

IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1998] SGCA 38

CA 237/1997

Between

Kassim Syed Ali

... Appellant

And

Grace Development Pte Ltd
Another

... Respondent

GROUND OF DECISION

Contract — Contractual terms; Contract — Remedies — Damages; Contract
— Remedies — Specific performance

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Kassim Syed Ali and Others v Grace Development Pte Ltd and Another

[1998] SGCA 38

CA 237/1997

Karthigesu JA; L P Thean JA; Yong Pung How CJ

03 June 1998

1 **LP THEAN JA**

2 Cur Adv Vult

3 (delivering the judgment of the court): The three appellants were the defendants respectively in the three separate actions, Suits Nos 1423, 1426 and 1443 of 1991, instituted in the High Court by the first respondents for specific performance of the agreements relating to their purchase of the premises. These three actions were subsequently consolidated (the consolidated actions). The first respondents also instituted, at the same time, 19 other actions against 19 other parties (the 19 purchasers) making similar claims in respect of their purchases of the premises respectively. All the defendants counterclaimed against the first respondents damages for breach of contract. They were represented by the same firm of solicitors. As the claims and counterclaims in all the actions were based substantially on the same facts, it was agreed that the 19 actions would abide by the results of the consolidated actions. The consolidated actions were tried before S Rajendran J, and in a reserved judgment (reported in [1998] 1 SLR 730) the learned judge allowed the claims of the first

respondents for specific performance and dismissed the counterclaims of the appellants. Against this decision the appellants have now appealed.

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2. The facts

5 The relevant facts that gave rise to the proceedings below are not in dispute and have been fully set out in the judgment of the learned judge, which we respectfully adopt. For our purpose, we need only to refer to the following material facts. The appellants each entered into agreements with the company called Adelphi Development Pte Ltd (ADPL) in 1982/1983 for the purchase of shop units in a building now called `The Adelphi`, which is situate at the junction of Coleman Street and North Bridge Road. The Adelphi, as originally designed, was to consist of a podium block and a tower block, and the podium block was to comprise units of shop premises and basement carpark, while the tower block was to house a hotel with 309 rooms. Work on the podium block commenced first as phase 1 of the project. The contract for the construction of The Adelphi was awarded to OCK Construction Pte Ltd (OCK).

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3. Prior to the execution of the sale and purchase agreements with the appellants and the 19 purchasers, ADPL had contemplated the conversion of the premises in the tower block from hotel to office and shop units. This is apparent from a letter written by ADPL's solicitors to the Controller of Housing seeking approval for the inclusion in the sale and purchase agreement of clauses (namely, cll 32 and 33) which were to the effect that the purchasers were

deemed to have knowledge of the vendor's intention to apply to convert the hotel component of the project into office and shop units. However, cll 32 and 33 were, for some inexplicable reasons, not included in 50 out of the 148 sale and purchase agreements that were entered into by ADPL. The appellants and the 19 purchasers were amongst those whose sale and purchase agreements did not have the amended clauses.

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4. On 19 January 1983, ADPL's solicitors wrote to the appellants' solicitors explaining that cll 32 and 33 had been 'inadvertently omitted' from some of the sale and purchase agreements entered into and sought a confirmation to the effect that the two clauses would be deemed to have been included in the sale and purchase agreements made with the appellants. The appellants' solicitors replied saying that their clients could not agree to the inclusion of such clauses.

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5. On 10 December 1987, ADPL 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 the premises in the proposed building. By a letter dated 2 August 1988, ADPL's solicitors requested consent from the appellants to the hotel component being converted to premises for office. The appellant's solicitors replied stating that their clients would consent on condition that ADPL agreed to compensate them by an abatement of the purchase price amounting to a discount of 35% of the purchase price. No agreement, however, was reached between the parties.

