IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1999] SGHC 70

Suit 1844/1998, RA 623/1998

Between

MP-Bilt Pte Ltd

… *Plaintiff*

And

Oey Widarto

… *Defendant*

GROUNDS OF DECISION

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

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MP-Bilt Pte Ltd v Oey Widarto

[1999] SGHC 70

Suit 1844/1998, RA 623/1998
G P Selvam J
26 March 1999

Judgment:

1.**GP SELVAM J**

The action

This case concerns an agreement for the sale and purchase of a flat in a condominium development called Ardmore Park which is presently under construction. It proposes to comprise 330 flats in three blocks. It is a billion dollar project. Only the affluent can afford to purchase the flats. The plaintiffs, the developers, brought this action to recover an unpaid progress payment from the defendant, the purchaser of one flat. They applied for summary judgment. The defendant is resisting the claim. The application was rejected and the defendant was given unconditional leave to defend. The reason for the resistance is novel and I have to defer stating it until after I have stated the background facts.

2. ***The facts***

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The agreement was made on 16 August 1996. It is in a form familiar to conveyancing lawyers. The area of the flat is stated to be 268 sq m, that is about 2,888 sq ft It is at the sixth level. The purchase price is $4,860,398 which works out to about $1,683 per sq ft.

3.The agreement states that the purchase price shall be paid by instalments. The instalments vary. The first is 20% of the price and is payable on signing the agreement. The next is 10% of the price and is payable by the purchaser upon the vendor`s notice in writing that the foundation work has been completed. The third is also 10% and is payable within 14 days after receipt by the purchaser of the vendor`s written notice that the reinforced concrete framework has been completed. The agreement provides for seven further instalments.

4.A failure to pay an instalment attracts interest on it at an agreed rate. If the purchaser defaults the vendor is given the right to give an unless notice to `repudiate this agreement` meaning that the agreement may be annulled by the vendor. The choice is the vendors`. If that happens the law says that neither side has any further rights or obligations except as to damages which are limited by the agreement. If the notice to annul is given, the interest stops running from the end of the notice period.

5.If the agreement is so annulled the vendor has an express right to resell the flat and recover from the purchaser, the accrued interest and `to forfeit and retain for his own benefit a sum equal to 20% of the purchase price from the instalments (excluding payments for interest) previously paid by the purchaser`. If, property price has plummeted in excess of 20% of the purchase price, as it appears to have, the developers must carry the excess.

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6.If the developers annul the agreement and cannot find another buyer at the same price immediately they have to source the funds elsewhere to proceed with the construction of the flat.

7.On the other hand if the developers do not annul the agreement and purchaser fails or refuses to pay the instalments, they might be in deeper trouble. They may have to cease construction. In which case the purchaser will be entitled to annul the agreement and seek reimbursement of the payments he has made. Thus, the developers are caught on the horns of a dilemma.

8. ***Application for summary judgment***

They have chosen a third alternative: they have sued the purchaser for payment of the first instalment based on the completion of foundation work. Then they sought summary judgment under O 14 for the sum of S$486,039.80 and interest on it.

9.The defendant appeared by counsel to show cause against the application. He relied on an alleged implied term to the effect that he can defer payment of the progress payment as long as he continued to pay interest. He said that he offered to pay interest without the principal sum but it was not accepted. Instead the plaintiffs affirmed the contract. Next he said that the plaintiffs were under a reasonable duty to mitigate all the losses they have incurred. These points were set out in a defence filed on 3 November 1998.

10.The application was heard on 11 December 1998. Counsel for the defendant raised five arguments which were recorded as follows: 1. The claim is really one of specific performance and that is not pleaded in the statement of claim.

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2. The principles of sale and purchase should apply.

3. We have not breached the agreement because of an implied term.

4. Even if there was a breach, it is an anticipatory breach as it is an executory contract.

5. As a matter of public policy, it should be ventilated at trial.

11.In developing his arguments counsel for the defendant cited **White and Carter (Councils) Ltd v McGregor** [1962] AC 413 and a number of additional authorities. The points raised by these authorities were novel. In the end, the court below was persuaded to give unconditional leave to defend on the ground that `this is in fact a claim for specific performance and it has not been pleaded as such in the statement of claim`.

12.The plaintiffs appealed to the judge-in-chambers. I heard the appeal. A dictum of Lord Reid in White And Carter was the mainstay of the defendant`s objection.

13. ***Order 14 on points of law***

Before I proceed to consider the merits of the application, I propose to make a brief reflection on O 14 proceedings. In **Hua Khian Ceramics Tiles Supplies Pte Ltd v Torie Construction Pte Ltd** [1992] 1 SLR 884 a rule of practice was stated to the effect that the courts should make a robust approach when considering applications for summary judgment particularly in commercial and construction cases where cash flow is the life blood to make commerce work. The rigour of that rule is being applied to good end. It has earned good reputation for Singapore.

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14.Since then a new provision was inducted into the Rules of Court 1996. Order 14A, now O 14 r 12, was introduced to enable the court to effect summary disposal of cases by determining any question of law or construction of any document arising in any cause or matter at any stage of the proceedings. This is an implement of a recent and present movement towards a speedy solution to civil disputes where oral evidence is unnecessary. The new procedure should be put to use in cases where all relevant and necessary evidence is documentary. Even in a case where an application is made under O 14 r 1, if the matter can be disposed of by the application of well settled principles of law, the court should not flinch from its obligation under O 14. The court should take judicial notice of the law and at once grapple with the issue. This rule of practice is founded on the following principle of practice found in ***The Supreme Court Practice 1999*** para 14/4/12 headed `Questions of Law`.

