IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1999] SGHC 171

Suit 1944/1997

Between

Cathay Theatres Pte Ltd

… *Plaintiff*

And

LKM Investment Holdings Pte Ltd

… *Defendant*

GROUNDS OF DECISION

Version No 1: 20 Nov 2026 (00:35 hrs)

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Cathay Theatres Pte Ltd v LKM Investment Holdings Pte Ltd

[1999] SGHC 171

Suit 1944/1997
Lee Seiu Kin JC
29 June 1999

JUDGMENT

1. The Plaintiffs are the lessees of the Regal Theatre at number 3501 Bukit Merah Road ("the Property") under the terms of a 99-year lease ("the Head Lease") from the Housing and Development Board ("the HDB") which commenced on 1 February 1977. On 17 May 1996 the Defendants contracted to purchase the lease on the Property from the Plaintiffs for $16.5 million, the completion date being 16 August 1996. Completion did not take place on 16 August 1996 and has still not taken place. In this action the Plaintiffs seek an order for specific performance and interest for late completion or, in the alternative, damages for breach of contract.

2. In their Defence the Defendants say that (i) the Plaintiffs have made certain misrepresentations which would entitle them to rescind the contract, which they did; and (ii) there is a defect in the title of the Property. The Defendants counterclaim for the refund of the $1.65 million deposit and certain ancillary reliefs, as well as damages for breach of contract.

Background

3. Sometime in 1995 the Plaintiffs put the Property up for sale. The Defendants were one of the interested parties but eventually another party was granted the option. However that sale fell through and the Plaintiffs continued with their efforts to sell the Property. The Defendants' interest was revived as a result of a chance encounter sometime in March or April 1996 (the parties do not agree on the exact date). The Plaintiffs' Manager for Marketing and Leasing, Peter Boo ("Boo") met the Defendants' Business Development Manager, Low Heng Yuen ("Low") when Low happened to attend a meeting at the Plaintiffs' offices on an unrelated matter. Boo mentioned to Low that the Property was still available. Low said that he would inform the Defendants' Managing Director, Steven Lek ("Lek") about it. After that meeting, Low had several telephone conversations with Boo in which he obtained certain information from Boo about the Property. They also discussed the price and Boo informed Low that the Plaintiffs wanted $16.5 million. On 16 April 1996 Low faxed a letter to Tan Nguan Teck ("Tan"), a Director of the Plaintiffs. Low referred to their telephone conversation on 12 April and offered to purchase the Property for $16.5 million, but subject to certain conditions. The Plaintiffs did not reply to this letter but a meeting was arranged for 17 April 1996.

4. Around noon on 17 April Lek and Low went to the Plaintiffs' office to meet with Boo and Tan. After some discussion Lek agreed to purchase the Property for the asking price. An option was prepared by the Plaintiffs' legal department and signed by Tan. Lek then handed over a cheque for $165,000 being 1% of the purchase price. One month later, on 17 May 1996, the Defendants exercised the option by payment of a further $1,485,000, being 9% of the price. The sale and purchase agreement ("the Agreement") provides that the sale is subject to the Singapore Law Society's Conditions of Sale 1994 unless otherwise varied. It also states that the Property is sold subject to seven leases in respect of part

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of the Property granted to McDonald's Restaurants Pte Ltd ("McDonald"), the last of which would expire on 20 May 2008.

5. Following the exercise of the option, the parties exchanged letters with each other, mostly through their solicitors. M/s Tan Rajah & Cheah ("TRC") acted on behalf of the Plaintiffs and M/s Prem & Co ("PC") on behalf of the Defendants. The solicitors dealt with a number of issues during the period leading up to the completion date. Two of these featured more prominently and one caused the parties to resort to litigation prior to the present action. The two issues are: (i) the issue of HDB approval for the sale to the D; and (ii) the McDonald caveat. I now set out the relevant correspondence.

6. The first issue is the question of whether the HDB had consented to the sale by the Plaintiffs to the Defendants. TRC wrote to the HDB on 20 May 1996 to seek consent for the sale. HDB replied on 4 July stating that they had "no objection" to the proposed assignment of the lease subject to the payment of a "non-refundable administrative fee of $515 … for [HDB's] consent to the proposed assignment". They also asked for a copy of the draft transfer for their approval. TRC forwarded a copy of this letter to PC, as well as their letter of 20 May to the HDB making the request. PC wrote directly to the HDB on 20 July, forwarding the Defendants' cheque for $515 "being the non-refundable administrative fee … for [the HDB's] consent to the proposed assignment." On 26 July TRC forwarded to HDB for their consent the engrossed Transfer duly executed by the Plaintiffs. However on 8 August PC wrote to TRC to state that they have not seen "HDB's official consent to the sale". PC said that they were going to seek clarification from the HDB about this, which they did by way of a letter on the same day. In that letter PC asked the HDB whether their "no objection" letter of 4 July to TRC was the official consent. TRC responded to this in their letter to PC of 12 August in which TRC pointed out that HDB had

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given their consent in their letter of 4 July. PC replied on the same day, saying that the Defendants was of the view that the "official consent from HDB" had not been received. This prompted an immediate response from TRC in the form of their letter of 13 August which stated that:

> "… there is no doubt that HDB has already consented to the sale. HDB's letter to us of 4th July 1996 states that it has no objections to the assignment provided its administrative fees for the consent are paid. Your clients have paid the administrative fees. What more do your clients expect? What else could the words "no objections to the assignment" mean?"

PC replied to this on 14 August, stating their disagreement that the HDB had given their consent. They also said that the HDB had not replied to their letter of 8 August seeking clarification of this point. To which TRC replied on the same day, saying that they understood from the HDB that they were, "not surprisingly, perplexed" by the inquiry. However in their letter of 15 August, PC said that they had also contacted the representatives of the HDB. They understood from them that the HDB were not "perplexed" by the inquiry as TRC had claimed and that they would be replying to that letter. However, the HDB apparently never replied to PC's letter of 8 August. On 15 August the HDB sent a letter to TRC enclosing the Instrument of Transfer duly executed by them. The Defendants did not raise this issue after this.

7. I now turn to the second issue, viz. the McDonald caveat, which resulted in a great deal of problems. One of the terms of the sale was that, subject to certain conditions, any deposits paid by McDonald to the Plaintiffs would, on completion, be transferred to the Defendants if McDonald agreed in writing to release the Plaintiffs from all obligations in respect of the deposits. McDonald required the Defendants to agree to be bound by the leases before they would give such a release. On 4 June, TRC wrote to PC forwarding the form of the letter that McDonald required the Defendants to provide. PC replied on 6 June

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to ask to look at the leases referred to in the form of letter. TRC wrote on 8 June, forwarding the seven McDonald leases to PC. On 29 June, PC wrote to TRC to ask if a caveat lodged by McDonald on the Property would be withdrawn upon completion. On 20 July, TRC replied to this letter in the following manner:

> "McDonald's requires the Transfer by our clients to yours to be subject to their Caveat. The Caveat will not be withdrawn. Hence, our amendment to your draft Transfer to mention the Caveat in the Prior Encumbrances box."

In their reply dated 24 July, PC stated as follows:

> "The Option agreement provides for a sale subject to McDonald's leases. In the leases, there's provision for termination in the event of breach. "Subject to the leases" is not the same as subject to caveat. However , we'll take our clients' instructions on your telefax and shall revert to you in due course."

On 12 August, PC wrote to TRC and one of the matters was the question of the leases. PC said as follows:

> "4. As for the sale "subject to caveat", our clients do not agree to this unilateral change of term of the Option agreement. According to our clients Mr Lek, he agreed to the price of $16.5 million and all the terms of the Option which included that sale is **subject to tenancies** only and thus to all intents and purposes **the title would be a clean title**.
>
> 5. Hence in this other issue of sale "subject to caveat", please inform your clients of our clients' objection and revert to us as early as possible."

In their reply of 13 August, TRC responded in this manner:

> "… with regard to the McDonald's Caveat, we would respond as follows:
>
> 1. You have sent us the engrossment of the Transfer for our clients' execution, with details of the Caveat inserted in the Prior Encumbrances box.

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> 2 The interest claimed by McDonald's under the Caveat is consistent with their interest as tenant to which the sale of the building by our clients to yours is subject."

8. PC replied on 14 August, saying that the Defendants would not have agreed to purchase the Property if the sale was subject to the caveat because there would be a problem in obtaining financing if the caveat was not removed. On the same day, in a second letter to TRC, PC stated that the caveat had to be withdrawn and required TRC's confirmation that the Plaintiffs would procure its removal upon completion. TRC replied on the same day and pointed out that the interest claimed under the caveat was the same interest which McDonald had under the tenancies and which the Defendants had purchased the Property subject to. To this PC replied on 15 August saying that the Defendants' position on this remained unchanged. PC also said that their concern was real as the financial institution from which they were obtaining finance would not disburse the loan unless the caveat was withdrawn. The solicitors had a further exchange of letters on 16 August in which they merely affirmed their respective positions.

9. In the event, the Defendants did not complete the purchase on the completion date, 16 August 1996. On 17 August TRC sent to PC a notice to complete pursuant to condition 29 of the Law Society's Conditions. On the same day, PC also sent a similar notice to complete to TRC. In this letter, PC referred to their letter of 16 August in which they stated that the Defendants were prepared to complete if there was a withdrawal of the caveat and "service of a proper completion account." Thereafter the parties continued to negotiate an acceptable manner in which the sale can be completed but to no avail.

Originating Summons 898 of 1996

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10. On 6 September 1996 the Plaintiffs took out Originating Summons 898 of 1996 for a declaration that the Defendants were precluded from insisting on the withdrawal of the caveat, and other consequential relief. On 17 November the Defendants took out Originating Summons 1147 of 1996 for the opposite relief. OS 1147/1996 was not proceeded with. In OS 898/1996, the Defendants succeeded at first instance but the Plaintiffs appealed. At the end of the hearing on 6 October 1997, the Court of Appeal allowed the appeal.

11. Following the decision of the Court of Appeal, the parties resumed negotiations on the matter. Following a meeting on 7 October 1997, PC wrote a letter to TRC on 15 October asking for confirmation that *"all deposits under all the Leases and also the Bank Guarantees referred in the Leases will be included in the completion account"*. TRC replied on 17 October to say that there was only one tenancy deposit of $24,000 collected from McDonald and that they had only one bank guarantee in the sum of $72,000. To which PC replied on 20 October by saying:

> "2. My clients do not agree with your interpretation of Clause 4(3) of the Option …
>
> 3. You're well aware that my clients inspected the leases (Clause 4(2) of Option) and under the same sub-clause, no further elucidation was required to be given. Clearly from your clients' point of view, the Leases are self-explanatory – i.e. deposits are paid upon execution of the Leases and not upon commencement of Leases. My clients purchased the said property taking the Leases therein as correct.
>
> 4. Clause 4(3) of the Option also speaks of "deposits" and "leases" and not of one single deposit under one lease.
>
> 5. My clients' contention is they acted on material representations in the Option and the Leases and the total deposits and value of bankers' guarantees to be transferred to my clients on completion are:-
>
> Bankers' Guarantees - $504,000.00
>
> Cash Deposits - $168,000.00

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> 6. On the original completion date, your clients were not ready to deliver up to us the above Bankers' Guarantees … and cash deposits … Now by your telefax of 17/10/97, my clients learnt that you clients "have not received any further deposit for the future leases"…
>
> …
>
> 9. My clients … will be ready to complete at the end of 8 weeks from today … My clients trust that your clients will comply with the terms of the Option and complete with consideration given to all deposits under all leases and also that all Bankers' Guarantees are to be delivered up …"

12. TRC responded to this point in their 3 November 1997 letter in the following manner:

> "As your clients have been informed, McDonald's have provided our clients the deposit in respect of the current lease expiring on 20/5/88 **[*sic*]**. This has been provided by a payment of $24,000/- and a bank guarantee for the balance of $72,000/-. No deposits in respect of the 5 leases which are yet to commence have been provided to our clients."