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6. In the course of construction, ADPL encountered financial difficulties which severely hindered the progress. In order to ameliorate further losses, which amounted to about \$18.5m, the shareholders of OCK decided to purchase The Adelphi site together with the benefit of the project (then partially completed) for \$77.5m, and the first respondents were incorporated for the purpose. On 15 September 1988, the first respondents entered into an agreement with ADPL for the purchase of The Adelphi. In the meantime, the first respondents were also negotiating with DBSL Building Pte Ltd (DBSL), the second respondents, for the sale to the latter of the tower block and the unsold shop units in the podium block.

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7. The sale and purchase agreement between the first respondents and DBSL was entered into on 19 October 1988, and by this agreement the first respondents sold the building, The Adelphi (less the shop units already sold), to DBSL for \$78m. By cl 30 of the agreement, DBSL reserved the right to require the first respondents to take steps to convert the hotel component of the building to office premises and shop units. It was also provided that, upon DBSL exercising this right, the first respondents would use their best endeavours to obtain the consent of all the purchasers of the sold units to the conversion as well as the approval of the building authority for the conversion. If the approval of the building authority was obtained, cl 30(5)(b) of the agreement provided for the upward revision of the purchase price from \$350 per square foot to \$520 per square foot for the shop and the office units purchased by DBSL. DBSL exercised the right under cl 30 on the same day as the sale and purchase

agreement was signed. The approval previously obtained by ADPL had lapsed on 1 July 1988, but DBSL was prepared to give the first respondents time to obtain approval for the conversion.

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8. Under the terms of the sale and purchase agreements between ADPL and the purchasers, the purchase price was payable progressively 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 the receipt by the purchasers of the vendor's notice in writing that a particular stage of the construction had been completed or that a particular event had occurred. Up to the time when the dispute between the appellants and the first respondents arose, all notices issued to the appellants under cl 4 of the sale and purchase agreements were duly complied with.

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9. On 16 December 1988, the first respondents' solicitors wrote to the appellant's solicitors offering a discount of 20% of the purchase price in exchange for the purchasers' consent to the conversion. The appellants replied on 22 December 1988 stating that their clients wanted a discount of 30% in return for their consent. The first respondents found the offer unacceptable. Consequently, by a letter dated 5 January 1989, the first respondents appealed to the Permanent Secretary of the Ministry of National Development for a waiver of the condition that they obtain consent from the purchasers for the conversion. This appeal was rejected on the grounds that Rule 2 of the Planning (Development) Rules required the developer to obtain the purchasers' consents. Upon the first respondents making a further appeal, consent was eventually

granted, and formal approval for the conversion was obtained on 31 January 1990.

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10. In the meanwhile, the podium and the basement floors were completed. On 15 December 1989, temporary occupation permit (TOP) was issued by the building authority for the podium and basement floors. The first respondents' solicitors on or about 27 December 1989 gave notice to the appellants' solicitors of the issue of the TOP and asked for payment of the instalment due under cl 4(1)(k) of the sale and purchase agreements and further requested the appellants to take possession of the respective premises subject to payment of all sums then outstanding and due to the first respondents. The appellants made the payments as requested and took possession of the respective premises in early 1990.

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11. On 14 March 1990, soon after the appellants had taken possession of their respective units, the appellants' solicitors wrote to the first respondents' solicitors saying that their clients had been informed that the first respondents were arranging for the conversion of the Adelphi complex to an office cum shopping complex and asked for a response to their letter of 22 December 1988, in which the appellants' solicitors had asked for the 30% discount for their clients in exchange for their clients' consent to the proposed conversion. The first respondents' solicitors replied stating that the first respondents were not agreeable to the appellants' proposal. No agreement between the first respondents and the appellants materialised in relation to the conversion.

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12. About one year later, on 4 February 1991, the building control division notified the architects that the first respondents' application for certificate of statutory completion (CSC) was approved, and the CSC dated 2 February 1991 was enclosed. On 5 February 1991, the first respondents' solicitors forwarded a certified true copy of the CSC to the appellants' solicitors and requested for payment of the instalment of 5% of the purchase price falling due under cl 4(2)(a) of the sale and purchase agreement.