> *Where the court is satisfied that there are no issues of fact between the parties, it would be pointless to give leave to defend on the basis that there is a triable issue of law, and this is so even if the issue of law is complex and highly arguable.*

The principle was applied in **European Asian Bank AG v Punjab and Sind Bank (No 2)** [1983] 2 All ER 508[1983] 1 WLR 642 (CA), **Israel Discount Bank of New York v Hadjipateras** [1983] 3 All ER 129[1984] 1 WLR 137 and more recently in **Stocznia Gdanska v Latvian Shipping Co** [1998] 1 All ER 883[1998] 1 WLR 574, where the House of Lords decided a point raised in an O 14 application. This practice has been approved and applied by the Singapore Court of Appeal in **Tokyo Investment Pte Ltd & Anor v Tan Chor Thing** [1993] 3 SLR 170 .

15. ***Implied terms must be reasonable, necessary and consistent with express terms***

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Now I shall consider the objections raised by the defendant. First this implied term. The defendant says that :

> *it was an implied term of the agreement and/or there was a common understanding or intention between the plaintiffs and the defendant that the defendant could defer payment of the instalment set out, inter alia, in cl 3(1)(b) of the agreement provided:*
>
> (a) the defendant pays to the plaintiffs all interest payable under cl 5(1) and 5(2) of the agreement; and/or
>
> (b) the plaintiffs did not accept the defendant`s failure to pay the said instalment within 14 days of the defendant`s receipt of the plaintiffs` notice in writing as a repudiatory breach of the agreement.

16.An implied term is a fictional device conceived by the courts as a term the parties had in their mind in order to make the contract workable. It is a fundamental assumption or basic sense on which the written contract before the court is deemed to have been made. By definition, it is complementary to the written contract. An implied term, therefore, cannot go counter to and destroy a sense or term that is already in the contract. Parties cannot have two contracts, one written and the other implied, contradicting each other. In **Liverpool City Council v Irwin** [1977] AC 239 at 253 (HL) Lord Wilberforce said that the courts would be `willing to add a term on the ground that without it the contract will not work`. In **Gyllenhammar International Ltd v Sour Brodogradevna Industrija** [1989] 2 Lloyd`s Rep 403 at 415 Hirst J said with succinctness: `On well established principles a term would only be implied if it was reasonable, necessary, and consistent with the remainder of the contract.`

17.The defendant`s implied term fails all three touchstones. First, it is not reasonable for the defendant to neglect and refuse to pay a debt which has fallen due. The defendant admits that he is liable to pay interest. But the liability to

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pay interest cannot arise unless and until the principal is due and payable. Accordingly, it is wholly unreasonable on his part to sign a contract requiring the plaintiffs to expend money and effort and make a myriad of contracts with others and consequent subcontracts against his promise to pay upon their performance and in the same breath say that an implied term exempts him from making payment. The plaintiffs did not give him an `interest only loan`. Next the alleged implied term is not necessary to make the contract work. On the contrary, the contract will become unworkable should the defendant`s term be implied into it. Finally, it is utterly inconsistent with the express wording and sense of the contract. The contract says that the payment of the instalment shall be made upon completion of foundation work and demand. The implied term offered by the defendant says that it is not payable upon completion of foundation work and demand by the plaintiffs but when, if at all, the defendant opts to pay. In my judgment on the true construction of the agreement the defendant cannot choose but pay. Time was expressly made the essence of the contract He must, therefore, act reasonably and seasonably.

18. ***No duty to act reasonably in the choice of remedies***

Next the defendant said that the plaintiffs ought to have mitigated damages. So, it becomes necessary to ascertain the law on the point. First, the rules of mitigation do not apply to the innocent party`s choice between different remedies open to him following the other party`s breach of contract: he is not bound to act `reasonably` in exercising his choice. See ***Chitty on Contracts*** (27th Ed) para 26-059. In **Tredegar Iron and Coal Co (Ltd) v Hawthorn Brothers and Co** [1902] 18 TLR 716, at pp 716-717 Collins MR gave a lucid statement of the law:

> *The plaintiffs could not maintain an action for damages except upon the footing that the contract had been broken. It was clear*

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> *law that the repudiation was a nullity unless it was accepted by the other party to the contract. If the other party chose to treat the repudiation as a breach, then matters proceeded on the footing that there had been a breach and the damages must be assessed as for a breach on that date, and he would be bound to act* ***reasonably*** *in the circumstances, that was to say, to take advantage of any mitigating circumstances there might be. All the discussions as to how the damages were to be mitigated rested on the foundation that there had been a breach of the contract. The argument came to this, that the plaintiffs ought to have treated the repudiation as a breach, and that it was unreasonable in them not to have so treated it, seeing that the market was then a rising one. There was no foundation in the authorities for that proposition.` [Emphasis here and hereafter supplied.]*

Accordingly, the stance taken by the defendant does not accord with the law. The duty to mitigate does not arise if the innocent party decides to affirm the contract. The duty to act reasonably arises only when the innocent party decides to treat the breach as repudiation and also annuls the contract.

19. ***No duty to mitigate before breach. No duty to mitigate when debt is claimed***

Common sense and authorities affirm the principle that there is no duty to mitigate where a debt is claimed. A creditor is entitled to recover a debt and it is independent of his duty to mitigate damages if and when he accepts a breach by the other party.

20.The duty to mitigate arises only after a breach has occurred. By definition the duty to mitigate is a failure of the innocent party to behave reasonably ***after*** the breach. By definition a debt is a sum of money fixed by the contract for the completed performance of a given obligation while the contract is alive. Damages arise and flow from a breach. It follows that once a debt has crystallized there is nothing for the creditor to mitigate. Once a debt always a debt. After a debt has fallen due the debtor cannot decide to dishonour it and

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convert it into damages. There being no claim for damages no duty to mitigate can arise. Instalments which have already accrued and due are recoverable as a debt even if the contract is rescinded subsequently. See **White and Carter (Councils) Ltd v McGregor** [1962] AC 413 at 445 (HL) and **Stocznia Gdanska SA v Latvian Shipping Co** [1998] 1 All ER 883[1998] 1 WLR 574(HL)

21.In **Workman, Clark & Co Ltd v Lloyd Brazileno** [1908] 1 KB 968 the plaintiffs by a contract agreed to construct a ship. The agreed price was 89,800. It was payable in five instalments based on the completion of different stages of construction. When the first instalment fell due after due performance by the plaintiffs, the defendants failed and refused to pay it. They sought judgment under O 14 for the instalment amount on the ground that it was for `a debt or liquidated demand in moneys`. The defendants objected that it was not a claim for `a debt or liquidated demand as money`. They said that when a sum is payable in instalments an action of debt would not lie for one or more instalments before the whole is due - that is until the entire performance is completed. It was argued that the claim arising upon default in payment of such an instalment was a claim for damages and not a liquidated sum. The objection was overruled by the Master, the judge and the Court of Appeal. It was held that the claim was for `a debt or liquidated demand for money`. It was not a claim for damages.