Naturally PC replied to this. In their 6 November letter, they said that the option stated that the Property was sold with seven leases. As each lease provided for a cash deposit and bank guarantee, there would be seven deposits and bank guarantees collected by the Plaintiffs and these should be handed over to the Defendants upon completion. In the letter, PC also stated the following:

> "(a) … [the Defendants] were never led to believe that the Tenant had failed in its obligations to pay up all the deposits.
>
> …
>
> (d) The Option agreement also provides for inspection of the leases and my clients inspected same before contracting with your clients and they agreed to purchase knowing they would be buying all deposits under all leases and all Bank Guarantees to be delivered on completion. … "

The Writ of Summons

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13. In view of this impasse, the Plaintiffs took out the writ in this action on 13 November 1997. Nevertheless negotiations continued, this time with M/s Allen & Gledhill ("A&G") who took over conduct of the matter from PC after the writ was filed. On 29 December 1997, TRC wrote to A&G to ask if the Defendants were prepared to complete on the basis that the question of whether the Defendants were liable to pay interest would be determined by litigation. A&G replied on 6 January 1998 to reject the proposal and to propose the following:

> "Our clients are prepared to complete on the basis of the terms set out in the Option, without any interest for late completion. Your clients should also transfer to our clients the security deposits for each of the leases entered into with the tenant. Similarly, the Bankers' Guarantee under each of the leases should also be transferred to our clients. The dispute over interest will be resolved by the court as being an issue raised by your clients in the action against ours."

On 14 January TRC responded by proposing to complete on the basis that a sum equal to 6 deposits of $24,000 each (by this time one of the seven leases had expired) and 6 bank guarantees of $72,000 each (totalling in all, $576,000) would be deducted from the amount payable by the Defendants on completion. The Plaintiffs would reserve their rights as to the sums deducted and would seek to recover these in this action, as well as to recover interest for late payment.

14. However matters were complicated by a fire in the Property which occurred on 6 January 1998. There was an exchange of letters regarding this and the Defendants refused to complete until they could ascertain the extent of the damage caused by the fire. There was also a dispute on who was liable to pay for the property tax from the period between the original completion date on 16 August 1996 to 31 December 1997, although the parties quickly agreed to reserve that issue for litigation. But the Defendants refused to commit themselves to completion until they were satisfied that the fire did not cause serious structural damage. On 24 January 1998, in Summons in Chambers 626

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of 1998, the Plaintiffs applied for summary judgment. This was heard on 19 March 1998 and the learned Senior Assistant Registrar dismissed the application and gave the Defendants unconditional leave to defend. The Plaintiffs' appeal against this decision was heard before me on 23 April 1998. I dismissed the appeal and affirmed the decision below granting the Defendants unconditional leave to defend.

15. Meanwhile on 15 January 1998, the Court of Appeal gave its written grounds of decision for OS 898/1996. This has since been reported in [1998] 1 SLR 917.

16. After the disposal of the application for summary judgment the parties proceeded with the exchange of pleadings. Paragraph 16 of the Statement of Claim states as follows:

> "The arrangement between the Plaintiffs and McDonald's was that, as a matter of practical and commercial common sense, there should be only one deposit at any one time. It was never contemplated that the Plaintiffs should require McDonald's to provide a number of deposits equal to the number of current and future Leases and the Plaintiffs waived any right that they had to make any demand of McDonald's to that effect."

The Defendants requested and obtained further and better particulars of this paragraph and they are as follows:

> "(i) The arrangement was that there was only ever to have been one month's deposit paid, which was "rolled over" when one lease expired and the next came into effect.
>
> (ii) The arrangement was the common understanding and intention of McDonald's and the Plaintiffs because McDonald's actual possession of the premises at any given time was based on a lease for a 3 or 2 year term.
>
> (iii) The Plaintiffs never intended to make such a demand of McDonald's. The waiver was technical, implied and given for no consideration."

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17. Those further and better particulars were filed on 19 May 1998. By a letter dated 18 June 1998, A&G purported to rescind the Agreement on the ground that the Plaintiffs had:

> (i) failed to be ready, able and willing to convey the Property to the Defendants by virtue of the Plaintiffs' breach of the Head Lease, which breach amounted to a defect in title; and
>
> (ii) failed to disclose to the Defendants before they exercised the option that the Plaintiffs had waived their right to collect rent deposits from McDonald, which amounted to a material misrepresentation.

18. The Defence was filed on 19 June 1998. Thereafter the parties proceeded along the usual course to the hearing. During the first week of the trial, on 30 October 1998, the Defendants applied for and obtained leave to amend the Defence and Counterclaim. In the course of the adjourned hearing, on 24 February 1999, the Defendants applied for and obtained leave to Re-amend the Amended Defence and Counterclaim. The Plaintiffs did not object to both applications. The crux of the Defendants' case is that they are entitled to rescind the Agreement on the grounds that:

> (i) there was a material misrepresentation in respect of deposits;
>
> (ii) there is a defect in title of the Property; and
>
> (iii) there was a material misrepresentation in respect of HDB approval for the leases.

In their counterclaim, they prayed for the return of the deposit of $1.65 million and various ancillary reliefs.

Misrepresentation on Deposits

19. The Defendants say that the Plaintiffs had represented to them that there were seven cash deposits and seven bank guarantees from McDonald in respect of the seven leases. They say that this was a material factor in inducing Lek to

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agree to purchase the Property. They seek to rescind the Agreement on the ground that the representation was false. The evidence of the Defendants' witnesses was that these representations were made in the following manner:

> (i) In the weeks leading to the grant of the Option on 17 April 1996, Boo had informed Low that there were seven sets of cash deposits collected from McDonald under the seven leases;
>
> (ii) At the meeting of 17 April 1996, Tan told Lek and Low that the Plaintiffs had collected seven cash deposits and that these would be transferred to the Defendants on completion.

20. Low said that he met Boo when he was at the Plaintiffs' offices in relation to another matter. This was "about March or April 1996". Boo had given evidence that this meeting took place on 8 April but Low said that it had to be before that date. This is because he had, following that encounter with Boo, prepared a feasibility report dated 8 April. This report was produced after he had done some research work relating to the Property, including having "many" telephone conversations with Boo to obtain details of the Property. Low said that he took about a week to prepare it after meeting Boo. It was in the course of these telephone conversations that Boo told him that the Plaintiffs had collected deposits from McDonald totalling $168,000, comprising seven deposits of $24,000 each. He had put this in his feasibility report. Lek confirmed receiving this report at that time.

21. In respect of the meeting of 17 April, Low said that while they were waiting for the option to be typed, the four of them conducted a conversation. In the midst of this, Boo left the room to retrieve a file. He returned with a stack of documents which Low gathered were copies of the McDonald leases. Lek perused the documents and asked questions about some of the terms. When the option was brought in, they read it. Lek asked Low about clause 4(3). He wanted to know the reason for the qualification "if any" in reference to deposits paid by

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McDonald. Low said that Lek asked Tan whether the Plaintiffs had all the deposits. Tan replied that this was a standard clause used by their corporate counsel for all their properties. Tan assured them that seven deposits had been collected and would be transferred to the Defendants on completion.

22. According to Lek, while waiting for the option to be prepared he asked some questions. One of these was the question of the deposits. Tan and Boo confirmed that the Plaintiffs held all the deposits paid to them by McDonald and these would be transferred to the Defendants on completion. He then asked to see copies of the McDonald leases and Boo then brought them into the room. As he perused the leases, Lek noticed that the each lease provided for the payment of a deposit upon execution. The cash deposit was $24,000 and there was also a bank guarantee for $72,000. Lek said that he asked Tan how this bank guarantee would be transferred to the Defendants. Tan replied that that they would ask McDonald to revoke the old guarantee and issue a new one in favour of the Defendants. When the option was brought in, Lek perused it and noticed the qualification in clause 4(3). He asked Tan about this and was told that this was the standard clause used by their lawyers. Tan assured him that since the seven deposits were collected from McDonald upon execution of the leases, they would all be transferred to the Defendants on completion.

23. The evidence of Boo in respect of this matter is simple. There was simply no mention of the deposits. The question of deposits was not raised in the course of his telephone conversations with Low prior to the meeting of 17 April 1996. He recalled that Low was not concerned with the McDonald leases at all, except insofar as their presence affected their renovation plans for the Property. Boo also said that there was also no mention about the deposits during the meeting of 17 April. As for Tan, he had since left the Plaintiffs and his recollection of the events of that meeting was hazy. He candidly conceded that they could have

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talked about deposits and HDB approval for the leases. But he said that he could not have informed Lek that there were seven deposits because he did not know how many deposits were collected. He also said that he could not have confirmed that the leases were approved because he did not concern himself with that level of detail. He left this matter to Boo.

24. The evidence of the witnesses for the parties are in total contradiction. I turn now to examine it in detail.

Feasibility Report

25. Low said that Boo had told him that there were seven deposits and that was why he had put this in his feasibility report dated 8 April 1996. This report was put up after rather extensive research and contains detailed computations of expected expenses and income including a "Sales Variability Table", which is a table showing how net income would vary according to the occupancy rate. The report shows that the project would cost a total of $21 million. It assumes a bank loan of 70% of the project cost. After deducting that loan, and deducting (what Low thought was) the total deposits of $168,000 collected from McDonald, the report projected the total capital requirement to be about $9.35 million. The problem is that even if, at that point, the Plaintiffs had collected a total of $168,000 from McDonald, the then current lease was due to expire on 20 May 1996, less than 2 months down the road. This would mean that by the completion date, one set of deposits would have been returned to McDonald and the Plaintiffs would have been left with $144,000 to hand over to the Defendants. Low said in the course of his preparation of the report he had received from Boo a list containing the details of the leases, including their periods and commencement dates. This clearly shows the expiry date of the current lease. Given the meticulous detail in which Low had produced the

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report, it is difficult to see how the fact that the total deposits would shortly be reduced to $144,000 could have escaped him.

26. The Defendants' solicitor, Prem Singh ("Prem"), said in cross-examination that he saw a copy of the feasibility report around 24 April 1996. This was when Low came to consult him on matters relating to planning permission. However the report that he saw was a handwritten document, not the typed document exhibited by Low. Prem also said in cross-examination that there was no date on that handwritten document. He said that Low told him that he did the report on 8 April. But this directly contradicts his own evidence-in-chief. Paragraph 10 of his Affidavit evidence-in-chief states as follows (with emphasis added):

> "When I next met with Steven and Low, I was shown a copy of a feasibility report which Low had prepared for Steven dated 8 April 1996. This contained Low's calculations and projections for their cineplex business. Amongst other things, I noticed that Low had made provision for the receipt of 7 sets of deposits from the Plaintiffs amounting to S$168,000.00, which would reduce the amount of capital outlay the Defendants would otherwise have had to make. This feasibility report pre-dates the Option granted by the Plaintiffs."

27. Boo said that the report could not have been prepared on 8 April for the simple reason that that was the day of his chance encounter with Low. To support this, he produced Low's name card which was exchanged for his at that meeting. He had pencilled on it the date "8/April '96". Boo explained that it was his practice, whenever he met anyone for the first time, to write the date of that meeting on that person's name card. To support this, he exhibited several other cards of people whom he had met. They all had dates and various annotations written on them. Tan corroborated this and said that Boo would normally write something on a person's name card immediately upon receiving it. He further said that it was Boo's practice to take notes at every meeting.

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Actions of Defendants' Representatives

28. The veracity of the witnesses' evidence can also be tested against their actions. This is particularly the case with the Defendants' representatives, Lek and Low. If it had been represented to them that the total deposits collected from McDonald was $168,000 and it was an important factor to them, then one would expect that they would at least raise the subject as soon as there was any indication that the deposit was only $24,000. However this was not the case.

29. The first mention in a document of there being only one cash deposit appears in a letter from TRC to PC dated 4 June 1996 which says (with emphasis added):

> "We enclose herewith the form of letter of confirmation required by McDonald's in exchange for their consent to the transfer to your clients of the cash deposit which is now held by our clients. Please arrange for the letter to be signed by a director of LKM Investment Holdings Pte Ltd and let us have it soon."

The "letter of confirmation" referred to was required by McDonald to be given by the Defendants to them before they would agree to give a release pursuant to clause 4(3) of the option to the Plaintiffs. The enclosed form of letter of confirmation states as follows:

> "To: McDonald's Restaurants Pte Ltd
>
> …
>
> RE: LEASE OF PART OF REGAL THEATRE
>
> We write advising that we have entered into an agreement to purchase the above property from your landlords, Cathay Theatres Pte Ltd, on the basis that our purchase is subject to the existing tenancy arrangements made between Cathay Theatres Pte Ltd and yourselves.
>
> In consideration of your consent to Cathay Theatres Pte Ltd transferring the cash deposit of $24,000.00 which they are holding under the existing lease for the period 21st May 1996 to 20th May 1998 we write confirming our agreement to accept and be bound by the terms and conditions of:-

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> (a) The original 3rd, 4th and 5th Leases …; (b) The Deed of Variation of 6th December 1990; (c) The four Leases drawn up to cover the period mentioned in (a) in replacement of those Leases; and (d) The three Leases dated 23rd April 1991 for the period 21st May 2002 through to 20th May 2008. …"

If the covering letter did not highlight the fact that only one deposit of $24,000 was held by the Plaintiffs, this draft letter of confirmation would have put the matter beyond doubt.

