of damages.

122

78. When the first plaintiffs made the offer of a 20% rebate, the situation was that the approval from the MND for the conversion was conditional upon the first plaintiffs obtaining the consent of the purchasers (who did not have cll 32 and 33 in their contracts) to the conversion. As the offer was not accepted, the first plaintiffs continued their dialogue with MND in an effort to try to get MND to withdraw that condition. As events turned out, the first plaintiffs were successful in this effort. In that factual matrix, I would view the offer of a rebate as no more than the price that the first plaintiffs were prepared to pay to satisfy the condition imposed by MND - it was not an estimate of the defendants' losses. In the circumstances, I can see no merit in the defendants' submission that that offer represented the first plaintiffs' estimate of damages that the defendants would sustain as a result of the conversion. The same considerations apply to the \$55m provision made at that time for obtaining these consents.

123

79. The position therefore is that even though I am satisfied, without hearing the defendants, that there has been a breach of contract by the first plaintiffs, there is no evidence before me to show what, if any, are the damages suffered by the defendants as a result of the breach. It is, I think, valid for Mr Singh to ask, as he did, the question: why is it, if there was a substantial change in character of the building which caused the defendants' loss, the defendants elected not to call evidence to show what the loss was? I agree with the submission of Mr Singh that compensation payable must be measured against what the party has suffered. If the party has not suffered any loss then there can be no question of

compensation being awarded. If one purchases artificial jewellery but gets real jewellery instead, there can be no grounds on which to seek compensation.

124

80. In the present case, for all that the court knows, the units in an office cum shopping complex delivered to the defendants may be more valuable to the defendants than units in a hotel cum shopping complex. This would be so if the defendants were, for instance, in the business of supplying office stationery and equipment. On the other hand, if the defendants were in the tourist business, it may be that units in a hotel/shopping complex would be more desirable. In the ***Tarval*** case for instance, expert evidence was called to show that the market price of the residential units, if the whole complex had been residential as originally intended, would be greater than the market price of the same units where the complex is partly commercial. No such evidence was before the court in this case. In the absence of evidence of damage, the court can only come to the conclusion that the defendants have not suffered any loss as a consequence of the conversion. It seems to me that the defendants were quite happy to take possession of the units in question and the reason for their demanding a rebate and refusing to complete was that they saw an opportunity to enrich themselves at the expense of the first plaintiffs. I think it is relevant to note here that had the first plaintiffs not come to `rescue` the project, not only OCK but also the defendants would have incurred considerable losses.

125

81. Mr Rajah submitted that difficulty in assessing the quantum of damages should not deter the court from embarking on that exercise. I agree with that

submission. But the position here is not one of difficulty in assessing the compensation payable. It is one in which there is no evidence of any loss at all before the court. In the circumstances, I rule that no compensation is payable to the defendants for the breach committed by the first plaintiffs.

126

82. Additional liquidated damages

127 In his final submission, Mr Rajah submitted that if the court held that the notice to complete was invalid by reason of the breach of contract and/or fiduciary duty, then liquidated damages would be payable until the date of actual completion and the defendants would be able to set off the outstanding progress payments against those damages.

128

83. Mr Singh objected to this claim for additional liquidated damages being raised at so late a stage. He submitted that if the defendants had wished to put forward such a case they should have done so in the pleadings. It was, he submitted, prejudicial to the interests of the first plaintiffs for the defendants to raise the matter in the final stage of the closing submissions.

129

84. The defendants' case throughout had been that there should be an abatement of the purchase price by reason of the first plaintiffs' breach of contractual and/or fiduciary duty to the defendants. In keeping with that position the

defendants had, in June 1991, even offered to complete the purchase if some agreement could be arrived at to preserve their rights pending determination of their claims for abatement. There was no claim for these additional liquidated damages until the final minutes of the defendants' closing submission. In the circumstances, I am of the view that it is not open to the defendants to now make such a claim. Accordingly, I uphold Mr Singh's objections.

130

85. For the reasons given above, I give judgment in favour of the first plaintiffs and: (a). order that the defendants specifically perform without compensation the sale and purchase agreements within 14 days from the date of judgment;

131 (b). order that the defendants pay (less the liquidated damages payable by the first plaintiffs and the credit given by reason of the shortfall in excess of 5%), the following sums:

132 (i). the 5% progress payment pursuant to cl 4(2)(a) of the sale and purchase agreement plus interest at 12% per annum;

133 (ii). the final progress payment pursuant to cll 4(2)(b) and 14(1) plus interest at 12% per annum;

134 (iii). the sum of \$1,500 (with statutory interest thereon) pursuant to cl 17 and all or any arrears in maintenance and service charges (with interest at such rates as determined by the management corporation);

135 (c). grant a declaration that the first plaintiffs are entitled to a lien upon the defendants' shop units until the defendants pay the sums stated above as well as its costs of this action;

136 (d). order that in the event of default by the defendants in making the payments due to the first plaintiffs, the first plaintiffs be at liberty to enforce the lien and order that in the event the defendants fail to sign any document necessary for such enforcement, the Registrar of the High Court be empowered to execute the same;

137 (e). order that the counterclaims be dismissed; and

138 (f). order that the defendants pay the plaintiffs costs in the claims and counterclaims.

S Rajendran J

Davinder Singh SC and Rosalind Lazar (Drew & Napier) for the first
plaintiffs
K Shanmugam and Edwin Tong (Allen & Gledhill) for the second
plaintiffs
VK Rajah and R Chandra Mohan (Rajah & Tann) for the defendants