22.Farwell LJ said at pp 977-978:

> *I agree that, upon the true construction of this contract, it contains separate promises to pay five several sums on the happening of five several events. If that be so, it can make no difference that all the promises are contained in one document. But, even if, on its true construction, it must be regarded as one contract to pay the whole of the sum named as the price of the ship by five instalments, each instalment is to become due and payable upon*

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> *the happening of the particular event specified in that behalf by the contract, eg the first instalment is to become payable upon the laying of the keel of the ship. In my opinion the claim for that instalment upon the happening of that event is a liquidated demand in money within the meaning of O III r 6: It has been argued that technically the claim arising upon default in payment of such an instalment is a claim for damages, and not for a liquidated sum. I confess that I cannot follow this argument.*

23.Lord Alverstone CJ in giving judgment explained the logic of the decision at pp 974-975:

> *It is, however, suggested that, by reason of some rule of law to be deduced from the old authorities as to the action of debt, or the principle upon which they were founded, the claim in this action is not for a `debt or liquidated demand in money` within the meaning of O III r 6. I cannot take that view. One knows that, in the case of contracts of this kind, eg contracts for the construction of ships or buildings, where the contractor has to incur heavy expenditure for labour and materials to be used in the work contracted for, it is the practice to insert provisions, such as were inserted in the present case, for payment of the contract price by instalments as the work proceeds, and I cannot understand why, or on what principle, the claim for such an instalment, when it becomes due according to the terms of the contract, should not be regarded as `a liquidated demand in money` within the meaning of O III r 6. It seems to me to answer exactly to the description contained in the rule as being a liquidated demand in money payable by the defendant under an express contract. The suggestion made, as I understand it, was that, because, in such a case, the shipbuilder, still having the ship, so far as she is built, in his hands, may be later on, if the purchaser finally makes default in carrying out his side of the contract, be in a position to dispose of the ship, possibly at a profit, the claim in respect of this instalment must be one for unliquidated damages only, and therefore is not within the words of the rule. I am unable to assent to this suggestion. It seems to me clear, from a business and common-sense point of view, that, if, in consideration of the shipbuilder`s finding materials and labour and carrying out the work of building the ship up to a certain stage, the purchaser agrees, when the work has reached that stage, to pay him a certain sum in cash, that is an express contract to pay a liquidated sum in that event, and within the meaning of the rule, and that it makes no difference in principle that four other instalments of the price of the work are subsequently to become payable on other events. I think that this contract is for the present purpose to be regarded as an express*

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> *contract to pay five different liquidated sums of money upon five different events.*

It follows that since the present claim is for a debt and not for damages no question of mitigation of damages can arise.

24. ***No duty to mitigate by discontinuing contractual performance***

In **White and Carter (Councils) Ltd v McGregor** [1962] AC 413, Mr McGregor, the defendant, was a garage proprietor. White and Carter (Councils) Ltd, the plaintiffs, were advertising contractors. An agreement was made between them for the plaintiffs to display advertisements for his garage for three years. There was a default acceleration clause by which if any instalment, being due for payment, remained unpaid for a period of four weeks, the whole sum payable under the contract would fall due for payment. The contract was headed by a warning notice that it was not to be cancelled by Mr McGregor. The contract further provided that the contract was not subject to `countermand` by Mr McGregor. The defendant repudiated the agreement the very day it was made by saying that it was made without his authority. He was held to be wrong. The plaintiff did not accept the repudiation and thereby annul the agreement. They kept it alive. They went ahead and displayed the advertisement on litter bins as they had undertaken to do. After complete performance they sued for the full contract price. Be it noted that the plaintiffs` claim was not for damages or specific performance. It was `for a debt due under contract made for good consideration`. There was not even the faintest suggestion that it was in the nature of specific performance. The defendant contended that since he `repudiated the contract before anything was done under it the plaintiffs were not entitled to perform it and sue for the contract price, but can only sue for damages. The company did not sue for damages and so the action must be dismissed`. It would be well nigh impossible to quantify the damages in a case

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like that. This practical difficulty was not addressed by the defendant. His argument was made at an abstract level based on emotion. No principle of equity was invoked. Mr McGregor relied on a line by Portia in ***The Merchant of Venice*** and made the emotive pitch: `What the appellant company is seeking is its pound of flesh.`

25.Rudimentary principles of law entitle the innocent party to a no-loss position. That is the position he would be in if the contract had been performed. If they had accepted the repudiation that would be price for three years less what they had saved by not performing. If they had not performed the contract they would have been in a predicament. The amount was fixed subject only to completion of performance. So they performed and demanded the price. The defendant could not assure that they would be in a no-loss position if they had not performed.

26.Before the House of Lords the plaintiffs` claim succeeded by numerical strength, three in favour and two against. The majority held that the plaintiffs were entitled to carry out the contract and claim the full contract price. They were not obliged to accept the repudiation and sue for damages. The decision amounts to practical justice. Lord Hodson, one of the majority, said `There is no equity which can assist the defendant`. Lord Hodson added at p 445:

> *It is trite that* ***equity will not rewrite an improvident contract where there is no disability on either side****. There is no duty laid upon a party to a subsisting contract to vary it at the behest of the other party so as to deprive himself of the benefit given to him by the contract.* ***To hold otherwise would be to introduce a novel equitable doctrine that a party was not to be held to his contract unless the court in a given instance thought it reasonable so to do. In this case it would make an action for debt a claim for a discretionary remedy.*** *This would introduce an uncertainty into the field of contract which appears to be unsupported by authority either in English or Scottish law.*

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27.It is an opportune moment now to echo the words of Wright J in **Lever Brothers Ltd v Bell** [1931] 1 KB 557 at 568: `It is important to uphold the binding force of contracts so far as possible, especially in commercial matters.` And I desire to add that courts should be slow to tinker with clearly worded commercial contracts in the name of discretionary justice.