30. Lek said in cross-examination that the first time he learnt that there was only one deposit was when his solicitor forwarded this draft letter to him for his signature around 4 June 1996. When asked whether he raised this issue with Prem, he gave the following answer:

> "Yes. I said this absolutely cannot be accepted because we were promised to have 7 sets of deposits transferred to us upon completion amounting to $168,000 and not $24,000. We felt shortchanged, that was reason why we refused to sign [the McDonald draft letter]."

He said that Prem agreed with his position. However the indignation he expressed under cross-examination was not manifested at the time. When PC replied to the TRC letter of 4 June, all they said was that they would like to look at the documents mentioned in the letter of confirmation. When asked about this, Lek said that it was possible that he had not yet discussed the matter with Prem when this was sent. He was shown a letter from PC to TRC dated 12 June 1996 which also did not reflect his position regarding the quantum of the deposit, although he agreed that by this time he had discussed the matter with Prem. He then explained that at that time he did not want to "jump the gun" and refuse to complete merely on this ground. Yet he had said in cross-examination that *"this absolutely cannot be accepted"*. Lek said that Prem advised him that even if only one deposit was collected, based on the leases executed, the Defendants would have the right to collect the other six after completion if the

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Plaintiffs were prepared to assign this right to them. He said that he expected and assumed that Prem would pursue this matter and left it to him.

31. Prem's position is rather different. He said that he first realised that the Plaintiffs were only going to transfer one deposit only when he received TRC's letter of 1 August 1996 containing the completion account, and not on 4 June when he received the McDonald draft letter of confirmation. The TRC letter of 1 August enclosed the completion account which states that the deposit from McDonald is $24,000. But there was also no written protest from the Defendants about this. Prem explained that when Lek received the McDonald draft in early June, he refused to sign it because the letter was "wrong". Lek told him that he wanted all the deposits to be mentioned in the letter of confirmation and that he would take this up with the Plaintiffs. He said that Lek did not revert to him on this issue and the next thing that happened was the receipt of the completion account on 1 August 1996. He discussed this with Lek who was unhappy that the deposit was stated as $24,000. However he said that by then Lek was preoccupied with the caveat issue and instructed him to concentrate on that instead because it was crucial to their ability to secure the loan. Lek told him not to "push" on the deposits issue. Moreover they were confident that the Plaintiffs would assign to the Defendants the right under the lease to collect the remaining deposits. However there is no evidence from Lek that he told Prem not to "push" the deposits issue. Indeed the affirmative evidence from Lek was that although he did not specifically instruct Prem to pursue this matter, he expected and assumed that Prem would do so.

32. Furthermore, what Prem said does not accord with a paragraph in a letter that PC themselves wrote to TRC on 16 August 1996 which goes as follows (with emphasis added):

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> "4. Please note that for completion purposes, the tenancy deposit will have to be deducted in your final completion account so that in effect upon completion our clients will already have the tenancy deposit in their possession."

One would have thought that, given the importance the Defendants attached to the issue of the deposits, and the fact that by then Lek and Prem had considered the matter in detail, at the very least there would be some reservation of position rather than complete silence. And even if there is no such reservation of position, then at least the Defendants would not have compromised their position as paragraph 4 of the letter above appears to have done.

33. Completion did not take place on 16 August and on 17 August, TRC and PC exchanged "notices to complete". On 19 August, TRC sent a letter to PC which said that, since the Defendants have failed to obtain the letter of release from McDonald, they would be obliged to complete the purchase "without the transfer of the cash deposit". PC replied on the same day and responded to this in the following manner (with emphasis added):

> "… Your clients' problems if any with McDonald's on the deposit is of no concern to the final completion account between our clients and yours. Clearly our clients are entitled to hold a tenancy deposit upon the Completion since the Sale is subject to tenancy."

It should be borne in mind that TRC had, on 1 August, sent to PC the completion account which stated that the deposit was $24,000 and therefore there can be no question that the words underlined refers to this sum. But the ultimate indicia of the state of mind of the Defendants' representatives must be the letter from PC to TRC dated 2 September 1996 in which they tendered the Defendants' completion account. It is clearly stated there that the amount of rental deposit is $24,000. Although this is expressed in the completion account as "2 months rental deposit", that is clearly in error because: (a) it does not accord with the

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Defendants' position that there should be seven deposits; and (b) the amount relates to the actual deposit in respect of one lease.

34. Indeed the first mention by the Defendants in the course of correspondence that they had expected 7 deposits was in the letter from PC to TRC on 15 October 1997. This was after the Court of Appeal had given its decision on OS 898/96. The parties had suspended matters pending the decision of the court on this Originating Summons. In that letter, PC asked for confirmation that the Plaintiffs *"will complete according to the terms of the Option, namely that all deposits under all the Leases and also the Bank Guarantees referred in the Leases will be included in the completion account …"* TRC replied on the same day to say that the deposit comprised the sum of $24,000 in cash and a bank guarantee for $72,000. PC replied on 20 October 1997 and responded as follows:

> "…
>
> 3. You're well aware that my clients inspected the leases (Clause 4(2) of Option) and under the same sub-clause, no further elucidation was required to be given. Clearly from your clients' point of view, the Leases are self-explanatory – i.e., deposits are paid upon execution of the Leases and not upon commencement of Leases. My clients purchased the said property taking the Leases therein as correct.
>
> 4. Clause 4(3) of the Option also speaks of "deposits" and "leases" and not of one single deposit under one lease.
>
> 5. My clients' contention is they acted on material representations in the Option and the Leases and the total deposits and value of bankers' guarantees to be transferred to my clients on completion are:-
>
> Bankers' Guarantees - $504,000.00
>
> Cash Deposits - $168,000.00
>
> …"

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It is noteworthy that despite the very affirmative evidence: (a) of Low that Boo had clearly represented to him that there were seven deposits, and which Low had incorporated into his feasibility report; and (b) of both Low and Lek that Tan had made the same representation to them at the 17 April 1996 meeting, this letter does not mention these facts.

35. On 6 November 1997 PC wrote to TRC on various matters. In relation to the question of the deposits, they said the following:

> "…
>
> 2. **On the Deposits matter**
>
> (a) The property is sold with the seven (7) Leases as stated in the Option Agreement. The letter which your clients wanted my clients to sign addressed to the Tenant indicated clearly that my clients are asked to accept all the terms/obligations in all the Leases. That being the case all deposits required to be paid upon execution of the future leases must be collected by your clients as the leases were executed long ago. My clients were never led to believe that the Tenant had failed in its obligations to pay up all the deposits. My clients have always been prepared to sign McDonald's letter provided the Tenant complies with the terms of the Leases including the Deposits to be paid and your clients agree to deliver on completion all deposits and all Bank Guarantees under all Leases.
>
> (b) The provision "the deposits (if any)" surely must relate back to what the leases provide as sale is with those leases. Hence there were deposits to be paid upon execution of the leases and my clients purchase with all deposits and all bank guarantees to be delivered to them on completion. Clause 4(3) of the Option Agreement speaks of "deposits" and "leases" in the plural sense.
>
> (c) If only one deposit was to be delivered on completion, your clients would have stated this to be the case in the Option Agreement. However, Clause 4(3) does not deal with one deposit.
>
> (d) The Option agreement also provides for inspection of the leases and my clients inspected same before contracting with your clients and they agreed to purchase knowing they would be buying with all deposits under all leases and all Bank Guarantees to be delivered on completion. The terms of the Leases and Deed are clear enough. The Tenant's Caveat speaks

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> of all the leases and my clients want the terms of all leases compiled with for purposes of completion.
>
> (e) I reiterate the entire contents of my letter of 20/10/97. My clients note from your present letter there has been no reply from you or your clients to Paragraphs 6(a) and (b) of my letter. What exactly is your clients' position viz-a-viz **[*sic*]** the Tenant on the payments obligation by Tenant of all deposits under all leases at the time of execution (not commencement) of the Leases?
>
> (f) My clients' position is they were never "informed" that McDonald's have given your clients the deposit in respect of the Current Lease. My clients' had gathered from inspection of all leases that Tenant would pay all deposits upon execution of the leases. The words used in the leases are "Simultaneously with execution" of the leases the Tenant to furnish to your clients the deposits and the Bank Guarantees. It was during the conveyancing transaction period (i.e. towards completion) that my clients and I learnt that only one deposit will be transferred.
>
> …"

36. This letter gives reasons why, from the terms of the Agreement and from the seven leases, there should be seven deposits collected from McDonald. It also asserts that the Defendants' representatives *"were never led to believe that the Tenant had failed in its obligations to pay up all the deposits"* and that they were never "informed" that McDonald had given only one deposit. Given the evidence of Low and Lek that Boo and Tan specifically represented to them that there were seven deposits, it is remarkable that there is no mention at all of those allegations. Indeed in sub-paragraph (f), the Defendants admit that they learnt that there was only one deposit in the period leading up to the completion date.

37. Shortly after this the Plaintiffs filed the writ in this action and applied for summary judgment. It was only in their affidavits filed on 26 February 1998 in opposition to summary judgment that the Defendants mentioned in writing for the first time that Boo and Tan had represented that there were seven deposits.

OS 898/96

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38. In OS 898/96 Lek affirmed two affidavits. In his second affidavit on 17 October 1996, he said the following at paragraphs 9 and 10 (with emphasis added):

> "9. Finally, I would like to add that copies of the lease documents in question were forwarded by the Plaintiffs' solicitors to my solicitors on 8 June 1996. … Under the terms of those documents, it was stated in each of the said lease documents as follows:-
>
> *"(iv) Simultaneously with the execution of this lease to furnish to the Lessor a cash deposit of S$24,000.00 and a banker's guarantee from a reputable bank for a sum of Singapore Dollars Seventy-Two Thousand ($72,000) which shall be held as security for the due performance and observance of the terms, covenants and conditions herein contained. …"*
>
> 10. I was therefore under the impression that the deposits and banker's guarantees in respect of all the said lease documents had been given to the Plaintiffs. However, when the Plaintiffs' solicitors forwarded the completion account to us to **[sic]** their letter dated 1 August 1996, … , they only made reference to one deposit of S$24,000.00. This is presumably in respect of the current lease. From this, I can only conclude that no other deposits or banker's guarantee was provided. In other words no consideration has been given for the said leases intended to be created under the Sixth Lease Agreement onwards."

The sentence underlined clearly states that he was merely under the impression that the Plaintiffs had seven deposits (and bank guarantees) and that this impression was the result of an examination of the copies of the lease documents sent to PC on 8 June 1996. This clearly contradicts his evidence that: (a) Low had informed him that the Plaintiffs had advised that there were seven deposits and (b) Tan had affirmatively told him and Low at the meeting of 17 April that the Plaintiffs had seven deposits from McDonald.

Demeanour

39. In respect of demeanour of the witnesses, I would like comment on two of them. The first is that of Lek. I have personally noted that on more than a few

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occasions he took a long time to answer the question posed to him. On other occasions the question had to be repeated several times because he did not answer it to the point. While I accept that such behaviour can also mean that the witness is confused or nervous, I have to take into consideration that Lek is an experienced businessman of undoubted intelligence. Put at its highest, his performance on the witness box is not inconsistent with that of a person who is not telling the truth.

40. The second witness is Prem. Some of his explanations stretched his credulity. He had maintained that he had understood throughout that there were 7 deposits, not one. This was what Lek told him had been expressly represented by the Plaintiffs' representatives. When he was confronted with his letters of 16 and 19 August 1996 in which he used the term "the deposit", he explained that it was his practice to use the singular when he meant the plural. His explanation as to what he meant by "proper completion account" in the circumstances that prevailed then is also somewhat bizarre. But the most disturbing aspect of his evidence relates to a letter that he sent to the HDB dated 7 May 1996. It said that if the Defendants purchased the Property, they intended to increase the Gross Floor Area of the Property by not more than 50%. The letter asked whether this would require any rezoning and if so, whether a premium would need to be paid and the amount. It then continues:

> "5. There is an urgency in this letter in view of the date for acceptance of the Option, which is 17 May 1996. ..."

