Ng Teck Sim Colin and another *v* Hat Holdings Pte Ltd and another [2010] SGHC 217

Case Number : Suit No 414 of 2008

Decision Date : 03 August 2010

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Peter Cuthbert Low, Chan Wai Mun, Paul Tan and Koh Li Yun (Colin Ng & Partners LLP) for the plaintiffs; Edwin Tong, Kristy Tan and Koh Bi'na (Allen & Gledhill LLP) for the defendants.

Parties : Ng Teck Sim Colin and another — Hat Holdings Pte Ltd and another

Conflict of Laws

3 August 2010 Judgment reserved.

Belinda Ang Saw Ean J:

Introduction

1 This action concerns the sale of a property known as Villa 2, Ayara Surin, Phuket, Thailand ("the Property"). The present litigation brought into sharp focus the uniqueness of Thai law where ownership of the land is separate from that of the house built on the land. Under Thai law, separate transfers and registrations are required before legal ownership of both land and house can validly and effectively change hands. The sale transaction was plagued by troubles encountered along the way, which gave rise to misplaced suspicion and mistrust in the minds of the parties stemming from the unappreciated difference between Thailand's and Singapore's property law; it certainly did not originate from the parties' desire to take advantage of each other. The plaintiffs, Colin Ng ("Colin") and Maria Ng ("Maria") (collectively, "the Ngs") are the sellers of the Property. The first defendant, Hat Holdings Pte Ltd ("Hat") is the purchaser of the Property. Samuel Foy Colflesh ("Samuel") and the second defendant, Bolliger Hans Peter ("Bolliger") are the directors of Hat. The Property was purchased by Hat for the use of Bolliger and his family. [note: 1] Samuel was the key person who represented Hat in the sale transaction.

Facts giving rise to the dispute

The Ngs' acquisition of the Property

2 On 8 October 2000, the Ngs entered into a Reservation Contract with Southern Land Development Co Ltd ("Southern Land") to purchase the Property for Thai Baht 27.3m. [note: 2] According to the Ngs, construction of the two-storey house on Ayara Surin (hereafter known as "Villa 2") started in late November or early December 2000. [note: 3] However, the Ngs only entered into a contract with Southern Land to purchase the lease of the Ayara Surin land ("the Land") under a "Vacant Land Lease Agreement" ("the 2001 Lease") on 23 April 2001. [note: 4] In addition, the Ngs entered into a construction contract with the builders, JV MIT Co Ltd ("JV MIT"), on 28 May 2001. [note: 5] Subsequently, Southern Land registered in favour of the Ngs, at the Talang District Land Office ("the Phuket Land Office"), the 2001 Lease and the right of superficies for the Land. By way of

explanation, the right of superficies is a right granted by the freehold landowner (here, Southern Land) to the superficies right holder (here, the Ngs) to own buildings and structures on the land in question (see s 1410 of the Civil and Commercial Code of Thailand). [note: 6] Notably, there is no dispute that the Ngs paid for the Land and the construction costs of Villa 2, and that they had exclusive possession, use and enjoyment of the Property for over six years before deciding to sell it to Hat.

3 On 22 April 1999 (before the Ngs bought the Property), Sarot Tantipatanaseri ("Sarot"), an architect who worked with (but was not an employee of) Southern Land, was issued a license to construct several houses, including Villa 2 ("the Construction Permit"). The Construction Permit stated that Sarot was the owner of Villa 2, and that the permit was "valid until" 21 April 2001. [note: 7] The Construction Permit was purportedly transferred to the Ngs ("the Assigned Construction Permit") on 23 March 2006. It is undisputed that the events giving rise to the dispute in this action started after 3 March 2008 when the Phuket Land Office rejected as defective the Assigned Construction Permit because it came into being after the Construction Permit had expired. [note: 8] I now move to the events in 2007.

Negotiations leading up to the signing of the Agreement

4 Bolliger first contacted Colin to ask if the Property was available for sale in October 2007. Thereafter, Maria negotiated the sale terms with Bolliger and, later, Samuel, both directly and through e-mail.

5 After some negotiations, the parties agreed on the terms of the sale and executed an agreement on 12 December 2007. While the document was entitled an "Option to Purchase", it was actually a sale and purchase agreement ("the Agreement"). [note: 9] The salient terms of the Agreement are as follow: [note: 10]

(a) The sale price for the Property was fixed at US$1.85m. Of this sum, US$1m was in respect of the Land, and the remaining sum of US$850,000 was in respect of Villa 2 and the fixtures attached thereto ("the Villa 2 Purchase Price");

(b) The title shall be free from encumbrances and the Property was sold "as is where is";

(c) The completion date was fixed for 4 February 2008, but this could be extended for up to 14 days at Hat's request;

(d) Hat was deemed to have "full notice of the actual state and condition of the [Property] in all respects" and "shall not be entitled to raise any objection or requisition whatsoever in respect thereof";

(e) The Agreement was to be construed in accordance with the laws of Singapore, "without regard to any principles on conflicts of law". The parties agreed to irrevocably submit to the exclusive jurisdiction of the Singapore court.