28.Professor JW Carter in his ***Breach of Contract*** (2nd Ed, 1991) at pp 407-408 summarises the reasoning of the majority of the House of Lords with startling clarity in five paragraphs. They feature now as five fundamentals relating to repudiatiory breach of contract. The pages where the reasoning appears are indicated by the numbers in parenthesis:

> *First, a repudiation of obligation does not operate to terminate the performance of a contract, and McGregor could not rely on his repudiation as terminating performance. (444)*
>
> *Secondly, a repudiation of obligation gives rise to an option: a plaintiff may either elect to terminate the performance of the contract or elect to continue performance. Thus, the appellants could elect to continue performance notwithstanding the right to terminate arising from McGregor`s repudiation of obligation. (427)*
>
> *Thirdly, the ability to elect in favour of continuation of performance is not limited to situations in which the remedy of specific performance is available, and the fact that the appellants could not have obtained specific performance did not fetter their right of election. (429, 445)*
>
> *Fourthly, there is no requirement that a promisee act reasonably when making an election, and the appellants did not have to prove that they had acted reasonably when electing for continuation rather than termination. (430)*
>
> *Finally, the law governing the mitigation of damages is not relevant to an action to recover a debt due under a contract, and the appellants, in claiming the contract price, were doing no more than enforcing their right to recover a debt due. (445)*

29.The reasoning totally demolishes the arguments of the defendants on the repudiation point.

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30.The correctness of the case on its special facts cannot be disputed. The aim of the law is to ensure that an innocent party receives his full due and there is no rule or equity which can compel him to take a loss no matter how minute it may be. Lord Denning in **Attica Sea Carriers Corp v Ferrostaal-Poseidon Bulk Reederei GmbH** [1976] 1 Lloyd`s Rep 250 (see below) agreed that an innocent party should be adequately compensated. The only compensation for non-payment of a debt is payment of the debt. The innocent party in other words is entitled to that no-loss end and is empowered to achieve it by an action for debt. The contract-breaker cannot escape his contractual liability or limit his liability by repudiating it and insisting that such repudiation be accepted by the innocent party. That is the immutable decisional law of England and Singapore.

31.Furthermore, ***White and Carter*** by implication affirmed the principle that the duty to mitigate affects only a claim to damages and not debt. In that case the claim was for a debt. It was argued for the defendant that the plaintiffs` claim in reality was that the defendant in respect of his repudiation and breach of contract was liable ***in damages*** . In other words by his own breach he converted the claim in debt to a claim in damages. The minority view was that the plaintiffs should have mitigated damages by not proceeding with the performance of the contract. This was rejected by the majority who held that the claim was in debt. Be it noted again that the plaintiffs had performed the contract unilaterally.

32.The reports are replete with authorities which show that there can be no question of mitigation of damages where a claim for debt and not damages has accrued. The plaintiffs in the present case, therefore, were never subjected to the duty to mitigate because their claim is in debt. The defendant cannot convert it into a claim for damages by his own breach.

33. ***Lord Reid`s doctrine***

I shall now consider the principal argument advanced before the court below and me that the plaintiffs were obliged to accept the defendant`s repudiation. The germ of that argument is a dictum of Lord Reid in ***White and Carter*** . He said:

> *It may well be that, if it can be shown that a person has no legitimate interest, financial or otherwise, in performing the contract rather than claiming damages, he ought not to be allowed to saddle the other party with an additional burden with no benefit to himself. If a party has no interest to enforce a stipulation, he cannot in general enforce it: so it might be said that, if a party has no interest to insist on a particular remedy, he ought not to be allowed to insist on it.*

34.Lord Reid appears to have relied on `the general equitable jurisdiction` in formulating his doctrine. He explained it by way of an example:

> *If I may revert to the example which I gave of a company engaging an expert to prepare an elaborate report and then repudiating before anything was done, it might be that the company could show that the expert had no substantial or legitimate interest in carrying out the work rather than accepting damages: I would think that the de minimis principle would apply in determining whether his interest was substantial, and that he might have a legitimate interest other than an immediate financial interest. But if the expert had no such interest then that might be regarded as a proper case for the exercise of the general equitable jurisdiction of the court.*

Be it remembered here that Lord Hodson at p 445 said that there was no equity which could assist Mr McGregor and that equity would not rewrite an improvident contract where there is no disability on either side. It is therefore difficult to comprehend Lord Reid`s explanation.

35.Lord Reid`s dictum, nonetheless, was approved or applied in **Attica Sea Carriers Corp v Ferrostaal-Poseidon Bulk Reederei GmbH** [1976] 1 Lloyd`s Rep 250, 255; **Gator Shipping Corp v Trans-Asiatic Oil Ltd SA** [1978] 2 Lloyd`s Rep 357, 372-374; **Clea Shipping Corp v Bulk Oil**

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International Ltd [1983] 2 Lloyd`s Rep 645. In **Stocznia Gdanska SA v Latvian Shipping Co** [1996] 2 Lloyds Rep 132 (CA) Straughton LJ posed this question at p 138: `Is an innocent party bound to treat a contract as repudiated, if he has no legitimate interest in future performance?`. The Lord Justice provided the following answer:

> *This doctrine stems from a passage in the speech of Lord Reid in* ***White and Carter (Councils) Ltd v McGregor*** *[1962] AC 413 at p 431. It has the support of this court in* ***Attica Sea Carriers Corp v Ferrostaal-Poseidon Bulk Reederei GmbH*** *[1976] 1 Lloyd`s Rep 250. It was applied by Mr Alec Kazantsis, a maritime arbitrator where the point does arise from time to time, in* ***Clea Shipping Corp Ltd v Bulk Oil International Ltd (No 2)*** *[1983] 2 Lloyd`s Rep 645, with the approval of Mr Justice Lloyd. I can readily accept that there is such a doctrine.*

36.The doctrine as applied does not expect the innocent party to act to his detriment and settle for less than what is legitimately due to him. The court under O 14 r 3 has the power to `give such judgment for the plaintiff against the defendant on the claim or such part of such claim as may be just having regard to the nature of the remedy or relief claimed`. The court under this rule can do practical justice without resorting to any esoteric doctrine of equity.