When he was cross-examined on this, he explained at first that the matter was urgent. However he was pressed further for an explanation and the following exchange took place:

> "Q : Was the urgency for the information required from HDB was because defendants wanted to have it before option exercise date of 17.5.96? You have stated that as far as you

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> were aware there was no connection between option exercise date and the urgency for the information. You now say that that is still your position despite what you have stated at paragraphs 2 and 4 of 464E-F.
>
> A : I was not instructed that defendants would not exercise option if answer unfavourable.
>
> Q : [Repeat question].
>
> A : Yes. That was how I would write a letter to get information as fast as I can, as solicitor. But it was not clients' instruction that they wanted information before option exercise date.
>
> Q : Is it your evidence that you manufactured this reason in your letter to HDB/URA, i.e., you made it up because it was not pursuant to client's instruction?
>
> A : Yes.
>
> Q : 464G-H. This is repeated in this draft, at paragraphs 2 and 5?
>
> A : Yes. This was sent to client and they approved it, including my "made up" reason."

41. It would appear that he was prepared, to put it bluntly, to lie to a government department in order to speed things up. This is the sort of behaviour that will cast his profession in extremely poor light. But I think it is more likely that the answer was made up at the spur of the moment, in the heat of cross-examination in order to avoid giving the answer anticipated by counsel. Whatever may be the case, he has shown that his evidence is not reliable.

Finding on representations

42. In view of the circumstances that I have described above, I find the allegations of Low and Lek that Boo and Tan had misrepresented to them that the Plaintiffs had collected seven deposits to be impossible of belief. Lek's reason for keeping silent was that they were preoccupied with the issue of the caveat. But that should not prevent them from at least registering their position as soon as they knew, around 4 June 1996, that there was only one deposit. I

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should add that on that date, the caveat was not in issue yet; it was first raised only in the letter from PC to TRC dated 29 June 1996. Also, as I have noted above, the evidence of the Defendants' witnesses are contradictory in material respects. In particular, Lek and Prem could not agree on what happened upon their discovery that there was only one deposit. Indeed they could not agree on when they made the discovery. Lek's evidence contradicts his own affidavit made in OS 898/96. And Prem's account of the feasibility report in his evidence-in-chief contradicts his version in cross-examination. On the other hand, the evidence of the Plaintiffs' witnesses were consistent throughout. If their version seemed to have the advantage of simplicity, it is because it is not complicated by any action or documents that were inconsistent with it. I find therefore that neither Boo nor Tan made any representation to Low or Lek that the Plaintiffs had collected seven deposits from McDonald. I accept their version that this matter was not raised between them.

Representation by documents

43. The Defendants have an alternative submission in the event that I hold that there were no oral representations as alleged by Low and Lek. They submit that such representations of fact had been made to Low and Lek by the fact that:

> (a) it was a term on all the leases that McDonald would pay a deposit upon execution;
>
> (b) these leases were shown to Lek and Low, or some of them were shown with the representation that they were typical of the rest; and
>
> (c) it was not disclosed to Lek that no deposit had been collected in respect of all the leases except for the current one.

The Defendants say that at the meeting of 17 April Boo had brought in the file and Lek had perused the leases. No statement or qualification were made by Tan or Boo in respect of the deposits. The Defendants say that the proferring of

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the leases for inspection amounted to a clear and unequivocal representation that the terms of each lease were governed by the written leases in the form in which they appeared, without any variation or waiver. Such representation was repeated on 22 April when Boo gave Low a selection of the leases for retention, with the express representation that the terms of the other leases were the same. And there was a further similar representation on 8 June when copies of all the leases were forwarded by the TRC to PC without comment.

44. The problem with this submission is that it was the unequivocal evidence of Low and Lek that express oral representations were made. Lek did not testify that at the 17 April meeting, when he perused the file containing the leases, he noticed that there was a clause in each lease that provided for payment of a deposit upon execution and that it was from there that he formed the impression that there were seven deposits to be handed over on completion. Lek had in fact said that when he noticed the "if any" qualification in clause 4(3) of the option he asked about it and was assured that there were seven deposits. He had testified affirmatively that he was led to believe that there were seven deposits through express oral representations. If he had attempted to give evidence that his belief was either through this, or through a perusal of the leases, obviously counsel for the Plaintiffs would have cross-examined him on this aspect. In making this argument the Defendants are, in effect, attempting to base a submission on alternative facts, as opposed to alternative arguments of law based on the same facts. In my view this alternative submission is totally devoid of merit.

45. Indeed, in Lek’s second affidavit for OS 898/96 affirmed on 17 October 1996, he said at paragraph 9 (see paragraph 38 above) that copies of the lease documents were forwarded by TRC to PC on 8 June 1996. He referred to the term in each lease providing for the deposit and said that he was therefore under

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the impression that there were seven deposits. While I accept that it can be argued that Lek was in this affidavit addressing a different issue, it is certainly consistent with his realising that there were seven deposits only on 8 June 1996 when the copies of the leases were forwarded to PC. However that date is well after the Defendants had exercised the option on 17 May 1996 and therefore this matter could not have been a factor in the decision to purchase the Property.

Materiality

46. I turn to the issue of whether, even if such representations were made, this was a material factor in the decision of Lek to purchase the Property. It is trite law that in order to have the right to rescind on account of a misrepresentation, the Plaintiffs must have relied on it.

47. The Defendants were not quite accurate in stating that the total of the deposits that they would get from McDonald was $168,000. While this figure was correct at the time the option was granted on 17 April 1996, the then current lease would expire on 20 May 1996 and the total amount of the deposits would then be reduced by $24,000 to $144,000. Be that as it may, since this is a factor in the minds of the Defendants' representatives, I shall assume that the figure is the higher one.

48. In Low's feasibility report, he projected that the capital requirement would be as follows:

> " **CAPITAL REQUIREMENT**
> TOTAL PROJECT COST $21,070,500.00
> BANK LOAN (70% OF PURCHASE PRICE) ($11,550,000.00)
> DEPOSITS FROM MACDONALD 7 LEASES ($ 168,000.00)
> TOTAL CAPITAL REQUIREMENT = **$9,352,500.00** "

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Low said that the capital required, of around $9.35 million, was to come from the Defendants' sources of funds, including any new investors they might be able to bring in. The difference between the $168,000 that the Defendants thought they would be getting and the $24,000 that the Plaintiffs said they would get is $144,000. This amounts to a grand total of 1.5% of the cash that the Defendants would need to raise for the project. This is a mere drop in the scheme of things. I cannot see how this could make any difference in the decision to purchase the property.

49. Indeed this is borne out in the manner in which Lek conducted the matter. When he discovered on 4 June 1996 that the deposit was only $24,000, he was not perturbed enough to raise any protest. Nor was there any response to the figure of $24,000 in the completion statement sent on 1 August. Prem argued that he did protest as he had insisted that TRC provide a "proper completion account" in his letter of 17 August 1996 giving the Plaintiffs notice to complete. That is an odd way to protest, even in respect of an unimportant matter much less in respect of an important matter such as this. If the Defendants choose to speak in riddles then they must take the consequences for any failure by normal persons to understand what they mean. However I do not find that they chose to speak in riddles. I find this explanation to be a colourable attempt to explain the inexplicable. This assertion is all the more incredible if one recalls that when PC sent their version of the completion account on 2 September 1996, they themselves had put the deposit as $24,000. Prem tried to explain that this was on instruction from Lek who had wanted to settle the matter amicably; but it is clear that there is really no substance in this evidence.

50. A critical issue is the importance of McDonald to the Defendants. The impression given by Lek's affidavits in the Originating Summons is that McDonald's tenancy arrangement was, if anything, a nuisance because of the

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presence of the Caveat. For instance, at paragraph 36 of his 1st affidavit in OS 898 of 1996 he said that:

> "… in a situation where there is no caveat, then if the HDB subsequently changes its policy and/or withholds approval for the future lease, then the Defendants would be entitled as against McDonald's to say that the leases cannot be granted because the future leases are all subject to HDB approval."

51. Also, Lek in cross-examination, had considerable difficulty in explaining the Defendants' letter of 16 April 1996 to the Plaintiffs. Low had, on behalf of the Defendants, sent this letter to the Plaintiffs offer to purchase the Property for $16.5 million but with certain conditions. In particular, it asked for a reduction in the lease period for McDonald, in the following terms:

> "We have outlined some proposals for Macdonalds in view of our redevelopment plans. One month notice will be given to them to vacate the premises before the physical redevelopment work commence. When the new premises is ready for business, Macdonalds can sign a new lease of between 5 to 9 years at S$8 per square foot with us. In return, we will compensate them $50,000 monthly for temporary closure of their business and a subsidy of up to 50% of renovation costs for their new outlet in Regal Theatre. Should Macdonalds choose to continue with the existing lease signed with your company despite having to enjoy better business in the newer premises after redevelopment, we will only compensate them the $50,000 monthly for the temporary closure."

This gives the impression that the Defendants would have been more than happy if McDonald were to agree to enter into a new lease for five to nine years paying more rent. The Defendants were going to offer McDonald lesser incentives for continuing under the existing arrangements. This suggests that the existence of an arrangement entitling McDonald to stay until 2008 with rental arrangements fixed in place was far from being an inducement to the Defendants to enter into the Contract. Low also suggested that he would have been very happy if McDonald had reduced their space to accommodate a food court and in fact move to a "new outlet" with a less advantageous frontage. One has to bear in

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mind the fact that the rent being charged at the time was in the region of $5 per square foot with provision for only relatively small increases for the remaining twelve years of the lease period. These matters would cast serious doubts on the Defendants' assertions that the Leases and deposits were very important to them.

52. I have no doubt on the evidence that, even if the representations were made as alleged, the Defendants placed no reliance at all on them and I so find.

Defect in Title

53. I turn now to the second ground of the Defendants, viz. that there is a defect in title entitling them to rescind the Agreement. The Defendants say that the leases entered into were not approved by the HDB. This would contravene clause 1(vi) of the Head Lease and entitle the HDB to determine the Head Lease. The following are the facts of the matter, which are largely undisputed, and the submissions of the parties in respect of those facts.

54. In 1987 the Plaintiffs and McDonald proposed to enter into a sub-letting arrangement for a twenty-one year period. They planned split it into three leases, each of seven years less one day. On 11 February 1987 the Plaintiffs and McDonald executed an Agreement for Lease for the first seven-year term, to commence sometime in 1987. This Agreement for Lease provided that it was subject to the approval of the HDB. As clause 1(vi) of the Head Lease prohibits the lessee from sub-letting the Property without prior approval from the HDB, TRC wrote to the HDB on 16 January 1987 to seek such approval. This letter goes as follows:

> "re: Proposed sublease of part of Cinema site "B" at Bukit Merah Town Centre for use as a Fast Food Restaurant
>
> We act for Cathay Theatres Pte Ltd the lessees of the above property under Lease I/92044B.

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> Our clients propose to lease part of the cinema premises to McDonald's Restaurant Pte Ltd for three terms of 7 years less 1 day each. On our clients' instructions, we submit herewith copies of the following for your perusal and approval of the terms therein:-
>
> (1) Agreement for Lease and Lease for the 1st term; (2) 1st Supplemental Agreement for Lease and Lease for the 2nd term; and (3) 2nd Supplemental Agreement for Lease and Lease for the 3rd term.
>
> Kindly let us have the Board's consent to the proposed granting of the leases and the Board's consent to the terms of lease as are set out in the abovementioned documents."