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13. The appellants each refused to pay the instalment, and their solicitors maintained that the first respondents' notice was 'bad and ineffectual'. Two reasons were given. First, the first respondents had already assigned their rights title and interests under the sale and purchase agreements to DBSL and accordingly, in the absence of any indication that the notice was given on behalf of DBSL, the first respondents' solicitors had no authority to give the notice. Second, the appellants claimed that they were entitled to withhold the payment for the purposes of setting-off the sums due to them under cl 14 (2) of the sale and purchase agreements as liquidated damages payable by the first respondents on the ground that the first respondents had failed to complete the sale and purchase agreement by 31 December 1990. The appellants' solicitors further stated that their clients had instructed them 'to institute proceedings against [the first respondents] to recover damages for flagrant and deliberate breach, inter alia, of the covenant relating to user under the respective sale agreements'.

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14. On 21 March 1991, the first respondents were informed by the Commissioner of Buildings that the schedule of share value allotments of the premises in The Adelphi submitted by the first respondents' surveyors had been accepted and filed under s 7 of the Land Titles (Strata) Act (Cap 158, 1988 Ed). Soon thereafter, subsidiary strata certificates of title were issued and the first respondents' solicitors issued notices to complete to the appellants on 15 April 1991 under cl 14 of the sale and purchase agreements. In the completion account, the first respondents gave credit to the appellants the liquidated damages payable to them for late completion under cl 14 (2). The appellants refused to complete; so did the 19 purchasers.

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15. On 5 July 1991 the first respondents commenced separate actions against the appellants and the 19 purchasers. In their statements of claim, the first respondents sought an order for specific performance of the sale and purchase agreements and payment of the balance of the purchase price, less the amounts payable to the appellants by the first respondents as liquidated damages for late completion and less also an amount in abatement of the purchase price for such shortfall in area as exceeds the 5% margin permitted under cl 26 of the agreements.

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16. Decision below

20 The learned judge held that it was clear that from the outset The Adelphi was to be constructed as a hotel and shopping complex, and that the first respondents in delivering to the appellants shop units in an office and shopping complex instead of a hotel and shopping complex were `seeking to put the [appellants] off with something which the [appellants] never bargained for`. As such, he found that the first respondents were in breach of their contractual obligations under the sale and purchase agreements. However, the learned judge found that the appellants had not proved any loss suffered by them, and the first respondents, therefore, did not have to pay any damages to the appellants for the breach of the sale and purchase agreements.

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17. On the issue of the notice to complete, the learned judge said that it was a clear proposition of law from the cases of **Siti & Anor v Lee Kay Li** [1996] 3 SLR 319 and **Pagebar Properties Ltd v Derby Investment Holdings** [1973] 1 All ER 65 that a party giving notice to complete must be ready and able to comply with all of his contractual obligations on the date fixed for completion. If the party was not so ready, the notice would be ineffective. However, the learned judge did not decide specifically on the validity of the notice of completion issued by the first respondents.

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18. The appellants had contended that the notice to complete was invalid by reason of the breach of contract. It follows that no notice to complete was given by the first respondents and that liquidated damages would be payable by the first respondents to the appellants until the date of actual completion, and the

appellants were entitled to set-off the outstanding progress payments against the damages. The learned judge upheld the first respondents' objection that the appellants' claim for liquidated damages was raised much too late, and that it was not open to the appellants to make such a claim.

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19. In conclusion, the learned judge allowed the claim of the first respondents and ordered that the appellants specifically perform the sale and purchase agreements. He also held that the first respondents were entitled to interest at 12% per annum on the progress payments due from the appellants under cl 6 of the sale and purchase agreements.