37.In any event the doctrine has a number of limitations. First, it cannot apply retrospectively to accrued debts. Accrued debts can be sued for even after acceptance of repudiation.

38.Next, it does not apply where the innocent party can reasonably perform his obligation without the co-operation of the contract-breaker. Illustrations: a contractor who has undertaken to repair a house for a lump-sum cannot perform his obligation because the house owner can prevent him by denying access. The contractor will need an order of court to force the house owner to give him

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access which will ordinarily be refused as damages would suffice. The only remedy in such instance is to sue for damages and not the full contract price.

39.Thirdly and more importantly, the doctrine was conceived in the context of the innocent party rejecting the repudiation by the other party and exercising his right to complete performance when the former has a legitimate interest to protect. A fortiori, the doctrine cannot apply when the innocent party is under a ***legal obligation or practical compulsion*** to complete performance of the contract in question and other contracts he has entered into on the basis of the contract in question.

40.A number of authorities were cited to sustain the defendant`s arguments based on Lord Reid`s dictum. I shall consider them now.

41.In **Attica Sea Carriers Corp v Ferrostaal-Poseidon Bulk Reederei GmbH** [1976] 1 Lloyd`s Rep 250 (CA), the plaintiffs, (Ferrostall) had chartered out their ship Puerto Buitrago to the defendants (Attica) for a period of 17 months. It was by way of a demise charter (a time-charter where the charterer supplies the crew). Six months later the ship broke down. The charterers in breach of their obligation sought to redeliver the ship without repairing it. The owners refused to accept re-delivery. It would have cost an estimated sum of US$2m to repair the ship and the value of the ship after repairs would be about US$1m. The owners lodged the action claiming hire at $46,000 a month until the vessel was repaired and re-delivered. Thus the primary purpose of the action was to compel the charterer to have the ship repaired. The secondary claim was in respect of unaccrued moneys being hire payable after the failure to repair. In effect, therefore, it was for specific performance of the obligation to repair the ship. Next the claim was for future hire and not an accrued debt. The claim was not for an accrued debt because the ship had not performed any service after it

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broke down. The owners were prepared to accept re-delivery only after repairs. The owners thus were seeking to unjustly enrich themselves by attempting to go far beyond a no-loss position. It was held on the facts of that case that the owners had actually accepted the repudiation. They were, therefore, rightly denied the remedy they sought and directed to recover damages. In this case we are in an entirely different realm.

42. ***White and Carter*** was not relevant to the ***Attica*** case. In ***Attica*** there was no claim for an accrued debt as it was in ***White and Carter*** . Additionally in ***Attica*** there was a finding that the owners had accepted the charterers` repudiation in that there was an effective redelivery of the ship to them. The ship was no longer in the charterers` possession. The owners` insistence that the charterers must repair the ship in effect meant that the owners were seeking an order for specific performance of the obligation to repair and continue to pay hire even though they no longer had possession of the ship. The ship was not earning hire. The future hire would form part of the compensation the owners would be entitled to under principles enunciated in **Interoffice Telephones Ltd v Robert Freeman Co Ltd** [1958] 1 QB 190 (CA), and **Yeoman Credit Ltd v Waragowski** [1961] 3 All ER 145[1961] 1 WLR 1124. Lord Denning MR with whom Orr LJ and Browne LJ concurred, decided against the owners. Lord Denning took the opportunity to make his critical comment on ***White and Carter*** . He spoke with his customary exuberance at p 255:

> *The House of Lords, by a majority of three to two, held that they were entitled to do so. The decision has been criticized in a leading textbook (* ***Cheshire & Fifoot****, pp 600 and 601). It is said to give a `grotesque` result. Even though it was a Scots case, it would appear that the House of Lords, as at present constituted, would expect us to follow it in any case that is precisely on all fours with it. But I would not follow it otherwise. It has no application whatever in a case where the plaintiff ought, in all reason, to accept the repudiation and sue for damages - provided that damages would provide an adequate remedy for any loss*

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> *suffered by him. The reason is because by suing for the money, the plaintiff is seeking to enforce specific performance of the contract - and he should not be allowed to do so when damages would be an adequate remedy.*

43.The specific performance mentioned by the Master of the Rolls was the obligation to repair the ship and the incidental obligation to pay future hire during the repairs. There was no question of a specific performance of an obligation to pay an accrued debt. In any event the Master of Rolls said that there would be an adequate remedy for any loss suffered by the owners in damages. The only adequate remedy for non-payment of an accrued debt is the payment of the debt and if it is not paid a judgment for the debt. Whether it is in the form of a judgment for damages or specific performance the result is the same. A judgment for debt is a simple and adequate remedy. There is no necessity to ask for specific performance. Lord Denning`s statement, therefore, has no application to the present case.

44.**The Alaskan Trader; Clea Shipping Corp v Bulk Oil International Ltd (No 2)** [1983] 2 Lloyd`s Rep 645 is somewhat similar. There was a time charter. The ship broke down. The owners repaired the ship and sought to deliver the ship into the charterer`s service. The charterer refused delivery and thereby repudiated the contract. The owners left the ship to idle with a full crew also idling on board. The owners at first drew hire from a letter of credit. Then the owners paid the hire `without prejudice`. It was held that they were not entitled to the hire for the entire period during which the vessel was not under actual service. Lloyd J relied on Lord Reid`s doctrine in ***White and Carter*** . Their entitlement was restricted to damages and subject to the rules governing mitigation. The result of the decision was entirely consistent with the principle of ***Interoffice Telephones*** and ***Yeoman Credit*** cases. It was not a case on an accrued debt. The present case is in an entirely different realm.