55. On 10 March the HDB replied to say that they had no objection to the proposed sub-letting if, among other conditions, it were only for a period of 3 years in the first instance with further renewal being subject to review. The relevant part of this letter is as follows:

> "…
>
> 2 We are pleased to inform you that we have no objection to allow your clients, M/s Cathay Theatres Pte Ltd, to sublet part of its Regal cinema premises to M/s McDonald's Restaurants Pte Ltd for use as a fast food restaurant subject to the following terms and conditions:-
>
> (a) The subletting terms shall be for a period of 3 years in the first instance. Further renewal will be subject to review.
>
> …"

56. McDonald was not satisfied with this and on 14 March TRC wrote to request the HDB to grant in-principle approval for seven leases of 3 years each. They cited an instance in which the HDB had granted such approval. The HDB replied on 8 April in the following manner:

> "PROPOSED SUBLETTING OF PART OF THE 1ST STOREY
>
> OF REGAL CINEMA TO McDONALD'S RESTAURANTS PTE LTD
>
> 1 We refer to your letter dated 14 Mar 87.
>
> 2 We are pleased to inform you that we have no objection in-principle for your clients, M/s Cathay Theatres Pte Ltd, to make

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> their own arrangement to sublet part of its Regal Cinema premises to M/s McDonald's Restaurants Pte Ltd for use as a fast-food restaurant for a total term of 21 years comprising 7 Subletting Agreements of 3 years each subject to their compliance with the terms and conditions as stated in our letter dated 10 Mar 87 therein.
>
> 3 However, please note that the Board's terms and conditions which are applicable to their subletting for the 1st 3 years may be subject to revision, if circumstances warrant for subsequent 3 years intervals."

57. Following this, TRC wrote to the HDB on 21 August 1987 to forward copies of the draft variation agreement to the original Agreement for Lease. This letter states as follows:

> "re: Sub-lease of part of the 1st storey of Regal Cinema to McDonald's Restaurants Pte. Ltd.
>
> We enclose herewith copies of the Variation of Agreement for Lease with forms of the 1st and 2nd Leases attached and pages 1 and 2 of the 3rd to 7th Leases for your approval. All the terms in the 3rd to 7th Leases are the same as the 2nd Lease except for the rents payable for each term."

The HDB replied to this letter on 29 September 1987 in the following manner:

> "1 Please refer to your letter dated 21 Aug 87.
>
> 2 We return herewith the draft Variation of Agreement for Lease and the draft 1st to 7th Leases for your necessary action.
>
> 3 However we shall be glad if you could kindly let us have the following information as soon as possible:-
>
> (a) The commencement date of the 1st Lease. (b) The actual floor area of the fast-food restaurant certified by a qualified surveyor."

58. Thereafter the Plaintiffs and McDonald entered into a Variation of Agreement for Lease on 10 October 1987. The preamble to this recites as follows:

> "WHEREAS:-

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> (1) This Agreement is supplemental to an Agreement for Lease dated the 11th day of February 1987 … whereby the Lessor agreed subject to the approval of the [HDB] to grant to the Lessee a lease of the premises … for a term of seven (7) years less one (1) day. (2) Pursuant to the terms of the Agreement for Lease the Lessor has applied to HDB for the necessary approval and HDB has given its approval to the Lessor for the subletting of the demised premises to the Lessee for a total period of twenty-one (21) years by seven (7) terms of three (3) years each subject to the terms and conditions contained in two letters from HDB … dated 10th March 1987 and 8th April 1987 respectively. …"

59. On the same day, 10 October 1987, the seven leases of three years each were executed by the Plaintiffs and McDonald. There matters rested for a while until the first three-year lease was about to end in May 1990. On 17 May 1990, TRC wrote to the HDB as follows:

> " We refer you to the above matter and enclose for your reference copies of your letters dated 10.3.1987 and 8.4.1987 approving the above subletting for a total term of 21 years comprising 7 sublettings of 3 years each.
>
> The first term of 3 years of the 7 sublettings commencing from 20.5.1987 expires on the 20th of May 1990.
>
> Our clients understand that under the Board's present management policy only a maximum period of a 2 year term for each subletting will be permitted by the Board and we are instructed to enquire if in this instance the previous approval of the Board given in respect of the above sublettings still stands."

60. The HDB replied on 21 May 1990 in the following manner:

> "1 We refer to your letter dated 17 May 90.
>
> 2 We would like to confirm that our present management policy only allow subletting for a maximum period of 2 years in each instance.
>
> 3 We wish to explain further that our previous approval given to your clients was for the first subletting term of 3 years commencing 20 May 87. Subsequent renewals of the tenancy upon expiry of existing term are subject to our review as specified clearly in para 2(a) of our approval letter dated 10 Mar

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> 87; your clients have also accepted these conditions vide your letter dated 21 Mar 87.
>
> 4 Please therefore advise your clients to apply to this office for the 2nd subletting term (maximum of 2 years) as soon as possible."

61. Following this, the Plaintiffs and McDonald entered into a second variation agreement whereby the six remaining three-year terms were amended into two-year terms. This would leave a shortfall of six years up to May 2008 and in order to close the gap, they decided to enter into three further leases of two years each. Accordingly TRC wrote to the HDB on 28 May 1990 in the following manner:

> " We thank you for your letter of the 21st instant and enclose a copy of Lease dated 10th October 1987 signed by the parties and stamped in respect of the 2nd subletting for a term of 3 years commencing from 21st May 1990.
>
> The Lessee has agreed to enter into a Deed of Variation to vary the term of the above Lease from 3 to 2 years and pending the preparation of the Deed, we are instructed by the Lessor to seek the Board's approval for the second subletting for a term of 2 years commencing from 21st May 1990 on the terms and conditions contained in the enclosed copy of the Lease save for the term to be varied from three to two years."

62. The HDB replied on 6 June 1990 as follows:

> "1 I refer to your letter dated 28 May 90.
>
> 2 Board's approval has been obtained to allow your clients to sublet the space on the 1st storey of the cinema premises to M/s McDonald's Restaurants Pte Ltd subject to the following terms and conditions:
>
> … (b) The subletting term shall be for a period of 2 years wef 21 May 90 but if the HDB should at any time before the expiry of the subletting term withdraw this consent by giving 3 months' notice in writing to your clients, the subletting term shall absolutely determine upon expiry of the said notice. In the event of withdrawal of consent, neither your clients nor the Subtenant shall hold the HDB liable for any loss, damages, compensation, costs or expenses whatsoever and your clients shall indemnify the HDB against all or any claims, proceedings or actions relating thereto. … (d) Your clients and the Subtenant shall accept all the covenants and conditions set out in

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> Appendix A hereto and forward to the HDB the Deed of Variation to the subletting agreement.

…"

63. It would appear that the HDB had decided to reserve to themselves the right to withdraw their consent for this second lease by giving three months' notice. Interestingly, this letter asks for a copy of the Deed of Variation to the subletting agreement. The HDB's conditions were accepted by the Plaintiffs and McDonald. On 16 November 1990 TRC wrote to the HDB to ask if they were required to submit a draft of the Deed of Variation to the subletting agreement for their prior approval before execution. On 19 November 1990 the HDB replied to say that TRC *"would only have to forward a copy of the duly signed Deed of Variation for our record "*. On 6 December 1990 the Plaintiffs and McDonald executed the second Deed of Variation and TRC sent a copy of this to the HDB on 11 December 1990. This second Deed of Variation contains the following preamble:

"WHEREAS:-

> (1) This Deed is supplemental to the several leases hereinafter mentioned all dated the 10th day of October 1987 …. [the six leases for two-year period from 21 May 1990 to 20 May 2002 are listed]
>
> (2) Prior to the subletting of the demised premises under the Leases the Lessor applied to the [HDB] for its approval for the subletting and such approval was given by the Board subject to certain terms and conditions which terms and conditions are subject to revision by the Board from time to time if circumstances warrant.
>
> (3) For the purposes of complying with the Board's revised conditions for the said subletting the parties hereto are desirous of reducing the terms of the Leases from terms of three (3) years to terms of two (2) years each so that instead of six (6) terms of three (3) years each granted under the Leases there shall be nine (9) terms of two (2) years each to be effected in the manner hereinafter appearing."

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This was followed by the execution of three further leases on 23 April 1991 to cover the last six years from 2002 to 2008.

64. The Plaintiffs contend that the HDB letter of 8 April 1987 constitutes the approval of HDB for the six reversionary leases. Furthermore, they say, they had forwarded the draft Variation Agreement for Lease to the HDB for their approval and although the HDB did not specifically say that they approved it, they raised no objection to it. The Plaintiffs also say that the circumstances surrounding the second Deed of Variation, in which the six leases of three years each were varied to two-year terms and a further three leases of two years each were agreed upon, shows that the HDB had given their approval at the outset. On the other hand the Defendants submit that no such approval was given because the HDB only specifically approved the current lease. In respect of the reversionary leases, the HDB had only "no objection in-principle". Furthermore, it was stated that the terms and conditions of the reversionary leases were subject to revision.

65. In my view the HDB had approved the leases. My reasons are as follows. Clause 1(vi) of the Head Lease provides:

> "1. AND THE LESSEE for itself and its successors and assigns hereby convenants with the Lessor as follows:-
>
> …
>
> (vi) Not to …, sublet or underlet the said land and/or the buildings thereon in whole or in part without first obtaining the consent of the Lessor in writing which consent the Lessor may give on terms and conditions as it may in its absolute and unfettered discretion deem fit and which terms and conditions shall include the levy of a fee. Section 17 of the Conveyancing and Law of Property Act … shall not apply;
>
> …"

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This provision obliges the Plaintiffs to obtain the consent of the HDB before they can sublet or underlet the Property or any part of it. The HDB may give consent on such terms and conditions as they see fit. TRC had written to the HDB on 16 January 1987 (see paragraph 54) specifically asking for such consent for the three proposed leases and for the terms of the leases. The HDB replied on 10 March 1987 (see paragraph 55) to say that they *"have no objection"* to the subletting, subject to a number of terms and conditions, one of which was that the subletting terms shall be for periods of three years only. Clause 1(vi) of the Head Lease states that the *"consent"* of the HDB is required and yet, in response to a specific request for such consent, the HDB say that they *"have no objection"* to such request. If the Plaintiffs concluded from this that the HDB use the expression "no objection" to mean "consent" I think not only was it reasonable for them to do so, but it would be entirely accurate.

66. To prove this point beyond doubt, I need only to cite another instance of this linguistic tendency of the HDB. Shortly after the Defendants exercised the option to purchase the Property, TRC wrote a letter to the HDB to seek their consent for the sale as they are required to do under the Head Lease. This letter, dated 20 May 1996, goes as follows (with emphasis added):

> " We act for Cathay Theatres Pte Ltd, the lessees of the above property under Lease No. I/92044B.
>
> Our clients have contracted to sell the unexpired term of the said lease to LKM Investment Holdings Ptd Ltd subject inter alia to your consent to the sale. A copy of the Option is enclosed.
>
> Completion of the sale is scheduled for 16th August 1996.
>
> Please let us have your consent to the sale as soon as possible. If there is any other information your require on this matter, please do not hesitate to contact our Ms S J Chew."

On 4 July 1996, the HDB replied as follows (with emphasis added):

> " We refer to your letter dated 20 May 1996.

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> 2 We have no objection to your proposed assignment of the above property to M/s LKM Investment Holdings Pte Ltd subject to the payment of a … fee of $515 … to the HDB for its consent to the proposed assignment.
>
> …"

True to form, the HDB used the expression "no objection" synonymously with "consent". It should be borne in mind that this second event took place almost ten years later.

67. For this reason, when the HDB stated in their 8 April 1987 letter (reproduced above) that they had *"no objection in-principle"* to the Plaintiffs' proposal to sublet the premises to McDonald for seven three-year leases, there can be no doubt that the HDB had consented to it, subject to the terms and conditions specified. I do not think that the addition of the words *"in-principle"* changes the nature of the consent. At most it emphasises the fact that it is subject to the right of the HDB to change their minds in respect of any reversionary lease that came up upon the expiry of the current lease. But it does not detract from the fact that the HDB had approved the Plaintiffs' proposal to enter into those reversionary leases subject always to the HDB's conditions.

68. A possible complication arises in the HDB letter dated 21 May 1990 (reproduced above). Paragraph 3 of that letter states that *"our previous approval … was for the first subletting term of 3 years commencing 20 May 87. Subsequent renewals of the tenancy upon expiry of existing term are subject to our review as specified clearly in para 2(a) of our approval letter dated 10 Mar 87; our clients have also accepted these conditions vide your letter dated 21 Mar 87."* However the approval for the Plaintiffs to enter into the reversionary leases is contained in the letter of 8 April 1987 and it incorporates the terms and conditions contained in the letter of 10 March 1987. In my view the HDB letter of 21 May 1990, by making reference to the 10 March 1987 letter, merely

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reiterated the condition that the HDB reserved the right to review each lease renewal application and withhold approval if they deem it appropriate. It must be remembered that clause 1(vi) of the Head Lease provides that the HDB may give consent on such terms and conditions as they deem fit. The conditions specified, including the term that each fresh lease is subject to their review, were made pursuant to this power. It is no less a consent with this condition attached to it.