On 14 December 2007, Hat transferred to the Ngs a total sum of US$277,500, purportedly as the deposit and option money for the Property. [note: 11]

Events leading to the first variation of the Agreement

6 After the Agreement was executed, the parties exchanged the contacts of their respective Thai lawyers. [note: 12] The Ngs were represented by Surasak Pittisuree ("Surasak") while Hat was represented by Pornchai Srisawang from the law practice of Tilleke & Gibbins International Ltd ("T&G"). On 4 January 2008, Maria sent Samuel and Bolliger an e-mail setting out the advice she had received from Surasak, namely that: [note: 13]

(a) the registration process for the Property had to be bifurcated (with the transfer of Villa 2 taking one month to complete due to the need to post a notice of the transfer application for 30 days at Villa 2 and elsewhere as designated by the local authorities); and

(b) Surasak had copies of the Title Certificate, the Assigned Construction Permit and House Registration Book and he confirmed that they were ready for registration.

Additionally, Maria suggested postponing the date of completion to 11 February 2008.

7 T&G conducted due diligence on the Property and prepared a due diligence report dated 10 January 2008 for Samuel ("the DD Report"). The DD Report concluded that the freehold land was owned by Southern Land and leased to the Ngs under the 2001 Lease. The DD Report also recognised, in respect of Villa 2, the existence of both the Construction Permit and the Assigned Construction Permit. [note: 14] On 20 January 2008, Samuel sent an e-mail to the Ngs and Bolliger, describing the outcome of the due diligence exercise as "satisfactory". [note: 15]

8 In February 2008, numerous unsuccessful attempts were made to complete the sale transaction. (The reasons for the failed attempts are not material for this judgment.) On 28 February 2008, T&G informed Samuel that it had arranged to meet the Ngs' lawyers and Southern Land's representatives on 3 March 2008 with a view to register the lease and superficies (for the Land) and to file an application to register the sale of Villa 2. [note: 16] However, the Phuket Land Office rejected the application to register the transfer of Villa 2 on that day as the Assigned Construction Permit was invalid (see [3] above). [note: 17] The officers at the Phuket Land Office suggested that Sarot transfer Villa 2 to the Ngs in order for the Ngs to transfer Villa 2 to Hat.

9 As a result, two suggested solutions to this problem emerged. T&G suggested that Sarot transfer Villa 2 to the Ngs, and then from the Ngs to Hat ("the Two-Steps Process"). [note: 18] Maria adopted and proposed her Thai lawyer's suggestion, which was for Sarot to transfer Villa 2 directly to Hat to save time and costs ("the One-Step Process"). [note: 19] Samuel agreed to the One-Step Process. The context in which this agreement was reached is important. The Ngs asserted that Hat (through Samuel), at the time of agreeing to the One-Step Process, was not concerned as to whether Sarot had good title to transfer, relying on the e-mail sent by Samuel to Maria on 5 March 2008 at 9.08am to support their argument. [note: 20] However, I do not think there is evidence to support such an interpretation. First, Samuel had, in that e-mail, clearly stated his understanding (based on the Construction Permit) that Sarot was the named owner of Villa 2 and that he would need to seek an expert's opinion on this matter. In addition, in an earlier e-mail dated 4 March 2008 (timed at 10.34pm), Samuel also sought clarification on how the One-Step Process would "[apply] to the effective conveyance". [note: 21] It is true that paragraph 5 of Samuel's e-mail dated 5 March 2008, read alone, suggests that Samuel was happy to receive whatever title Sarot could transfer to Hat, and he was even willing to personally assist in getting Sarot to effect the transfer. However, in the light of his earlier observations and comments, in all fairness, it cannot be said that Hat was not concerned, at that point of time, with whether the title that Sarot could transfer was good or

otherwise imperfect. I should add that, at all material times, the parties, on the advice of their respective Thai lawyers, had proceeded with the application to register Villa 2 on the premise that Sarot was the correct person to transfer Villa 2 as he was named as the owner on the Construction Permit. It was only well into this litigation that the defendants, under the advice of a different set of Thai lawyers, adopted the current position that Southern Land, and not Sarot, was and is still the legal owner of Villa 2.