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20. The appeal

25 Before us lengthy arguments were raised by the parties, but at the end of the day, they may be resolved into three principal issues. First, in delivering to the appellants shop units in an office and shopping complex instead of shop units in a hotel and shopping complex, were the first respondents in breach of the sale and purchase agreements? Second, if the first respondents were in breach, what loss or damage had the appellants suffered and how should damages be assessed? Lastly, again if the first respondents were in breach, were they entitled to call on each of the appellants to complete the transaction and pay the balance of the purchase price under the respective sale and purchase agreements?

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21. Breach of contract

27 The first issue is a simple one, and we have no difficulty in arriving at the conclusion that the first respondents were in breach of the sale and purchase agreements. It was contemplated in the sale and purchase agreements that The Adelphi was to be built as a hotel and shopping complex. Each sale and purchase agreement had attached to it a site plan, which set out the various levels of the complex and in which the hotel component of the complex was demarcated as well as a schedule which made it clear that the property expressed to be sold to the purchaser was a unit in a hotel and shopping complex. The appellants, therefore, had agreed to purchase shop units in such a complex, and were entitled to have what they had contracted for. In delivering to the appellants units in an office and shopping complex instead of units in a hotel and shopping complex, the first respondents were clearly in breach of contract.

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22. The old case of **Ayles v Cox** [1852] 16 Beav 23 is illustrative of the point. There, the purchaser agreed to purchase a property having a copyhold tenure. It turned out that the tenure of the property was partly freehold and partly copyhold. It was held that the purchaser was entitled to rescind the sale. The court held that the vendor could not compel the purchaser to complete the purchase, even though the purchaser was offered property which was better than what he had contracted to purchase, because the property offered was substantially different from that which the purchaser had contracted to purchase.

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23. In **Lee v Rayson** [1917] Ch 613, the purchaser agreed to purchase from the vendor thirteen freehold houses, which were let on six leases for a term of ninety-nine years at rents amounting in aggregate to 72 per annum. The contract described that the houses were let as follows: one pair of houses was let at one entire rent of 11 10s; each of the next four pairs was let at a rent of 11, and the last three houses were let at a rent of 16 10s. The abstract of title deduced, however, showed that the twelve houses were each let at a rent of 5 10s, and one at a rent of 6. In an action by the purchaser for rescission of contract and the repayment of the purchase price, Eve J held that the purchaser was getting something substantially different from what he had bargained for. The learned judge said, at p 619:

I take that to mean that 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.

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24. The authority which is clearly in point is **Tarval Pty Ltd v Stevens & Ors** [1991] NSW Title Cases [para] 80-004. There, five purchasers agreed to purchase from the developer their respective units in a proposed residential building comprising mainly residential units. Subsequently, the developer applied to the authority for a change of use and was permitted to use the first

ten floors as offices and to carry out the conversion of these floors units into offices, with the result that the development became partly commercial and partly residential. The purchasers terminated the contracts claiming that the developer had breached the contracts. At first instance, Kearney J of the Supreme Court of New South Wales held that the developer was obliged on completion to transfer to the plaintiffs their units in a wholly residential building, and the units then proposed to be transferred did not correspond substantially in all material respects with the units described in the contracts: see [1990] NSW Lexis 10517. The learned judge said, at [para] 29:

This description of the building is necessarily attached to, so as to become part of, the description of the unit the subject of the contracts. These were not contracts for the sale of freestanding existing houses but for units contained within a building not yet in existence. I consider that the character of the building as designated in the strata plan is in such case a crucial element in the description of the units being sold. Accordingly, the defendant was obliged by the express terms of the contracts to have available to be transferred to the plaintiffs in fulfilment of their contracts home units in a wholly residential flat building. By procuring the rezoning of the lower ten floors of the building the defendant rendered it impossible at the time of it giving notice to complete and thereafter for it to transfer home units corresponding substantially in all respects with the units described in the contracts.

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On appeal, his decision was affirmed by the full court of the Supreme Court of New South Wales.

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25.Reverting to the case at hand, S Rajendran J said, at [para] 68:

*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.*

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We agree entirely with this finding.