69. Perhaps the root cause of the Defendants' complaint in relation to this issue is the response from the HDB to their inquiry on whether the reversionary leases had been approved. On 27 August 1996, PC wrote to the HDB along the following terms:

> "…
>
> According to the Board's Lease to Cathay Theatres Pte Ltd the use of the land or any part of the building is for cinema. Please advise whether the Board had approved part for fast food operations and if so whether that part had received legal sub-division approval.
>
> Kindly also let me know whether you had granted consent to McDonald's past and current and future leases. McDonald had executed separate leases (originally 3 years each but subsequently changed to 2 years each) in 1987 and also 1991 and the combined effect of the leases would allow McDonald's to be the tenant up to year 2008.
>
> According to a Deed dated 6 December 1990 between Cathay Theatres Pte Ltd and McDonald's reference was made to the HDB's alleged "Revised Conditions for Subletting" and thus the executory leases of 3 years were reduced to 2 years each. A copy of the Deed is enclosed.
>
> … let us know whether the HDB "Revised Conditions for Subletting exist …"

70. On 30 August, the HDB replied in the following manner:

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> " We refer to your letter dated 27 Aug 96 and our recent telephone conversation with Mr Low Heng Yuen from LKM Investment Holdings Pte Ltd.
>
> 2 Currently, we have granted approval for subletting of the space of the above premises to McDonald's Restaurants Pte Ltd for 2 years for period of 21 May 96 to 20 May 98. Our records do not show any approval for legal sub-division of the premises.
>
> 3 Prior to this, our similar subletting approvals were also granted as follows:-
>
> (a) 2 years from 21 May 94 to 20 May 96 (b) 2 years from 21 May 92 to 20 May 94 (c) 2 years from 21 May 90 to 20 May 92 (d) 3 years from 21 May 87 to 20 May 90
>
> 4 You would notice that our present policy only allows subletting for a maximum period of 2 years in each instance. Subsequent renewals of the subletting upon expiry of existing term are subject to our review."

71. This, of course, is a non-answer as what the Defendants were interested in was not whether those past and the current leases were approved, but whether the HDB had given their consent to the Plaintiffs granting the reversionary leases to McDonald. All that the HDB said in their reply was that subsequent renewals of the subletting upon expiry of the existing lease were subject to review. But this is entirely consistent with the situation: HDB had given their approval for the Plaintiffs to enter into the reversionary leases with McDonald on condition that, among other things, each lease, as it came up, would be subject to review and the HDB had the right to refuse consent at that time. PC did not help matters by stating, quite inaccurately, that *"the combined effect of the leases would allow McDonald's to be the tenant up to year 2008"*. This is not true because it would be conditional upon the HDB's review every two years. Therefore if the HDB had reacted to this statement in giving the reply in that manner, and I strongly suspect that they had, then the Defendants have only themselves to blame. The Defendants did not seek clarification from either the HDB or the Plaintiffs on this letter, but it must be remembered that the parties were embroiled in the dispute over the caveat at this time. The Defendants were

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in fact seeking ways and means to oblige the Plaintiffs to procure the withdrawal of the caveat.

Waiver by HDB

72. The Plaintiffs submit that even if there was a breach of the Head Lease, the HDB had waived their rights to forfeit pursuant to clause 3. This is a standard forfeiture clause and it states as follows:

> "3. PROVIDED ALWAYS that … if any covenant on the part of the Lessee hereinbefore contained shall not be performed or observed … it shall be lawful for the Lessor … to enter upon and take possession of the said land and buildings or any part thereof in the name of the whole and thereupon the term hereby created shall absolutely cease and determine …"

73. The Plaintiffs cite Gray's Elements of Land Law (2nd edition) where the learned author said, at p.832:

> *"(j) Waiver of breach*
>
> The landlord's exercise of a right of re-entry for breach of the tenant's covenants is subject to the operation of the doctrine of waiver.
>
> *(i) Principle of waiver* Even if a lease provides that the tenant's term of years shall be void in the event of a breach of covenant, it is clear that the lease does not ipso facto become void. The tenant is not permitted to take advantage of his own wrong and the landlord has a right to elect whether to treat the lease as forfeited or as remaining in force. This election need not be made immediately, but once made it cannot be retracted.
>
> It is against this background that the waiver of forfeiture operates. A landlord is precluded from seeking re-entry (though not in general from recovering damages or arrears) if with knowledge of the tenant's default he does some act which unequivocally indicates his intention to regard the lease as subsisting. Both knowledge and active recognition of the subsistence of the lease are necessary. … Waiver, where it does occur, may be either express or implied.
>
> *(ii) Implied waiver of forfeiture* Although an implied waiver of forfeiture can arise in many kinds of circumstance, it seems

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> that conduct in relation to rent may 'fall into a special category'. …
>
> Waiver may also occur, although somewhat less automatically, in other categories of case. In matters not connected directly with the payment of rent, the courts seem to be more 'free to look at *all* the circumstances of the case' in considering whether the landlord's actions are consistent with his avoiding the lease. Waiver may well arise where the landlord, with knowledge of the breach giving him a right of re-entry, engages in action so unequivocal as to be consistent only with the continued existence of the landlord-tenant relationship. …
>
> *(iii) Temporal scope of the waiver* In the case of a 'once and for all breach', any proven waiver of forfeiture precludes any claim by the landlord to forfeit the lease on the ground of the particular breach which had occurred, but does not operate as a general waiver in relation to similar breaches in the future. …"

74. The breach concerned here is a "once and for all" breach. The HDB had constructive notice of it when TRC sent to them a copy of the Deed of Variation of 6 December 1990. This contains a reference to the seven three-year leases granted to McDonald, and another to three further two-year leases to be granted. There have been further correspondence subsequently, from both TRC and PC to the HDB, setting out the nature and details of the arrangement between the Plaintiffs and McDonald. No objections whatsoever have been voiced by the HDB. Indeed the HDB had collected ground rent from the Plaintiffs and there is nothing in the Head Lease that provides that such receipt shall not constitute a waiver. I should add that in giving approval to the Plaintiffs for the sale of the Property to the Defendants, the HDB is engaging "in action so unequivocal as to be consistent only with the continued existence of the landlord-tenant relationship". I conclude that, if there has been a breach, it is clear that the HDB had elected to waive it. However I note that the HDB had never taken the position that the Plaintiffs had breached clause 1(vi) even though the matter was brought to their attention by PC.

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Issue estoppel

75. The Defendants say that the question of whether the Plaintiffs have breached the Head Lease by entering into the leases without the consent of the HDB had been determined by the High Court in OS 898/96 in which the Plaintiffs lost at first instance. Although the Court of Appeal subsequently allowed the appeal, it did not deal with this part of the judgment of the court below. Therefore, they say, the determination of this issue by the High Court gives rise to an issue estoppel between the parties.

76. The judgment at first instance held that the grants of the reversionary leases were made without the consent of the HDB and the Plaintiffs had therefore contravened the Head Lease. This would entitle the HDB to re-enter for breach of covenant. The Court of Appeal had this to say about this issue in its grounds of decision:

> " We need only to say a brief word on the reversionary leases. The learned judicial commissioner held that the interest of McDonald in these leases is an *interesse termini* and is capable of supporting a caveat under s 115 of the Land Titles Act. He further held that, notwithstanding the fact that the reversionary leases were made without HDB's consent, they are not illegal but that they would entitle HDB to exercise its right of re-entry under the head lease. The reversionary leases, in his opinion, were valid. This conclusion was challenged by the respondents. They contended that the learned judicial commissioner had failed to consider the fact that the grant of the reversionary leases without HDB's approval contravened s 50 of the Housing and Development Act and were therefore void.
>
> We do not find it necessary to consider the issue of reversionary leases. Suffice it to say that the validity of the reversionary leases has no bearing on the issue at hand. Even if the reversionary leases are indeed void so as to be incapable of supporting a caveat, the respondents would be at liberty, upon registration of the transfer, to seek the withdrawal or amendment of the caveat under s 127 of the Land Titles Act."

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77. The question is whether, given that the Court of Appeal had found it unnecessary to consider the issue of the reversionary leases and therefore did not deal with it, the finding of the court below can give rise to an issue estoppel between the parties. The Defendants contend that it does as it was expressly not disturbed on appeal nor inconsistent with the decision of the Court of Appeal. Therefore the determination by the High Court that there was a breach of covenant remains a final decision by a court of competent jurisdiction.

78. According to Halsbury's Laws of England, Vol 16 (4th Edition), the three conditions giving rise to issue estoppel are:

> (i) the same question was decided in both proceedings;
>
> (ii) the judicial decision said to create the estoppel was final; and
>
> (iii) the parties to the judicial decision were the same persons as the parties to the proceedings in which the estoppel is raised.

The Plaintiffs agree that conditions (iii) is satisfied but not (i) and (ii). I am of the same view. The finding of the High Court that the Plaintiffs had breached the covenant was held by the Court of Appeal to have no bearing on the issue at hand. Quite apart from authority, it would be alarming if, where the Court of Appeal has determined that a particular finding made in the court below had no bearing on the dispute between the parties and therefore did not deal with it, an issue estoppel could arise out of this finding. This is because the Court of Appeal may well have determined that such finding was wrong if it had chosen to address that issue. For obvious reasons a court does not normally decide on matters not necessary to its decision.

79. In any case, direct authority in support of the Plaintiffs' position is found in *Re State of Norway's Application (No 2)* [1989] 1 All ER 701, a decision of the

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English Court of Appeal which was reversed by the House of Lords, but on other grounds. At p 721, Balcombe LJ said:

> "1(C) *Issue estoppel*
>
> In my judgment the same considerations which preclude the judgments of the first Court of Appeal from constituting a binding precedent also preclude their constituting an issue estoppel by which the witnesses are bound.
>
> 'Even when in one way or another it can be demonstrated that the court has *expressly* determined, in the earlier proceeding, the same issue as is now in dispute, an issue estoppel will not by any means always be the result. Only determinations which are necessary to the decision—which are fundamental to it and without which it cannot stand—will found an issue estoppel. Other determinations, without which it would still be possible for the decision to stand, however definite be the language in which they are expressed, cannot support an issue estoppel between the parties between whom they were pronounced.'
>
> (See Spencer-Bower and Turner *Res Judicata* (2nd edn, 1969) para 210, p 179.)
>
> The editor continues (para 211, pp 181–182):
>
> 'In order to make this essential distinction [between the fundamental and the collateral] one has always to inquire with unrelenting severity—is the determination upon which it is sought to found an estoppel so fundamental to the substantive decision that the latter *cannot stand* without the former. Nothing less than this will do.' (The editor's emphasis.)
>
> And later he says (para 215, p 186):
>
> 'Not every finding of fact in a judge's judgment, not every issue of fact determined by a judge or jury, is *res judicata* between the parties in later proceedings. Thus, a decision of fact or law *against* the party in whose favour the substantial dispute was ultimately decided will not found an estoppel in a later proceeding; and this because it cannot have been necessary to the substantive decision. It is merely collateral, clearing the way perhaps to the point where a substantive decision can be given, but not fundamental or necessary to the decision itself. Moreover, it would be not only illogical but unjust to make it the foundation of a subsequent estoppel; for, the substantive decision being in his favour, no appeal is available on such a collateral decision to the person against whom it was given.' (The editor's emphasis.)

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> These statements from this authoritative work are fully supported by the cases there cited and by the many authorities to which we were referred, and which I do not find it necessary to set out in extenso."

80. That is sufficient to dispose of this point. But I would like to add that an analysis of the basis of the decision of the High Court in OS 898/1996 would reveal the reason for the finding there. Paragraphs 25 and 26 of that judgment are as follows (with emphasis added):

> "**HDB consent**
>
> 25. The head lease granted by HDB contains a covenant against subletting "without first obtaining the consent of HDB in writing which consent HDB may give on terms and conditions as it may in its absolute and unfettered discretion deem fit". HDB has by its letter dated 6 June 1990 given its consent to the lease in favour of McDonald's for a term of two years from 21 May 1990. The consent is subject among other things to HDB's right to withdraw it and to put an end to the subletting. There is no evidence before me that the consent has been withdrawn but there is also no evidence that HDB has given its consent to any of the reversionary leases. Ms Rajah submitted that McDonald's interest under the reversionary leases cannot support its caveat as HDB's consent has not been first obtained.
>
> 26. By granting the reversionary leases the plaintiff has committed a breach of covenant under the head lease. There is a proviso for re-entry for breach of any covenant but it is not the defendant's case that completion of the agreement for sale is excused by reason of such breach. Its case is that until HDB's consent is obtained the lessee has no interest in land for the purpose of lodging a caveat and the consent may be given on terms which are not acceptable or refused altogether."