The successful transfer of the Land

10 On 7 March 2008, the parties went to the Phuket Land Office to register the respective transfers of the Land and Villa 2. [note: 22] The Land was successfully transferred to Hat by: (a) terminating the 2001 Lease between the Ngs and Southern Land; [note: 23] (b) terminating the Ngs as superficies; [note: 24] (c) applying to register a *fresh* lease given by Southern Land to Hat; [note: 25] and (d) applying to register Hat as the superficiary of the Land. [note: 26] Notably, the *fresh* lease was effective from 7 March 2008 ("the 2008 Land Lease"). [note: 27] Hat paid the Ngs the balance of the purchase price for the Land on 12 March 2008. [note: 28] No dispute arises from the transfer of the Land.

The transfer of Villa 2

11 The transfer of Villa 2 did not materialise on 7 March 2008 as Sarot was worried about his potential income tax liability arising from his purported sale of Villa 2 [note: 29] (which was based on a standard form Sale and Purchase of House Agreement [note: 30]). On 10 March 2008, the Ngs provided Sarot with a Letter of Guarantee to cover any duty, fee, commission or tax arising from the "sale" of Villa 2. [note: 31] Sometime around 31 March 2008, Sarot provided a power of attorney (dated 12 March 2008) in favour of Adul Chueasaman, who was one of the Ngs' lawyers in Thailand at that time, to facilitate the transfer of Villa 2 to Hat. [note: 32] During this period of time, the parties agreed to work towards handing over Villa 2 on 2 April 2008. [note: 33] Hat arranged to pay for the services required to upkeep Villa 2 and paid the common area dues for the second quarter of 2008 sometime on or around 23 April 2008. [note: 34]

12 On 13 March 2008, Colin wrote to Samuel requesting part-payment for Villa 2 before its actual transfer. [note: 35] The Ngs' rationale for requesting early payment was that the Land had already been transferred. This request triggered questions as to when registration of the transfer for Villa 2 would take place and there were extensive discussions on this point between Maria and Samuel. [note: 36] On 19 March 2008, Colin wrote to Samuel and Bolliger to inquire when the Ngs could expect payment (in part) for Villa 2. [note: 37] This inquiry prompted Bolliger to write a long e-mail to Samuel on 25 March 2008. In this e-mail, Bolliger questioned the legality of the Ngs' title to Villa 2 and the physical structure of Villa 2 itself, whether Villa 2 could be made legal, and also whether Hat should be paying the Ngs when the latter was not the party transferring title to Villa 2. [note: 38] On 29 March 2008, Bolliger asked Samuel further questions relating, again, to the legality of Villa 2 and the implications of taking over possession of Villa 2 in the circumstances. [note: 39] Bolliger also stated that he was happy to delay taking possession of Villa 2. Samuel's reply on the same day was that he was not sure why title to Villa 2 had not been transferred to the Ngs, and that the difference between having an illegal and legal house was only money. [note: 40] Samuel further opined that Hat taking possession of Villa 2 was the "best scenario" as it would remove the Ngs from their only

possible claim (for possession), leaving Hat and Southern Land to resolve any consequential problems. Samuel concluded by stating that he was relaxed because: (a) the Land was in Thailand; (b) Hat had title to the Land; (c) Hat had not paid the US$850,000 over to the Ngs; and (d) Southern Land was professional.

13 The attempts to conclude the transfer of Villa 2 and for Hat to enter possession of Villa 2 hit a snag on 2 April 2008, when Samuel offered to pay only 20% of the Villa 2 Purchase Price upfront and the remaining 80% on completion. Colin refused to allow Hat into possession of Villa 2 as he felt insulted by the offer. [note: 41] Subsequently, Colin suggested that Singapore lawyers (as stakeholders) hold the US$850,000, or that Hat pays 50% of the Villa 2 Purchase Price upfront with the remaining 50% to be paid after expiry of the 30-day notice period required for Villa 2. [note: 42] Samuel agreed, on 4 April 2008, that 50% of the Villa 2 Purchase Price would be paid on the first Friday after successful application at the Phuket Land Office, and the remainder on the first Friday following final completion. [note: 43] The parties' respective Thai lawyers then arranged to meet at the Phuket Land Office on 9 April 2008 as Hat's Thai lawyers were unable to attend earlier. [note: 44]

14 Bolliger was forwarded a copy of Samuel's e-mail to the Ngs dated 4 April 2008, and again, he wrote to Samuel to record his discomfort over the legality of Villa 2 in the light of the expired Construction Permit. [note: 45] Samuel's response was that Hat's Thai lawyers would ensure that it obtained a legal building before the sale was completed, and the deal as structured "[would] ensure this so long as it [went] as planned on 9 April". [note: 46] Further, Samuel stated that Hat would approach the "owner" (presumably, Southern Land (see [12] above)) directly if the transaction failed on 9 April 2008, and that the "only difference between legal and illegal [in Thailand]" was money.