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26. Damages

35 We next turn to the issue of damages. It was contended on behalf of the first respondents that the appellants are not entitled to any damages by reason of condition 11 of the Singapore Revised Conditions of Sale, which were incorporated into the sale and purchase agreements. 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.

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27. In our opinion, this is not a case of any error or misstatement or omission in the description of the premises sold. It is a case where the premises delivered to the appellants were different from what they had purchased, and condition 11 is wholly inapplicable. On this issue, the learned judge said, and in our view, rightly, at [para] 70:

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.

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Hence, condition 11 is of no assistance to the first respondents.

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28. In **Ayles v Cox** (supra) the contract contained the following condition of sale:

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.

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Sir John Romilly MR held that this condition was inapplicable, at p 24:

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 conditions of sale, but not when the property sold is totally different from that which the vendor has.

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29. The next question is what loss, if any, the appellants had suffered as a result of the breach of contract on the part of the first respondents. The burden is on the appellants to show the loss they had suffered. There was no evidence as to whether the value of the premises purchased by the appellants had diminished by reason of the conversion of the tower block from hotel to offices. The purchasers in **Tarval** adduced evidence which showed that the change of use to a part of the building had a `detrimental effect on the value of the residential units`. Here, the appellants had not given evidence; nor had they adduced any evidence as to the extent of the loss. In the absence of such evidence, it is hard to come to any conclusion other than that the appellants have not suffered any

loss. Damages are compensatory, and one cannot seek compensation in vacuo. Compensation must be measured against the loss suffered. In our judgment, the appellants have not proved that what they got was less valuable than what they had contracted for.

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30. Liquidated damages

42 The appellants contended that they are entitled to liquidated damages under cl 14(2) of the sale and purchase agreements. That clause provides as follows:

The said notice to complete shall be given by the vendor on or before 31 December 1990. If the vendor shall fail to give the said notice to complete on the date fixed for completion the vendor shall pay to the purchaser liquidated damages calculated from day to day commencing from the date when such notice to complete should have been given at the rate of 9% per annum on a sum equal to 85% of the purchase price such interest may be deducted from any instalment due and payable to the vendor.

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Their contention is that because of the breach of contract by the first respondents, the latter were unable to serve a valid notice to complete on the appellants, and until such time as the court orders the completion to take place, the appellants are entitled to liquidated damages pursuant to cl 14(2) of the sale and purchase agreements. This argument is wholly unsound. The liquidated damages under cl 14(2) are payable only in the event that the notice to complete was not given by the first respondents on or before 31 December 1990. The notice to complete was given by the first respondents on 15 April 1991 or

thereabouts and liquidated damages computed in accordance with cl 14(2) had been deducted from the amounts payable to the first respondents as shown in the completion account. Clause 14(2) is not applicable in assessing damages for the loss, if any, occasioned to the appellants by reason of the breach of contract on the part of the first respondents. We can find no basis for applying this provision.

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31. Abatement of purchase price

45 Counsel for the appellants submitted that it is a clear proposition of law that where a party as a result of a breach by him of the terms of the sale and purchase agreement is unable to serve a valid notice to complete, the court is nevertheless empowered to order completion subject to the party not in breach giving his consent to the completion and subject to the court ordering a suitable abatement of the purchase price. In this case, so counsel submitted, the court in granting an order for specific performance should order a suitable abatement of the purchase price. In support, counsel relied on the following passage of the judgment of the Privy Council in **Duncan Rutherford v William Acton-Adams** [1915] AC 866, pp 869-870:

In exercising its jurisdiction over specific performance Court of Equity looks at the substance and not merely at the letter of the contract. If a vendor sues and is in a position to convey substantially what the purchaser has contracted to get, the court will decree specific performance with compensation for any small and immaterial deficiency, provided that the vendor has not, by misrepresentation or otherwise, disentitled himself to his remedy. Another possible case arises where a vendor claims specific performance and where the court refuses it unless the purchaser is willing to consent to a decree on terms that the vendor will make compensation to the purchaser, who agrees to

such a decree on condition that he is compensated. If it is the purchaser who is suing the court holds him to have an even larger right. Subject to consideration of hardship he may elect to take all he can get, and to have a proportionate abatement from the purchase-money. But this right applies only to a deficiency in the subject-matter described in the contract.