It can be seen that the decision there was based on the fact that there was no evidence before the court that the HDB had given their consent to any of the reversionary leases. However, as I have set out above, this is not the case here.

81. The Defendants have also submitted that re-litigation of this issue would amount to an abuse of process. In view of my determination that there is no issue estoppel, this argument is no longer tenable.

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Misrepresentation on HDB Approval

82. Lek and Low had also testified that Tan orally represented to them at the 17 April 1996 meeting that HDB approval for the McDonald subletting had been obtained for all the outstanding leases. Insofar as the complaint relates to a defect in title, the finding that I have made, that there was HDB approval, adequately deals with this issue. However there is a more subtle aspect to this. The Defendants' position on this issue is set out in paragraphs 17A and 20 of the Re-amended Defence which are as follows:

> "17A. Further or alternatively, by the representations referred to in paragraph 16 above, the Defendants were given to understand that the consent of the HDB for all the lease agreements was an unqualified and irrevocable consent. The Plaintiffs did not at the material time disclose, as was the fact, that:-
>
> (a) the HDB's consent was only effective for the then current lease and not for the future leases; (b) the HDB's consent was subject to a number of conditions as set out in its letter of 10 March 1987 to Messrs Tan Rajah & Cheah, including an annual payment of a sub-letting fee of 2% of the total sub-letting income from McDonalds; and (c) the HDB had in its letter of 6 June 1990 to Messrs Tan Rajah & Cheah, reserved its right to withdraw its consent at any time by giving 3 months' notice in writing. These matters rendered the representations in paragraph 16 above untrue and were therefore matters which ought to have been disclosed at the material time.
>
> …
>
> 20. … Alternatively, the matters set out in paragraphs 17 and 17A above amounted to a material misrepresentation which induced the Defendants to exercise the Option on 17 May 1996. Alternatively, the lack of HDB consent for the McDonald's leases (other than the lease for the period 21 May 1994 to 20 May 1996) amounted to a repudiatory breach of Clause 4(1) of the Option entitling the Defendants to rescind the Sale and Purchase Agreement."

83. It would appear that the Defendants are complaining that the Plaintiffs' representatives had:

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> (i) represented that the approval for the reversionary leases was unqualified and irrevocable; and
>
> (ii) failed to disclose that:
>
> (a) HDB's consent for only effective for the current lease; (b) there was a 2% sub-letting fee payable annually; and (c) the HDB reserved the right to withdraw their consent at any time with three months' notice in writing.

The Defendants argue that these are material representations of fact or omissions which would entitle them to rescind the Agreement.

84. I first examine the allegation that there was a representation that the HDB approval for the reversionary leases was unqualified and irrevocable. There is no evidence from Lek or Low or any other witness that any of the Plaintiffs' witnesses had expressly stated that the approval was of such a nature. So the Defendants are relying on the fact that if the approval was qualified in this manner, it ought to have been disclosed to the Defendants. Lek testified that Tan showed him the Deed of Variation of 6 December 1990 which recited that HDB's approval for a subletting of 21 years from 1987 had been granted. Lek said that with this, and the recitals in the leases as well as Tan's assurance that HDB approval had been obtained, *"I was thus reassured that HDB's approval in respect of the McDonald's leases had been sought and granted."*

85. Firstly, I note that the very preamble that Lek relied on to support his case, preamble 2 of the Deed of Variation of 6 December 1990, specifically states that the approval was subject to certain terms and conditions. It goes as follows (with emphasis added):

> "Prior to the subletting of the demised premises under the Leases the Lessor applied to the [HDB] for its approval for the subletting and such approval was given by the Board subject to certain terms and conditions which terms and conditions are subject to revision by the Board from time to time if circumstances warrant."

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Lek had conveniently left out the underlined words in his affidavit evidence-in-chief. His evidence was that he was shown this document at the 17 April 1996 meeting. Had he read the preamble in full, he would have seen that not only was the approval subject to certain terms and conditions, those terms and conditions are subject to revision by the HDB from time to time. He said he read this preamble, and did not say he had not read the underlined words. Therefore it must be his evidence that he had read it, and it would have put him on notice that there not only could be, but were, qualifications to the HDB approval. But it is really not material whether he actually read this part because his evidence is that he was mislead by the preamble. Clearly he could not have been mislead by it if he had read it in its entirety. And if he had not read it in its entirety, then it is not open to him to say that he was mislead by it.

86. Furthermore, clause 4(1) of the Option specifically provides that if the leases become terminated for any reason whatsoever before completion, the Defendants were obliged to proceed with completion. Clause 4(1) states as follows:

> "4(1) The property is sold subject to 4 Leases dated 10 October 1987 (as varied by a Deed dated 6 December 1990) and 3 Leases dated 23 April 1991 all made between the Vendor of the one part and McDonald's Restaurants Pte Ltd ("the Tenant") of the other part (hereinafter collectively referred to as "the Leases" which expression shall where the context so requires mean any one of or more of them) unless the Leases shall have been terminated for any reason whatsoever before completion. In the event of such termination, the Purchaser shall accept the relevant part of the property with vacant possession on completion and the Vendor shall not be obliged to take any action against the Tenant in respect thereof."

If Lek were concerned that McDonald should stay on right until 2008, then it is curious that he did not question this provision which did not even oblige the Plaintiffs to ensure that McDonald stayed on until the completion date. Lek was,

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according to himself and to Low, sharp enough to pick out the qualification "if any" two sub-clauses down. He would have picked this point up if it were important to him that McDonald remained as a tenant. I find that the lack of any comment from Lek in respect of this provision shows that the continued presence of McDonald was not a material factor in his decision to purchase the Property.

Affirmation

87. The Plaintiffs say that even assuming that there were material misrepresentations which induced the Defendants to enter into the Contract and on which they relied, when the Defendants realised the truth of the matter i.e. that there was only one deposit and that the HDB had given its approval for only one Lease "subject to review", they had nevertheless affirmed the Contract. I agree with this submission and so find, for the reasons that follow.

88. In his affidavit in OS 898 of 1996, Lek said that he realised that there was only one deposit after seeing the completion account dated 1 August 1996. Under cross-examination, he said that he realised that he would only receive one deposit - and would not be prepared to complete on that basis - when he saw the first McDonald confirmation letter after 4 June 1996. Therefore the Defendants were aware that they were only going to receive one deposit well before the contractual date of completion.

89. As for the HDB consent to the Leases, again the Defendants' story has changed. In his affidavit in OS 898 of 1996 Lek said that *"It was only much later [i.e., after the 17 April 1996 meeting] that I was informed by [Low] that he had found out from the HDB that approval had been given only in respect of the current lease."* In his affidavit in OS 1147 of 1996 Lek gave a slightly

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different version: *"However, it was only subsequently, in late July/early August, after the execution of the option, that I was informed by Mr Low that the approval was only given on the current lease and that the HDB would consider the future leases as and when the appropriate time came."* In neither of those affidavits was there any reference to the 22 August 1996 meeting which, according to Lek's evidence-in-chief, was when he became aware of the reality of the situation. Under cross-examination, Lek changed his position yet again. He said that Low told him there were "market rumours" that HDB had only consented to one Lease. Lek was very concerned about the situation and instructed Low to clarify the position with the Plaintiffs. At the same time, it was only a "rumour" and he did not want to panic (even though, according to Low, the source of the information was a previous abortive purchaser). This, Lek said, was one of the reasons why they had the 22 August 1996 meeting and it was only after that meeting that he told his solicitors about the situation. This was almost a week after the contractual date of completion and contradicted Lek's starting point, namely that he would not be prepared to complete if there was "uncertainty" about HDB's consent for the McDonald's Leases.

90. Therefore even if the Defendants' case on misrepresentations is made out, Lek knew the truth about the deposits as early as 6 June 1996 on his own evidence, when he saw the TRC letter of 4 June, and certainly no later than 1 August 1996 according to Prem, when TRC sent the completion account to PC. As for knowledge of the scope of the HDB consent, it was no later than 22 August 1996. The correspondence is quite clear that the Defendants were nonetheless prepared to complete: PC sent letters to TRC on 31 August, 2 September and 5 September 1996 stating that they were prepared to complete if the Plaintiffs would procure the withdrawal of the caveat. No other condition was set. Also, the fact that the Defendants issued OS 1147 of 1996 as late as 19

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November 1996 seeking, *inter alia*, a declaration that their notice to complete was effective, is a clear indication that they were prepared to complete even though they knew the misrepresentations were false. I need only cite the learned editor of *Cheshire, Fifoot and Furmston's Law of Contract* (Second Singapore and Malaysian Edition) at p.477:

> "Affirmation is complete and binding when the representee, with full knowledge of the facts and of the misrepresentations either declares his intention to proceed with the contract or does some act from which such an intention may reasonably be inferred."

This test has been satisfied here.

91. The Defendants seek to rely on *Watson v. Burton* [1956] 3 All ER 929 to show that there was no affirmation but it is hard to see how that case helps them. In that case, the purchaser tried to get the price down after he discovered the misrepresentations. The Court held that he had not elected to waive his right to rescind. In the present case the position is quite different. There was no attempt to lower the price, merely a demand to withdraw the caveat which the Defendants thought they were entitled to insist upon.

92. Another case cited by the Defendants is *Yukong Line Ltd v Rendsburg Investment Corporation* [1966] 2 Lloyd's Rep 604. However that case turned on a single letter from the plaintiffs expressing indignation at the notice of non-peformance given by the defendants and asking the latter to change their mind. Moore-Bick J said, at p.608:

> " Considerations of this kind are most likely to arise when the injured party's initial response to the renunciation of the contract has been to call on the other to change his mind, accept his obligations and perform the contract. That is often the most natural response and one which, in my view, the Court should do nothing to discourage. It would be highly unsatisfactory if, by responding in that way, the injured party

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> were to put himself at risk of being held to have irrevocably affirmed the contract whatever the other's reaction might be, and in my judgment he does not do so. The law does not require an injured party to snatch at a repudiation and he does not automatically lose his right to treat the contract as discharged merely by calling on the other to recognise his obligations."

That is hardly the situation in the present case.

Waiver of Rental Deposit

93. There is a further issue regarding the misrepresentations about the deposits which is appropriate to be dealt with at this juncture. The Defendants say that it was only after the Plaintiffs served the Writ in this Suit in November 1997 that they became aware, on account of paragraph 16 of the Statement of Claim, that the Plaintiffs had "waived" the obligation on the part of McDonald to provide "simultaneously upon execution" a security deposit in respect of each Lease. The Defendants say that:

> (a) the failure to disclose this "waiver" at the time the Leases were shown or sent to the Defendants itself amounted to a misrepresentation; and
>
> (b) the handing over of the Leases without the explanation amounted to a representation that all the provisions in the Leases (including Clause 2(iv)) had been enforced.

In other words, the Defendants were led to believe that all the deposits had been paid. The argument goes further than that, however, because the Defendants also seem to be saying, secondly, that the existence of the previously undisclosed waiver means that they themselves cannot now collect the deposits from McDonald which the Plaintiffs had failed to collect.

94. With regard to the first aspect of the misrepresentation, this cannot really get the Defendants very far for the same reasons as are discussed above, namely that the Defendants knew from early June 1996 when they received the

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McDonald draft letter of confirmation, and in any event when they received the completion account on 1 August 1996, that in fact only 1 deposit had been paid.

95. If seven deposits had been paid but McDonald were only going to consent to the transfer of one, then all that could have been "assigned" by the Plaintiffs was the obligation to repay McDonald at the end of each Lease. But that is a burden, not a benefit, and is not capable of assignment unless McDonald were to co-operate in a novation which they would obviously not do if they were not prepared to consent in the first place.