15 On 9 April 2008, Samuel and the parties' respective Thai lawyers successfully filed an application to register the sale and purchase of Villa 2 at the Phuket Land Office. [note: 47] On 11 April 2008, Bolliger sent Samuel yet another e-mail to question if he should ask the Ngs why they were selling a structure that was illegal, and whether Colin could be banned from practicing law in Singapore for selling something that did not belong to him. [note: 48]

Payment of the first 50% of the Villa 2 Purchase Price and the alleged Oral Agreement

16 On Thursday, 10 April 2008, Maria wrote to Samuel to remind him that payment of the first 50% of the Villa 2 Purchase Price was due the next day. [note: 49] Nothing happened until 13 April 2008, when Samuel asked Maria how he should go about arranging for payment to stakeholders, apparently because he was accountable to his trustees on the payment to be made. [note: 50] Presumably, Samuel was thinking of British and Malayan Trustees Ltd, who is the majority shareholder of Hat. On 14 April 2008, Colin explained that the Ngs were still the sellers of the Property, but Sarot was the "registered house owner" who had executed a Power of Attorney allowing the Ngs' Thai lawyers to transfer Villa 2. [note: 51] Samuel's response to Colin's explanation on the same day was that: [note: 52]

(a) Both parties should move away from their "lawyers" and "trustees" as it was "near impossible" to get them to accept to Colin's proposal; and

(b) Hat would pay 50% of the Villa 2 Purchase Price, with the remaining amount "owing to be paid on the first Friday following completion", if the Ngs would provide a "statement of joint liability" and "receipt for the funds being collected on [Sarot's] behalf".

Colin agreed to Samuel's proposal in relation to payment of the Villa 2 Purchase Price ("the Oral Agreement") and further stated that: [note: 53]

> [I SUPPOSE IT IS RIGHT THAT WE ARE RESPONSIBLE TO THE BUYER IF [SAROT] CLAIMS ANYTHING FROM YOU IN RELATION TO THE HOUSE REGISTRATION. OF COURSE WE DON'T EXPECT THIS. BUT IF IT DOES HAPPEN THEN WE [SHOULD] BE CONSULTED AND IF ANY PAYMENT IS TO BE MADE THEN WE [SHOULD] BOTH AGREE. IN SHORT WE INDEMNIFY THE BUYER AGAINST ANY SUCH CLAIM BY [SAROT]] …

17 Later on 14 April 2008, Samuel sent Colin another e-mail to clarify the terms of the joint liability statement, and asked that it included a "clause of non-performance on the part of the "registered owner", and not simply to cover the event of [Sarot] making a claim on matters of the registration post-event". Samuel explained that his greater concern was "non-performance" (presumably by Sarot), and not whether the Ngs or Hat would be able to defeat any claim raised by Sarot. [note: 54] Colin agreed to Samuel's request. The parties arranged to meet later that day. At that meeting, Samuel made payment of 50% of the Villa 2 Purchase Price while the Ngs executed an indemnity in Hat's favour in the event of any claim by Sarot, and further agreed to the following: [note: 55]

> If [Villa 2] is not delivered then you can proceed for breach of contract (after reasonable time has been given) against [the Ngs].

Completion of the transfer of Villa 2

18 The registration of the sale of Villa 2 to Hat was completed on 23 May 2008 pursuant to a "Sale and Purchase of House Agreement" entered into between Sarot and Hat. [note: 56] In particular, the document "Agreement to Sell Building" that was registered at the Phuket Land Office carried the following endorsement: [note: 57]

> I, [Hat], confirm that, in the process of making this Agreement, I had directly come into contact with the [freehold] Land Owner [*ie*, Southern Land] and come to an agreement with him explicitly. Hence as a result, this agreement was documented and registered. And if there should be a case of mistaken identity regarding the Land Owner or the Land itself, I will solely bear all responsibilities. The Officials involved will not be implicated.

There is no dispute that registration was completed on 23 May 2008. Payment of the remaining unpaid 50% of the purchase price for Villa 2 ("the Final Payment") was due on 30 May 2008. However, Samuel did not provide payment then, claiming that there was an "impasse"; that the matter was "under review", and that his "Settlement sheet" was not ready. [note: 58] On 5 June 2008, Samuel asked Maria for a meeting without Colin and Bolliger to settle two remaining issues. [note: 59] Simultaneously, Samuel informed Bolliger about the meeting, claiming that the meeting was arranged because Maria had pressed to meet. In his e-mail to Bolliger, Samuel mentioned Bolliger's "intention … [to have] the final sum owing discounted". [note: 60] Samuel and Maria met on 6 June 2008. Samuel allegedly informed Maria of the Ngs' breach of the Oral Agreement and that was why Hat would not be making the Final Payment in full. [note: 61] Maria denied that Samuel had said such a thing.