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32. That pronouncement was said obiter by the Privy Council and must be understood in the proper context in the circumstances of the case. The facts there were these. By an agreement the purchaser agreed to purchase certain freehold and leasehold lands in New Zealand. Shortly, after payment of the deposit the purchaser went into possession of the land and completed the purchase of the leasehold lands. But before completing the purchase of the freehold lands, the purchaser claimed that the amount of fencing on the lands had been misrepresented to him to be 232 miles, whereas there were only 164 miles of fencing. However, the agreement was silent as to the amount of fencing. Nonetheless, the purchaser claimed a certain sum to be deducted from the balance of the purchase price, and the parties completed the transaction with that amount held back. The Privy Council held (at p 869) that the only `possible remedy` open to the purchaser was to claim compensation for the deficiency of the mileage of fencing `by invoking the well-known jurisdiction of the Court of Equity in cases of specific performance to order compensation for discrepancy between what was agreed to be conveyed and what can be conveyed`, but the remedy was not applicable to the case as the contract was silent on the amount of the fencing.

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33. In our view, the broad proposition laid down by the Privy Council must be

applied with great care, and, needless to say, is not applicable in all cases of sale and purchase of lands where the vendor seeks a decree of specific performance and the purchaser seeks an abatement of the purchase price. Very much depends on the circumstances of the case. The appellants here each seek an abatement of the purchase price, but abatement is not at large. There must be a proper and rational basis for such abatement. An abatement is not ordered merely because a breach of contract has been committed by the vendor. This is not a case of `deficiency in the subject matter described in the contract` as discussed by the Privy Council in ***Rutherford*** . Nor is it a case of any shortfall in the areas of the premises delivered to the appellants, as in ***Chin Tien Sung v Yat Yuen Hong Co Pte Ltd*** [1993] 2 SLR 744 .

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34.As we have held, there was no evidence that the premises delivered to the appellants were less valuable than what they had contracted for. And as the learned judge said, and we agree, the units delivered to the appellants may even be more valuable to the appellants than units in a hotel and shopping complex. The appellants had not shown on what basis an abatement of the purchase price should be made. They now relied on the discount of 20% of the purchase price offered in 1988 by the first respondents to the appellants in consideration of their consent to the conversion, and appeared to suggest that a discount of 20% of the purchase price could be the amount of abatement. We rejected this suggestion. The 20% discount was offered by the first respondents to the appellants in 1988, which, rather unwisely, was not accepted by the appellants, and that offer is now no longer available. It is difficult to see on what basis the discount of 20% could be adopted for determining the extent of an abatement of the purchase price.

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35. The appellants pointed out that the first respondents in their calculation of their profits for The Adelphi on conversion of the hotel premises to the offices made a provision of \$5.5m as compensation to obtain the consent of purchasers for the conversion. Whatever provision the first respondents made in this respect was solely for their own accounting purposes, was wholly their internal matter and does not in the least concern the appellants. Again, we do not see how and in what way such a provision could afford a basis on which an abatement of the purchase price should be ordered. This provision in their account has no relevance whatsoever and does not assist the appellants' case for an abatement of the purchase price.

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36. Right to complete

51 As we have held, the first respondents were in breach of contract in that they had delivered to the appellants premises different from what had been agreed, and the question really is whether in these circumstances they were entitled to call upon the appellants to complete. The appellants relied mainly on **Pagebar Properties Ltd v Derby Investment Holdings Ltd** [1973] 1 All ER 65 and **Siti & Anor v Lee Kay Li** [1996] 3 SLR 310 in support of the proposition that the vendor is not entitled to serve a notice to complete, if he was himself in breach of an obligation which ought to have been performed by that date, and therefore he cannot be said to be ready, willing and able to perform the contract.