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45.Finally, ***Stocznia Gdanska SA v Latvian Shipping Co*** the appeal concerned decisions by four judges: Clarke J, Waller J, Longmore J and Colman J. Only one point of decision made by Clarke J is relevant to the present case. Lord Reid`s doctrine was not really relevant to the case since the repudiation had been accepted by the innocent party. It concerned a shipbuilding contract. It arose from a humble O 14 application. The plaintiffs were shipbuilders. They entered into six contracts to build six ships for the defendant buyers. Under each contract the price was payable in instalments. Work was begun on the ships. The buyers failed to pay the instalments due on keel-laying of two hulls. The plaintiffs rescinded the contracts and sued for damages in addition to the unpaid instalments. They applied for summary judgment for those claims. The defendants objected on the ground that the provisions in the contracts precluded the plaintiffs from recovering the unpaid instalments as they formed part of the damages. Clarke J granted them summary judgment for both. The Court of Appeal allowed the buyers` appeal from Clarke J on the ground that once the contracts were rescinded the innocent party`s rights were exclusively governed by the contract and the unpaid second instalments (although recoverable at common law) were not recoverable. On further appeal to the House of Lords it was held that the unpaid instalments of the price which had already accrued due were recoverable. The contract did not contain clear words to annul the accrued right to recover unpaid instalments of the price ***as a debt*** at common law. Lord Lloyd said at p 597:

> *The right to claim the keel-laying instalment had already accrued before the plaintiffs rescinded the contracts. It would take very clear language to deprive the plaintiffs of their right to recover those instalments in debt. I do not find such language in cl 5.05(2). The right to retain instalments which have already been paid does not exclude the right to recover instalments which have not been paid. I can see no purpose in drawing a distinction between paid and unpaid instalments, provided the instalments have fallen due under cl 5.02. The crucial distinction is between instalments which have fallen due (whether paid or unpaid) and*

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> *instalments which have not fallen due. As will be seen, the remaining provisions of cl 5.02 work sensibly and fairly on that basis.*

If the logic of the Court of Appeal, namely, that by rescinding the plaintiffs in ***Stocznia*** lost their common law rights, was applied to the present case the plaintiffs in the present case by not rescinding would be in an even stronger position. The defendant cited the ***Stocznia*** case to support his stand on the repudiation point. In the end he was hoisted by his own petard. The relevant ruling on the accrued instalment unconditionally favours the plaintiffs` claim in this case.

46.Finally an American case: **Centex Homes Corp v Eugene H Boag & Anor** [1974] 128 NJ Super 385. The plaintiffs were the developers of a condominium comprising more than 3,000 units. The defendants, Mr and Mrs Boag, signed a contract for the purchase of one apartment and paid $525 as deposit. Then they gave a cheque for $6,870. The two sums amounted to 10% of the purchase price. Then Mr Boag was transferred to a far away place. Mr Boag stopped payment and thereby repudiated the contract. The plaintiffs sued Mr and Mrs Boag for specific performance of the entire purchase agreement or, in the alternative, for liquidated damages. Be it noted that it was not a claim for a debt which had fallen due by reason of performance. The court held that under their law the remedy of specific performance was not available for the sale and purchase of a condominium house. Damages sustained by the developers were readily measurable and the damage remedy at law was wholly adequate. The alternative claim was dismissed on the basis of the peculiar wording of the contract. We are in a different world. Before me there is no claim for specific performance of the entire contract or part of a contract. What is before me is a claim for a debt which has fallen due by reason of the performance by the plaintiffs. Additionally, I do not believe the law of Singapore to be that specific

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performance is not available in respect of condominium units or HDB flats. That issue is not before me and accordingly I make no decision on it.

47. ***The issue of pleadings***

It was held that the claim in the present case was for specific performance. By implication the statement of claim did not disclose a cause of action in debt. This is a startling proposition and requires a detailed discussion. From time out of mind under common law it was possible to obtain an order for specific performance of an obligation to pay a debt. To be sure, the only contractual obligations which at common law could be enforced by specific performance were those consisting debts. For everything else the remedy was damages. In practical terms, its significance was the mode of execution. It was given effect by the arrest and incarceration of the debtor. Even the admiralty court followed this procedure - the debtor and not the ship was arrested. Under the common law procedure of specific performance, debtors` prisons were overflowing. Gaolers had a field day torturing and tormenting debtors who in the fit of things were moneyless in order to extract moneys. Their monstrosity was a public scandal. Even the compassionate court of equity was unable to ameliorate their lot. Eventually mitigation came from Parliament. Arrest and imprisonment for debt were done away with in stages. The Debtors Act 1869 drove the last nail into the coffin. Section 4 of the Debtors Act pronounced that `with the exceptions hereinaftermentioned, no person shall be arrested or imprisoned for making default in payment of a sum of money.` Thereafter a debtor could not be taken in execution. Instead only his property was subject to execution. Paradoxically, when equity made an order of specific performance for payment of money or other obligations, it was enforced by the harsh remedy of committal. Thus equity imitated the common law by incarcerating debtors when it was no longer possible under common law.

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48.This divergence was reflected in the form of judgments and orders. The common law court gave a negative form of judgment for money. That is the `do recover` form. Enforcement was by execution on property. The equity court order was in specific performance form, namely the `do pay` form. In this case enforcement was by incarceration. This is derived from the equitable doctrine that the court acts in personam. So an order for specific performance was expressed in the form of requiring the defendant to do a specific act within a specified time. All that changed in 1966. New forms of judgments and orders were introduced in the interest of providing uniformity and consistency in the forms of judgments and orders and the methods of their enforcement. Judgments for money were all in the same form: the `do pay` form.