Post-completion events in and after June 2008

19 On 6 June 2008, Samuel assured Maria that Bolliger would sign the cheque without any irrational

deductions. [note: 62] On the side, Samuel and Bolliger exchanged a number of e-mails discussing how they could justify obtaining a 10% discount for the Property from the Ngs as full and final settlement, for example, by having Samuel include his fees (presumably for services rendered in the sale transaction). [note: 63] On 11 June 2008, Samuel offered to the Ngs payment of S$336,936 without any apparent explanation for the unilateral deduction of 10% of the Purchase Price of the Property and, as expected, the offer was rejected by the Ngs. [note: 64] As a consequence, on 16 June 2008, the Ngs' lawyers sent Hat a Statutory Demand for the Final Payment, threatening to commence winding up proceedings if the full amount remained unpaid. [note: 65] Hat responded by commencing Originating Summons No 890 of 2008 ("OS 890/2008") to restrain the Ngs from winding it up. In Samuel's affidavit in support of Hat's application, he alleged that the parties had reached an Oral Agreement for Sarot to issue a receipt to Hat (see [16] above), and that the Ngs' failure to procure such a receipt meant that they were not entitled to Final Payment. [note: 66] Kan J ordered Hat to pay the Final Payment into court on 15 July 2008. OS 890/2008 was withdrawn upon payment.

20 On 28 July 2008, the Ngs procured from Sarot a letter resembling the terms of the receipt that Hat alleged the Ngs did not produce. Sarot's letter ("Sarot's Receipt") stated that he (Sarot) was "happy that [Villa 2] had been transferred out of [his] name" (having been a nominee holder to the Ngs hitherto) and that he was "not claiming money from anyone (be it [the Ngs] or [Hat]) for the transfer. [note: 67] In addition, the Ngs replaced the personal guarantee originally provided to Sarot (see [11] above) with a charge over the Ngs' bank account in Thailand that had an account balance of Thai Baht 2m. [note: 68] On 26 August 2008, the Ngs (through its solicitors) made a without prejudice offer to Hat's solicitors to pay the taxes and expenses associated with the transfer of Villa 2 and to provide the receipt and confirmation sought for (see [16] above), but Hat did not respond to the offer. [note: 69]

Issues arising from the dispute

21 The Ngs' case is that the parties had agreed (on 14 April 2008) that the Final Payment (*ie*, US$425,000) would be paid on the first Friday following the date of registration of the sale and purchase of Villa 2. [note: 70] The registration of the sale and purchase of Villa 2 was completed on 23 May 2008, and the Final Payment became due and payable on 30 May 2008. [note: 71] However, in breach of the Agreement, Hat failed to pay the Final Payment, but instead, sought to tender payment of S$336,936.00 as "full and final settlement" of the purchase of Villa 2 on 11 June 2008. [note: 72] As such, the Ngs claim for the Final Payment.

22 Hat's defence is two-fold. First, Hat argues that it was an implied term or warranty of the Agreement that the Ngs would transfer "good, proper and perfect legal and beneficial title" to it. [note: 73] After Hat became aware that Sarot was the purported registered owner of Villa 2, it was agreed that the Ngs would procure Sarot to transfer legal ownership to Villa 2 to Hat. Hat claims that the parties entered into an oral agreement ("the Oral Agreement") on or about 14 April 2008, and that the Ngs were in breach of the terms of the Oral Agreement in failing to: [note: 74]

(a) pay all taxes, costs and other expenses associated with the transfer of Villa 2 from Sarot to Hat; and

(b) procure a receipt from Sarot evidencing payment by Hat, and/or confirmation from Sarot that he has no further title, interest or any other claims in Villa 2 whatsoever.

As a result of the purported breach of the Oral Agreement, Hat claims to be entitled to withhold the Final Payment. I will refer to this defence as the "Oral Agreement Argument".

23 Next, Hat pleaded that it discovered, in April 2009, that Sarot's title was defective and that "good, proper and perfect legal title" to Villa 2 was not transferred to Hat despite the purported registration on 23 May 2008. Sarot's title to Villa 2 was defective based on the following grounds: [note: 75]

(a) Although Sarot was the holder of the Construction Permit, he was not the proper applicant and/or holder of that permit in respect of Villa 2.

(b) The transfer of the Construction Permit from Sarot to the Ngs on 23 March 2006 was not a valid way of transferring registered title to Villa 2 as Villa 2 was already constructed at that time. In any case, Sarot did not have good legal title to transfer, for the reason given above in (a).