37. We need to examine these two cases in some detail. In ***Pagebar Properties***, the plaintiff purchased a flat from the defendants and the contract incorporated the National Conditions of Sale (18th Ed) in England. Under condition 22(1), either party 'being ready and willing to fulfil his own outstanding obligations under the contract' may at any time after the contractual date of completion give to the other party notice of completion. The purchaser did not complete the purchase on the contractual date of completion. The vendor acting under condition 22 gave notice to the purchaser making time of the essence and requiring completion within 14 days. On the last day stated in the notice, the clerk of the purchaser's solicitor attended on completion and discovered, for the first time, that there was an unexpired three year lease which was not disclosed by the vendor in the abstract of leases or tenancy agreements. He decided to take instructions and did not complete the purchase. Subsequently, the purchaser's solicitor wrote to the vendor's solicitor stating that the purchaser would complete, notwithstanding the unexpired lease. The vendor, however, refused, on the ground that the time allowed by the notice had expired and proposed to forfeit the deposit. The purchaser sued for specific performance of the contract and applied for summary judgment. Goulding J held that the vendor was obliged under the contract to disclose the unexpired lease in the abstracts of the leases or tenancy agreements to the purchaser under the relevant condition of the agreement, and as the vendor was in breach of that obligation, which ought to be performed by the date he served the notice to complete, he was not entitled to serve the notice to complete.

38. It should be noted that in that case the notice to complete was given under condition 22 which, so far as relevant, were in the following terms:

(1) At any time on or after the completion date, either party, being ready and willing to fulfil his own outstanding obligations under the contract, may give to the other party or his solicitor notice in writing requiring completion of the contract in conformity with this condition. (2) Upon service of such notice as aforesaid it shall become and be a term of the contract, in respect of which time shall be of the essence thereof, that the party to whom the notice is given shall complete the contract within twenty-eight days after service of the notice. (3) In case the purchaser refuses or fails to complete in conformity with this condition, then the purchaser's deposit may be forfeited

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It was in the context of this and other conditions of sale that Goulding J accepted the argument of counsel for the purchaser and said, at pp 69-70:

First of all, he [counsel] says, the defendant was not entitled to serve a notice making time of the essence on 28 July, because the defendant itself was in breach of an obligation that ought to have been performed by that date; namely, the obligation to disclose all existing tenancies. In my judgment that contention is sound. In terms condition 22 merely speaks of a party giving notice being ready and willing to fulfil all his outstanding obligations under the contract. However, in the context of these conditions and the ordinary framework of a contract of sale and purchase of land, it is in my judgment clearly intended that the procedure allowed by general condition 22 is only available to a party who is not in default; and just as the vendor who had not delivered a complete abstract of title could not serve a notice under condition 22, so in my judgment a vendor who has not yet disclosed existing tenancies cannot serve a valid notice.

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39. In ***Siti & Anor v Lee Kay Li***, the vendor and the purchaser were engaged in a series of disputes, each complaining that the other had not observed and

performed the sale and purchase agreement. Each served on the other a notice to complete under condition 29 of the Law Society's Conditions of Sale 1994. This court held that both parties' notices were invalid. Among other things, the court held that the vendor's notice was invalid, as at the date of the notice he had not discharged his obligation in respect of payment of the maintenance charge payable on the property. Here again, it should be noted that the notice was given under condition 29(2) of the Singapore Law Society's Conditions of Sale which provides:

*If the sale shall not be completed on the date fixed for completion either party may on that date or any time thereafter (unless the contract shall first have been rescinded or become void) give to the other party notice in writing to complete the transaction in accordance with this condition **but such notice shall only be effective if the party giving the same at the time the notice is sent is either ready, able and willing to complete** or is not so ready, able and willing by reason of the default or omission of the other party to the contract. [Emphasis is added.]*

56 Thus, under this condition, the notice was only valid and effective, if the party serving it was 'able ready and willing' to complete on the date the notice was sent. It was on this basis that it was held that the vendor was not able, ready and willing to complete and the notice was ineffective.