49.The new common form of judgment was introduced in Singapore in 1970 and is still in use. When a plaintiff obtains a judgment for money he can avail himself the same execution process irrespective of whether the cause of action is founded on common law or equity. However, there is one important point to note. It arises from the double dimension of the relief of specific performance: one relating to procedural law and the other substantive law. The change in procedure did not change the substantive law. In either case if the judgment creditor desires to avail himself of committal proceedings he must ask for insertion in the judgment or order a time limit within which the money is to be paid. In which case material must be placed before the court to enable it to exercise its discretion. It will not be given as a matter of course. Without the insertion of the time limit there can be no committal proceedings. Without it, it is not an order for specific performance in its true sense and form. All that is procedural law. That does not alter the substantive law governing debt, damages and specific performance.

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50.In the result, the defendant was wrong in his submission that there was no claim in debt. This is not to say that when a cause of action is based on debt the substantive principles governing it will be eschewed. In this case the plaintiffs have not asked for the traditional equitable form of judgment stipulating a time limit. Accordingly the argument based on the allegation that specific performance was not pleaded was a red herring. It becomes material only when committal of the defendant is contemplated. Committal of the defendant was not in the contemplation of the plaintiffs. There was a valid cause of action founded on debt and that claim was governed by the principles I have enunciated. Principles governing the granting of specific performance do not apply to a claim in debt.

51. ***Summary judgment for specific performance in Singapore***

Now is a good moment to attend to **Excelsior Hotel Pte Ltd v Hiap Bee (Singapore) Pte Ltd** [1989] 2 SLR 902 . It concerned two sale and purchase agreements in respect of two shop units. The price was to be paid in instalments in accordance with the progress of the construction of the project. The agreements contained provisions in substance similar to cl 5 in this case before me. The purchasers defaulted in the payment of some instalments. The project was completed notwithstanding the purchasers` failure to pay some of the instalments. Upon inspection of the court file I found that the price of one unit was $363,800 and the other was $465,000. The outstanding amount on one was $60,000 and the other was $93,000, exclusive of interest. Vacant possession was offered but was not taken up. The vendors gave the required notice to complete but to no avail. So they issued a writ and then a summons seeking summary judgment for specific performance of the entire contract and liberty to exercise vendor`s lien by sale in case of default. What is the same thing, they wanted the

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purchasers to pay the outstanding instalments and service charges and complete the conveyance.

52.The application was made pursuant to O 81 of the Rules of the Supreme Court 1970 (`the 1970 RSC`). It was a conveyancer`s summons. Order 81 of the 1970 RSC in effect provided as follows:

> *In any action begun by writ indorsed with a claim for specific performance of an agreement for the sale and purchase of any property with or without an alternative claim for damages or for rescission of such an agreement or for the forfeiture or return of any deposit made under such an agreement the plaintiff may, on the ground that the defendant has no defence to the action apply to the court for summary judgment.*

Such an application was excluded from O 14 of the 1970 RSC by r 1(3) of that order. So for summary judgment for specific performance of sale and purchase agreements of any property was not possible under O 14 of the 1970 RSC. That provision was lifted from O 86 of the Rules of the Supreme Court 1965 (England) providing for summary judgment procedure for claims in the Chancery Division (`Ch D`) for enforcing or setting aside contracts for the sale of real property and associated claims in relation to real property. In England a separate provision was necessary because all matters relating to the sale of land were by statute assigned to the Ch D. The Queen`s Bench Division (QBD) had no jurisdiction over such claims. Hence, claims for specific performance, which in reality meant applications for enforcing sale and purchase agreements for real property were excluded from O14 of the English Rules. Such division was based on specialisation of the English judges. However, there was no such specialisation in Singapore. Notwithstanding that, the 1970 RSC introduced and maintained the English dichotomy in Singapore. It was an anomaly. The anomaly has now been removed. The application for summary judgment for specific performance in the ***Excelsior*** case had to be made under O 81 of the

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1970 Rules. However, a developer was and is not under an obligation to ask for specific performance when only he has a debt claim. He should not ask for specific performance in such a case. Applications for summary judgment for specific performance can be made under O 14 of the Rules of Court 1996. This court is obliged to operate the present O 14 as it finds it. See **The August 8th** [1982-1983] SLR 32 [1983] 1 MLJ 281 ; sub nom **The August 8** [1983] 2 AC 450 (PC).

53.In ***Excelsior*** , it was argued by the purchaser that the remedy of specific performance was excluded by a clause in the agreement. The court disagreed and granted an order for specific performance within 28 days from the date of the order. There was also a declaration that the vendor had a lien on the units for the balance amount due. Finally the vendor was given liberty to apply to enforce the lien in the event of default in making payment of the amounts. The decision in ***Excelsior*** related to the special facts of the case. There was no claim for debt in that case because it was not an application under O 14. Besides Excelsior, there are many cases where the actual remedy sought was specific performance where the principles governing specific performance were applied. In all those cases there was no claim based on debt. **MacQuarrie v A-G of Nova Scotia** [1972] 32 DLR 603 was a case where the equitable remedy of specific performance was sought. **Centex Homes Corp v Eugene H Boag** [1974] 128 NJ Super 385 was another case where specific performance was sought. In all these cases the substantive principles governing that relief were rightly applied. The case before me is in a different universe.

54. ***Summary of propositions of law***

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It is now appropriate to summarise the law governing the rights of an innocent party in the case of a repudiatory breach by the other (the contract-breaker`). I propose to state it as propositions of law.

55.First, where a contract provides for payment of a sum of money in consideration of the delivery of goods or the performance of services by one of the parties, then that party, on completing performance, is entitled to payment of the sum he has earned. His remedy in the case of default is not damages but a debt action to recover the contract sum. Debt lies only where the plaintiff has performed those acts which, by the terms of the contract, entitled him to payment. If such performance is prevented by the defendant`s wrongful act, the plaintiff cannot sue in debt but must claim damages. Where a plaintiff`s contractual obligations are divisible, in the sense that the contract entitles him to be paid in portions for each stage of performance, he can sue for each part of the contract price as the work relevant to that part is completed. See ***Commercial Law*** by Roy Goode (2nd Ed), p 119.