24 Consequently, Hat pleaded that the Ngs were in breach of the Agreement (as varied) which required them to transfer "good, proper and perfect legal title" to Villa 2. The Ngs were, therefore, not entitled to payment until they transferred "good, proper and perfect legal title" to Villa 2 to Hat. [note: 76] Hat's counterclaim against the Ngs is in respect of: (a) their breach of the Agreement in failing to provide "good, proper and perfect legal title", and (b) their breach of the Oral Agreement. [note: 77] At the end of the trial, Hat elected to claim solely for specific performance of the sale and purchase of Villa 2, and for damages arising from the Ngs' failure to procure or transfer title to Villa 2 to Hat. [note: 78]

25 From the parties' pleaded case, there are two main issues for me to decide. The first is whether the Ngs were in breach of the alleged Oral Agreement. The second is whether the Ngs had transferred good title to Villa 2 to Hat. I will first consider the Oral Agreement Argument.

First issue: The Oral Agreement and the Ngs' breach thereof

26 Hat pleaded that the parties had reached an oral agreement under which the Ngs were to provide, *inter alia*, a confirmation from Sarot that he has no claims against Hat in relation to Villa 2 ("Confirmation"), and a receipt from Sarot evidencing payment by Hat of Thai Baht 7.5m ("Receipt"). [note: 79] Hat submits that the Ngs remained in breach of their duty to provide the Confirmation and Receipt. In its further and better particulars filed on 8 August 2008, 21 August 2008 and 11 September 2008, Hat took the position that this Oral Agreement was reached in a telephone conversation between the Ngs and Samuel in the afternoon of 14 April 2008. [note: 80] In trial, Samuel confirmed that such was the case. [note: 81]

27 In its closing submissions, Hat does not dispute that the Sarot Receipt (see [20] above) satisfied the requirements of the Receipt and the Confirmation it sought. Instead, Hat contends that the Ngs' failure to provide Sarot's Receipt was a breach of their discovery obligations, and that the present proceedings "would have been obviated" if it had been disclosed. [note: 82] The argument which Hat raised in respect of the Final Payment does not justify its withholding the Final Payment; it has a bearing only on the question of costs (if at all). On the existence of the alleged Oral Agreement, I make the following observations. First, there is no record of any phone call between the Ngs and Samuel on the afternoon of 14 April 2008 from Colin's and Maria's phone-records. [note: 83] Hat provided no evidence of any such phone call that took place between the parties. In addition, it is not obvious to me that the words "i.e. production of", as allegedly written by Colin on a printed

copy of an e-mail [note: 84] when Samuel met to make payment for Villa 2, would necessarily suggest that the Ngs had agreed to produce the Receipt. The sentence is incomplete and the written words are too vague to lend itself to such an interpretation. Furthermore, the failure to provide the Receipt and Confirmation was never explicated by Samuel or Bolliger, at the material time, as the reason for withholding or discounting the Final Payment. Notably, on 2 June 2008, Maria specifically asked Samuel "[w]hat else do we [*ie*, the Ngs] need to do" to receive full payment for Villa 2. [note: 85] In subsequent communications between the Ngs and Samuel, Samuel did not mention anything about there being no Receipt or Confirmation. Indeed, Samuel did not provide any concrete reason at all for unilaterally imposing a discount. [note: 86] This is especially curious, since Bolliger and Samuel were evidently trying to find ways to justify a discount on the Purchase Price. The evidence strongly supports the Ngs' submission that the issue of the Receipt and the Confirmation was merely an afterthought. For all these reasons, Hat's defence based on the Receipt and Confirmation is untenable and without merit.

28 I now turn to consider whether the Ngs were obliged to pay the costs and taxes associated with the transfer of Villa 2 from Sarot to Hat. The Ngs accept that they would have to pay for the costs and taxes associated with the transfer of Villa 2, but argue that Hat did not demand payment for the same. [note: 87] No completion accounts reflecting such costs or taxes including reimbursements by way of deductions from the balance sale proceeds had been provided to the Ngs, as would have been customary for a property transaction in Singapore. Hat claims that it has paid Thai Baht 248,225 as personal income tax (with a receipt to back its claim) and that the Ngs have not repaid them. [note: 88] While the Ngs had agreed to pay for such personal income tax, apparently, Hat had not made any demand for repayment of such income tax. Notably, Hat did not rely on the unpaid income tax as a ground for seeking a discount of the Purchase Price. In any case, the unpaid income tax of Thai Baht 248,225 (which works out to approximately S$10,000) was nowhere near the 10% deduction that Hat sought to unilaterally impose on the Ngs. At best, Hat could deduct the equivalent sum to Thai Baht 248,225 from the Final Payment, leaving the balance payable to the Ngs. Furthermore, the Ngs had offered to make payment of taxes but their offer was ignored (see [20] above). In the circumstances, assuming that only the issue of taxes was alive, I would have held that Hat was not entitled to rely on this issue alone to withhold the Final Payment from the Ngs.