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40. The factual situation in the present case is entirely different from those in *Pagebar* and *Siti*. *Pagebar* involved the issuance of a notice by the vendor under condition 22. Such notice to complete made time of the essence and entitled the vendor to treat the contract as repudiated if the purchaser failed to complete on the expiry of the notice. Similarly, in *Siti* the notice was issued under condition 29 of the Singapore Law Society's Conditions of Sale 1994 and

is a notice of repudiatory breach which made time of the essence and entitled the party giving the notice to treat the contract as repudiated by the other if on the expiry of the notice the other fails to complete. Here, the first respondents were not relying on any notice given under any such or similar condition. The notice which called upon the appellants to complete was one given under cl 14 of the sale and purchase agreements which, so far as relevant, is in the following terms:

(1) The sale and purchase of the said unit shall be completed at the office of the vendor's solicitors, Messrs Jing Quee & Chin Joo fourteen (14) days after the receipt by the purchaser or his solicitors of the notice to complete from the vendor or the vendor's solicitors such notice to be accompanied by On completion, the vendor shall execute in favour of the purchaser a transfer or lease, as the case may be, of the said unit sold, such transfer or lease to be prepared by and at the expense of the purchaser. (2) The said notice to complete shall be given by the vendor on or before the 31 December 1990

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41. The true question here is whether the first respondents having breached the contract were entitled to call upon the appellants, as the purchasers, to complete their purchases under the agreements. The breach of contract by the first respondents was that they did not deliver to the appellants the premises which the appellants had bargained for. That having said, the question is what position did the appellants take in relation to this breach? The appellants accepted the premises; they did not seek a rescission of the contracts. What they sought was damages occasioned by that breach. This was certainly borne out by the events that had transpired.

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42. When the TOP was issued, each of the appellants accepted it and took possession of the premises he had purchased. Assuming that at that time they did not know that the first respondents had successfully obtained the requisite approval from the planning authority for the conversion and were in the process of converting the premises in the tower block into offices and shops, they certainly knew of the conversion soon after they went into possession. Yet they remained in possession and made no complaint of a material change in the nature of the building. They were entitled to seek a rescission of the sale and purchase agreements upon their discovery of such change; but they never did. They were content to remain in possession and were prepared to accept the premises. They continued to enjoy the benefits of having possession of the premises. Now, in these circumstances, were the first respondents entitled to issue the notice under cl 14 of the sale and purchase agreements and call upon the appellants to complete? The answer must unquestionably be in the affirmative. If they were not so entitled, then there would come about a stalemate, and the first respondents would never be entitled to ask the appellants to complete the purchases. In our opinion, such a state of affair is untenable, both at law and in equity.

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43. In fact, the appellants were not really resisting specific performance of the sale and purchase agreements; they were prepared to complete, but they wanted damages or an abatement of the purchase price. In the letter dated 27 April 1991 written to the solicitors for the first respondents, the solicitors for the appellants concluded thus:

2 As you are aware, your clients' wilful breach of contract and adversarial stance has left our clients with no alternative but to

commence litigation. Statements of claim in the names of two of our clients have already been served on you. Our clients are not proceeding with completion pending the determination of the suits. 3 If your clients agree, we suggest that transfer of title can take place without prejudice to either parties' contentions and on the basis that our clients withhold payment of the alleged outstanding instalments.

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44. In our judgment, the appellants were not justified in refusing to complete, and the first respondents were entitled to the order for specific performance and interest on the balance of the purchase price. In the result, the appeal fails and is dismissed with costs. The deposit as security for costs is to be paid to the first respondents or their solicitors to account of costs.

Karthigesu JA
L P Thean JA
Yong Pung How CJ

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