56.Secondly, the innocent party has the right to elect whether he will treat the contract as annulled or still alive. The rules governing mitigation of damages do not apply to the innocent party`s choice of remedy for the other party`s breach. In making his choice the innocent party is not required to act reasonably. He is completely free to act as he judges to be in his best interest. The contract-breaker has no right to force the innocent party to accept the repudiation if the innocent party can complete performance unilaterally, that is without the assent and co-operation of the contract-breaker. The innocent party, then, is entitled to all the benefits, and bound by all the obligations under the contract. See **The Solholt; Sotiros Shipping Inc v Solholt Shmeiet** [1983] 1 Lloyd`s Rep 605 at pp 608-609 (CA), **White and Carter (Councils) Ltd v McGregor** [1962] AC 413 and **Fercometal SARL v Mediterranean Shipping Co SA** [1989] AC 788.

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57.Thirdly, if the innocent party does not accept the repudiation and therefore affirms the contract there is no breach to act on. The contract subsists for the benefit of both parties. `An unaccepted repudiation is a thing writ in water`. No requirement to mitigate damages arises. Since the contract survives, the innocent party may proceed with the performance if he can do so unilaterally and recover future instalments as debt after completion of performance and demand. He cannot recover future instalments as debt before performance by asking for specific performance. If he desires to claim future payments in advance he must accept the repudiation and sue for damages and subject himself to the rules governing mitigation. See **Howard v Pickford Tool Co Ltd** [1951] 1 KB 417 at 421, **White and Carter (Councils) Ltd v McGregor** [1962] AC 413, **Interoffice Telephones Ltd v Robert Freeman Co Ltd** [1958] 1 QB 190 (CA) and **Overstone Ltd v Shipway** [1962] 1 All ER 52[1962] 1 WLR 117 (CA).

58.Fourthly, when a contract stipulates for payment of part of the purchase money in advance and the purchaser relies on the vendor`s promise to give him a conveyance, the vendor is entitled to enforce payment before the time has arrived for conveying the land. Consequently, a claim for arrears of progress payments already due is a claim in debt and not damages for a breach of contract as a whole. Accordingly it is recoverable as a debt irrespective of whether or not a subsequent repudiatory breach is accepted to annul the contract. See **McDonald v Dennys Lascelles Ltd** [1933] 48 CLR 457, **Workman, Clark & Co Ltd v Lloyd Brazileno** [1908] 1 KB 968, **Overstone Ltd v Shipway** [1962] 1 WLR 117 (CA), **White and Carter (Councils) Ltd v McGregor** [1962] AC 413 and **Stocznia Gdanska SA V Latvian Shipping Co** [1998] 1 WLR 574.

59. ***Application of the law***

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The plaintiffs in this case have brought this action to recover a debt - an agreed sum of money which has unconditionally fallen due by reason of a prior promise contained in a contract. The action is brought to convert the contractual debt into a judgment debt so that they can avail themselves of the various modes of execution processes. The relief they have sought is not specific performance in the procedural or substantive sense of the expression. There is no law which requires them to give up their cause of action in debt and seek another relief. There is no defence to their claim based on debt. The defendant has not raised any valid point in opposition to the claim in debt. The allegations of hardship are all based on his distorted view of the plaintiffs` claim. It is precisely because the plaintiffs have not asked for the relief of specific performance and have chosen to sue on debt that they must succeed. This is not a claim in damages. Accordingly no duty to mitigate damages arises. They require the money to proceed with and complete the construction. The contract is structured on that basis. The Housing Developers (Control and Licensing) Act approves of their collecting and using the progress payments for the purpose of the construction and expenses related to the project. The Housing Developers (Project Account) Rules spell out the procedure for the collection and utilisation of the progress payments for the purpose of foundation works, soil investigation and construction of the building project. The progress payment may also be used for purposes of repayment of any loan for the construction of the building project and the interest and other charges on the loan. It is therefore imperative that the purchasers act reasonably and seasonably in discharging their financial obligations as stipulated in the agreement. On the true construction of the agreement and application of the law and the logic outlined above the defendant has not raised any plausible defence or bona fide triable issue.

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60.On the facts of this case it would be improper to apply for an order for specific performance of payment of a debt when a simple money judgment would suffice. Consequently it would be a travesty of justice to turn away a claimant who has issued a writ for an unarguable debt on the ground that it is a claim for specific performance which has not been pleaded. To do so is tantamount to saying that the statement of claim does not disclose a cause of action for debt. It is the duty and function of the court to adjudicate the claim disclosed in the statement of claim except when it is an abuse of process. If every creditor who sues on a debt is told to go for specific performance so that the defendant can invoke the discretionary principles of equity, it will provide the escape route to multitude of debtors who are brought to court every day on indisputable debts. It will defeat the purpose of O 14. That cannot be right. In this case the writ disclosed a cause of action for debt and it was a valid cause of action. Finally on the facts of the case, the plaintiffs not only have a legitimate interest to complete the project but are under a legal obligation and practical compulsion to do so because by the nature of the case, they have to honour a myriad of other contracts with contractors who in turn have sub-contracts.

61.It is not my desire to range beyond the application before me. However, I do desire to make an observation, not amounting to a decision, that it would not be proper to ask for specific performance of the entire agreement at this stage. The plaintiffs should wait until they have completed the construction of the project and are ready to sign the conveyance.

62. ***Conclusion***

By reason of the matters discussed above and by way of conclusion I say this: the defendant in this case asks this court to decide this case by his lights. The court, however, is duty-bound to decide it by the lights of the law. And by the

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lights of the law there will be judgment in favour of the plaintiffs for the amount claimed with contractual interest and costs.

G P Selvam J

Engelin Teh SC, Jill Tan and Thomas Sim (Engelin Teh & Young) for the plaintiffs/appellants
Ernest Lau and Thio Shen Yi (Thio Su Mien & Partners) for the defendants/ respondents

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