Second issue: the Court's jurisdiction to determine if good title was transferred to Hat

29 Hat's principal defence is that it did not receive good title to Villa 2. The obligation to transfer good title requires the Ngs to deliver Villa 2 free from encumbrances, subject to two qualifications. Hat takes Villa 2 subject to any irremovable defects in title: (a) which are patent; or (b) of which it knew at the time of contracting (see Megarry & Wade, *The Law of Real Property* (Sweet & Maxwell, 7th Ed, 2008) ("*M&W*") at para 15-074 -075 and the decision of Chao Hick Tin J in *Lie Kee Pong v Chin Chow Yoon* [1998] 1 SLR(R) 457 at [11] and [17]). There is no dispute that the Ngs were, at the time of entering into the Agreement, obliged to transfer good title to Villa 2 to Hat. Indeed, Colin accepted as much during cross-examination and the Ngs do not deny this in their submissions. [note: 89] Furthermore, the duty to deliver Villa 2 free from encumbrances is expressly provided for under cl 2 of the Agreement. However, the Ngs dispute that they were remiss in their obligation to transfer good title to Hat. They highlight that the test for whether good title is transferred was described in *Manning v Turner* [1957] 1 WLR 91 in the following terms (at p 94): [note: 90]

> In my opinion, the test must always be: would the court, in an action for specific performance at the instance of the vendors, force a title containing the alleged defect upon a reluctant purchaser?

30 During the course of the hearing, I asked, as a preliminary query, whether this court could determine the issues relating to title to Villa 2, since Villa 2 is located in Thailand. Both the Ngs and Hat take the position that this court could determine the dispute because their respective claims are founded in contract (*viz*, the Agreement), and this would be so, notwithstanding, the issues raised concerning title (to Villa 2) situated on foreign land.

31 However, I note that an integral (and strongest) part of Hat's defence is that the Ngs did not have good title and had failed to transfer good title to Villa 2 to it, and they were thereby in breach of their obligation to transfer good title. In support of this defence, in its closing submissions, Hat resolutely maintains that neither the Ngs nor Sarot had title to Villa 2, or was capable of transferring good title to it. The Ngs, however, deny that they were remiss in their obligation to transfer good title to Hat. Their expert witness, Supasak Chirasavinuprapand, opined that, at all material times, the Ngs, and not Southern Land, were the owners of Villa 2, and Sarot's transfer of Villa 2 to Hat was valid. [note: 91] The Ngs also point out that Hat was "in contact" with Southern Land at the time Villa 2 was registered in Hat's name on 23 May 2008 (see [18] above), as indicated on the Agreement to Sell Building that was lodged at the Phuket Land Office on that day. [note: 92] This, in turn, raises questions as to whether Announcement No 1522/2497, which requires the applicant (*ie*, Hat) to provide a letter from the freehold landowner (*ie*, Southern Land, according to Hat's case) giving consent for the transfer of Villa 2, is notionally satisfied under Thai law, [note: 93] and the implication of that, if any, on the experts' opinion that registration of a sale agreement between Southern Land and Hat for Villa 2 is required. Furthermore, Hat's expert witness on Thai law, Mr Pichitpon Eammongkolchai ("Pichitpon") points out that it is not settled under Thai law whether ownership of an existing building can be transferred through the grant of a right of superficies. As a result, in order for this court to determine whether the Ngs have satisfied their contractual obligation under the Agreement to transfer good title to Hat, it would have to determine a myriad of issues, arising under Thai law, relating to whether the Ngs or Sarot had title to transfer, and whether Hat had received good title to Villa 2.

32 It is trite law that the court does not have the jurisdiction to entertain proceedings involving determination of title to foreign land (see Collins, *Dicey, Morris & Collins on The Conflict of Laws* (Sweet & Maxwell, 14th Ed, 2006) ("*Dicey & Morris*") at para 23R-021). I will refer to this principle as the "*Mocambique* principle" (see *Companhia de Mocambique v British South Africa Co* [1892] 2 QB 358). On the other hand, the court can, in certain limited instances, make an order in an action, even if the action may concern foreign land. One such instance is where personal equities between the parties are involved ("the personal equities exception"). The circumstances under which the personal equities exception can arise were described by Parker J in *Deschamps v Miller* [1908] 1 Ch 856 as follows (at pp 863-864):

> There are, no doubt, exceptions to the rule, but, without attempting to give an exhaustive statement of those exceptions, I think it will be found that *they all depend on the existence between the parties to the suit of some personal obligation arising out of contract or implied contract, fiduciary relationship or fraud, or other conduct which, in the view of a Court of Equity in this country, would be unconscionable*, ***and do not depend for their existence on the law of the locus of the immovable property*** . Thus, in cases of trusts, specific performance of contracts, foreclosure, or redemption of mortgages, or in the case of land obtained by the defendant by fraud, or other such unconscionable conduct as I have referred to, the Court may very well assume jurisdiction. ***But where there is no contract, no fiduciary relationship, and no fraud or other unconscionable conduct giving rise to a personal obligation between the parties, and the whole question is whether or not according to the law of the locus the claim of title set up by one party, whether a legal or equitable claim in the sense of those***

words as used in English law, would be preferred to the claim of another party, I do not think the Court ought to entertain jurisdiction to decide the matter .