96. Moving to the second aspect of the misrepresentation, reliance on paragraph 16 of the Statement of Claim enables the Defendants to say that they only discovered the true situation regarding the deposits in November 1997, when the Writ was served. This situation, however, is equally problematical for the Defendants. Lek, in his evidence, seemed at times to assume that the Defendants, as purchasers, would "naturally" be entitled to the benefit of any deposits because they were buying the Property "subject to tenancy". As a matter of law, this is simply not the case. The covenant to provide a deposit is not a covenant which "touches and concerns the land": see *Hua Chiao Commercial Bank Ltd v. Chiaphua Industries Ltd* [1987] 1 A.C. 99; *Gray Elements of Land Law* [1993] pp. 861-862.

97. At other times in his evidence, Lek said that he would be getting an assignment of the right to the deposit. This seems to mean that it did not matter that he would not be getting the deposits from the Plaintiffs because he would be getting from McDonald instead. That was why they were complaining about the waiver. The trouble with this is that if Lek were expecting to get an assignment, there would have been some documentation regarding this prior to

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completion. But there was no such documentation and no discussion of any assignment.

Conclusion

98. For the reasons given above, I hold that the Defendants are not entitled to rescind the contract and that it is still valid and in force. The Plaintiffs' notice to complete dated 17 August 1996 is therefore valid.

99. Stepping back to look at the matter as a whole, it is clear that the Defendants were merely trying to back out of the deal. They had initially raised only one problem, and that was the caveat. They had unequivocally stated that if the caveat was withdrawn they would complete. They gave a notice to complete on this basis. Although shortly before the completion date of 16 August 1996, the Defendants raised two other issues, i.e. (a) HDB consent to the sale and (b) the Defendants' entitlement to inspect the Property, these were not substantial ones and were not pursued. They certainly did not raise the questions of (i) the deposits or (ii) HDB consent to the leases. This shows that they were not the concerns of the Defendants at the time, either because these issues were not raised at all, or if raised, they were unimportant. Indeed there is some evidence that the Defendants were at this stage having second thoughts about the transaction. Tan gave evidence that sometime in early August Lek met him and asked for completion to be delayed. Tan said that he refused the request. Although Lek denied this, the fact that the Defendants were not ready to complete on 16 August 1996 for a number of reasons supports Tan's version. In any event, the dispute between the parties on 16 August 1996 was not over any of the matters before the court in this action, but solely on the question of the caveat. The Defendants knew by then that there was only one deposit, yet they did not raise it. The issues of the deposit and the HDB consent to the

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reversionary leases only came to the fore after the Defendants lost the appeal in OS 898/1996. This was one and a half years from the time the Option was granted in April 1996. In that period, the economic circumstances had changed a great deal. It is therefore not surprising that by late 1997 the Defendants were reluctant to complete the purchase.

Remedies

100. I now deal with the prayers of the Plaintiffs.

Specific Performance

101. The final issue is the appropriate remedy. The Plaintiffs pray for an order that the Defendants specifically perform the contract. However the Defendants say that this is an appropriate case to refuse specific performance and simply order an assessment of damages. The Defendants cite paragraphs 8.100 to 8.220 from Sharpe on *Injunctions and Specific Performance* (1992). There, the learned author argues a compelling case for a deviation from the right of specific performance in the case of a vendor. He sets out the three arguments usually forwarded to support a vendor's right to specific performance:

> "… The first is that, although the vendor's specific performance claim is merely one for money, damages would be inadequate on the grounds that the award is limited to the difference between the contract price and market value whereas, under a specific performance decree, the vendor gets the entire price immediately. …
>
> This argument might seem to hark back to a period when the market in real estate was more constrained and when it was more difficult to find a buyer for land. In fact, a damages award with interest can readily reflect any loss the vendor has sustained by having to wait for the purchase price. The need for immediate judgment for the entire price is not regarded as a sufficient reason to justify specific performance in other sale

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> cases and it is difficult to see why there should be a special rule in the case of land. …
>
> More frequently, one finds the vendor's right to specific performance justified on the basis of mutuality: "In every case justice requires that the purchaser should be entitled to specific performance, … and there must be reciprocity of remedy between vendor and purchaser." … the argument is … that the availability of specific relief to the opposing party, the purchaser, provides justification for this award in favour to the vendor as well. … it has been argued that, in modern times, there is little if anything in principle to support it. Admittedly there is ample authority in the case-law to support the black letter proposition that mutuality requires that specific performance be made available to the vendor as well as the purchaser. However, … a modern court should seek more satisfactory grounds upon which to base the vendor's claim.
>
> The third argument, like the second, turns on the fact that specific performance is available to the purchaser, and is related to the principle of equitable conversion. Equity deems done what ought to have been done, and accordingly, the equitable title to the property passes upon the formulation of the final agreement, even before the vendor's claim has crystallized as a debt."

102. He then presents very cogent reasons why this remedy would not be conducive to mitigation of damages:

> "It is submitted that from the remedial point of view, especially in relation to mitigation, there may be definite advantages to a rule which requires the vendor to prove inadequacy of damages. The very fact that the plaintiff has refused to complete the transaction suggest strongly that he … does not want the property and that, if forced by a specific performance decree to take it, a resale will follow. Thus, the real choice here is whether the vendor or the purchaser should be forced to sell in mitigation. … it is preferable to impose that obligation on the plaintiff even though he or she is the innocent party. In the case of real property where the purchaser has broken the contract, especially where the vendor retains possession, the vendor will ordinarily be in a much better position to dispose of the property. … On the other hand, forcing the unwilling purchaser to take up the property will often cause considerable inconvenience and expense which would be avoided through a damages award in favour of the vendor. The purchaser will have some knowledge of the market but that knowledge will relate to his … own particular needs and desires rather than to the

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> various uses and prospects for the subject property. The purchaser will have entered the market as a buyer, not a seller, and will inevitably incur costs in becoming a seller which the vendor would avoid.
>
> … although the prospect of having a point of finality to transactions is attractive, it is obtained at a substantial price. The courts have been unwilling to pay that price in other instances and … neither should the price of added mitigation costs be invariably incurred in cases involving land.
>
> Another argument … may offer some support to the vendor's right to specific performance in the case of house purchases. Very often, the completion of one house purchase depends upon completion of another since many purchasers are unable to finance the purchase of their new house unless they have the proceeds from the sale of the old one. If one purchase and sale agreement collapses, others can follow. The virtually automatic availability of specific performance provides some assurance that the full sale price will be forthcoming to finance the purchase. …
>
> On the whole, however, the vendor's case for specific performance is ordinarily much weaker than that of the purchaser. It is submitted that should the courts be prepared to reconsider the virtually automatic award of specific performance of contracts for the purchase and sale of real estate, the vendor's right will be found to be somewhat wanting."

103. In *Good Property Land Development Pte Ltd v Societe Generale* [1989] SLR 229, Chan J (as he then was) said:

> " Land may be owned for personal enjoyment (e.g. for dwelling or as gardens etc) or they may be owned as investment, i.e. for profit. In circumstances where the main object of owning land is not the personal enjoyment thereof but the profit derived therefrom, it would be unrealistic to believe that damages would not be an adequate remedy to the owner for the loss of the mortgaged property. I am aware that there is high authority to the contrary: see in *Pianta v National Finance of Trustees Ltd* (1964) 38 ALJR 232 where Barwick CJ said, at p 233:
>
> But in my opinion this proposition is without foundation in law, even if the respondent had had no other business than that of subdividing and selling land and had made a decision to subdivide and sell the subject land.

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> but see the Canadian authorities referred to in *Sharpe on Injunctions and Specific Performance* 1983, para 617."

However, it should be noted that this case did not deal directly with the question of specific performance. And the learned Judge there had referred to "high authority to the contrary", and so had *Sharpe* when he said that there was "ample authority in the case-law".

104. Indeed, as it turned out, the availability of the remedy to the Plaintiffs has meant that they are able to sit on the Property for the past two years to await the order for specific performance. I hasten to add, however, that in this case matters were delayed because of the fact that there were two separate actions which were conducted one after the other. Nevertheless, it would probably have been a "lower cost outcome" had the Plaintiffs simply auctioned the Property at the outset and pursued their claim against the Defendants in damages. However given the weight of authority, it would not be just in this case to overturn it even if I could. I will have to be content to merely state that it seems to me that the views expressed in *Sharpe*, and with respect in the *Good Property* case, have great merit and to leave it to another forum in another decision to consider whether it is appropriate to retain the automatic right of specific performance for vendors.

Interest for late completion

105. I turn now to the question of interest for late completion. The Plaintiffs claims such interest, at 10% per annum, from 17 August 1996 which is the day following the completion date. This is pursuant to condition 8(a) of the Law Society’s Conditions of Sale 1994. The Defendants say that this quantum is not a genuine pre-estimate of damages likely to be suffered and is a penalty. They cite *Golden Bay Realty Pte Ltd v Orchard Twelve Investments Pte Ltd* [1991]

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SLR 18 in which the Privy Council was considering Clause 14(2) in a sale and purchase agreement based on the form prescribed by the Sale of Commercial Property Rules 1979. The clause in the agreement provided for payment of liquidated damages by the vendor of 9% of 85% of the purchase price. The Privy Council expressed the view that this was arguably not a genuine pre-estimate of the damages likely to be suffered from delay in completing the sale in any case, and that this was particularly where the purchaser had not suffered any damages. In that case, the building was complete at the date of the contract and the purchaser was let into possession under the terms of the contract.

106. In the present case, it cannot be said that no damages were suffered by the Plaintiffs. They were out of pocket by the amount that they ought to have been paid upon completion. It is only a question of whether the 10% stipulated is so excessive in the circumstances that it amounts to a penalty. The Defendants say that evidence of the interest rate that prevailed at the time may be found in letters from Malayan Banking, the Defendants' financier. In a letter from the bank dated 8 August 1996, the prime lending rate is stated to be 6.625% and the bank charged the Defendants 1% above this, i.e. 7.625%. Accordingly, they argue, 10% is too high.

107. In my view, this is not a tenable argument. The question is whether 10% is a genuine pre-estimate of damages as opposed to a penalty. It is a provision drafted by the Law Society for general use in conveyancing transactions. More importantly, it applies to both parties. Given the relative magnitudes and the circumstances of this provision, I cannot say that it is not a genuine pre-estimate and therefore a penalty.

Obligation to transfer deposit

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108. The Plaintiffs pray for a declaration that they are not obliged to transfer the deposit unless McDonald have agreed in writing to release them from all their obligations in respect thereof. The Contract is quite clear on this point. Clause 4(3) provides, in effect, that the deposits (if any) will only be transferred with McDonald's consent. McDonald have not given their consent because the Defendants have not signed the letter of confirmation that McDonald's solicitors have provided. That is really the end of the matter.

Property Tax

109. The Defendants do not dispute that if the court finds against them on the principal issues, then the Plaintiffs are entitled to claim property tax against them.

Orders

110. Accordingly, there shall be:

> (1) a declaration that the Plaintiffs' notice to complete dated 17 August 1996 is valid; (2) an order that the Defendants specifically perform the contract for sale of the Property within 14 days from the date of judgment and pay to the Plaintiffs the sum of $14,850,000 being the balance of the purchase price; (3) an order that the Defendants pay the Plaintiffs late completion interest under condition 8(a) of the Law Society's Conditions on the balance of the purchase price at 10% per annum amounting to $4,068.49 per day from 17 August 1996 to the date of actual completion less the rent received in respect of the Property by the Plaintiffs as landlord from 17 August 1996 to the date of actual completion; (4) a declaration that the Plaintiffs are not obliged to transfer the deposits (if any) paid to them under the Leases pursuant to Clause 2(iv) of the Leases until McDonald have agreed in writing to release them from all their obligations in respect thereof and that in the event that such agreement in writing is provided by McDonald, the obligations of the Plaintiffs under Clause 4(3) of the Option will be limited to transferring the cash deposit of $24,000.00 held in respect of the current two-year Lease; (5) a declaration that

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> the Plaintiffs are entitled to a lien on the Property in respect of the sum due and owing by the Defendants to the Plaintiffs under the orders made in paragraphs (2) and (3) above until payment and for the Plaintiffs' costs of this action; (6) an order that in the even of default being made by the Defendants in making the payment due to the Plaintiffs, the Plaintiffs be at liberty to apply to enforce the lien referred to in paragraph (5) above; and (7) an order that the Defendants pay the Plaintiffs their costs in this action.

LEE SEIU KIN

JUDICIAL COMMISSIONER

SUPREME COURT

Lee Seiu Kin JC

C R Rajah & WJM Ricquier (Tan Rajah & Cheah) for the plaintiffs
Michael Hwang & Christine Chan (Allen & Gledhill) for the defendants

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