[emphasis added in italics and bold]

33 The distinction between the *Mocambique* principle and the personal equities exception was clearly described and well illustrated by Peter Prescott QC (sitting as deputy High Court judge) in *R Griggs Group Ltd v Evans* [2005] 2 WLR 513 ("*Griggs*"), as follows (at [65]–[66]):

65 The Moçambique case was about rights in rem. I do not doubt that if the British company had admittedly been the owner of the land in Manica, but had agreed to sell it to the Portuguese company, a court of equity might have decreed specific performance. For that would have been to enforce a right in personam. The House of Lords was not purporting to overrule a long line of equity cases to that effect.

66 The equitable jurisdiction in personam touching land abroad has existed for at least 250 years. Notice the difference. In the Moçambique case the Portuguese company was saying, in so many words: "Please decide that under the local law we were *already* the owners of the Manica lands and minerals." In contrast, under the in personam jurisdiction of equity, the claimant would be saying:

> "I fully admit the defendant is the owner of this land. That's my very complaint. You see, he has signed a contract to sell it to me. Please compel him to fulfil his bargain."

Then the court of equity would "act upon the conscience" of the recalcitrant party by ordering him to transfer the land to the claimant according to the forms of local law. The jurisdiction is not over the property, but over the person. The defendant signs the requisite documents for fear of being held in contempt of court, but the result is to alter the ownership of foreign land all the same.

34 I will now consider if the personal equities exception to the *Mocambique* principle applies here. On the facts of the present case, it is particularly significant that the personal equity must not depend, for its existence, on the law of the locus of the immovable property (see [32] above). The applicability of this requirement was considered in the following cases. In *Tito v Waddell* (No 2) [1977] 1 Ch 106 ("*Tito*") at p 263-264, Megarry V-C took the view that the *Mocambique* principle would not apply where it is necessary for the plaintiff to prove his title to foreign land in order to establish his claim and enforce the equity. In other words, the *Mocambique* principle does not apply where proof of title is "incidental" to the main claim. On the facts of the case in *Tito*, although it was necessary for the plaintiff there to prove that he was a landowner, there was no suggestion of any dispute that the plaintiff was, indeed, the landowner. However, the opposite applies in the present case, as there is a substantial dispute as to whether good title had passed to Hat, be it from the Ngs or Sarot. This in turn raised questions as to whether the Ngs or Sarot had good title to transfer.

35 In *Couzens v Negri* [1981] VR 824 ("*Couzen*"), the Supreme Court of Victoria took the view that the personal equities exception applied only where "no adjudication touching on the laws of another nation is directly involved". The facts of this case are interesting. A liquidator sought directions from the court as to whether the company in liquidation owned the land or held it on trust for another company. The court dealt with the preliminary issue as to whether a determination of the issue of trust would offend the *Mocambique* principle and decided it did not. This was because (at p 828):

> ... what the court strictly speaking, is being asked is whether the company here in liquidation had

> any and what fiduciary obligations in respect of the New South Wales land and in turn whether the liquidator is obliged to recognize them.

In other words, the dispute was as to the rights and obligations of the two companies *inter se* and did not relate to *legal* title to the land. No adjudication touching on the *lex situs* of the land concerned was necessary. Again, on this basis, *Couzens* is distinguishable from the present case.

36 It is clear that the respective claims made by the Ngs and Hat are caught by the *Mocambique* principle. Quite plainly, the court will have to decide whether Hat had received good title to Villa 2 to resolve the dispute between the parties. Borrowing the language of Prescott QC (see [33] above), Hat's case is, quite plainly: "Please decide that under Thai law the Ngs or Sarot were never the owners of Villa 2 and that as a consequence, we are not the current owners of Villa 2". In other words, the issue of title does not arise incidentally, but is, instead, the principal issue in both of their claims (see, in this regard, the observations of Professor Adrian Briggs in *Civil Jurisdiction and Judgments* (LLP, 4th Ed, 2005) at para 4.07). Indeed, this is also implicitly recognised in Fawcett and Carruthers, *Cheshire, North & Fawcett on Private International Law* (Oxford University Press, 14th Ed, 2008), where the learned authors suggest (at p 482) that the personal equities rule can only apply where the contractual right "can only be pursued by an *uncontested* assertion of his title to foreign land" [emphasis added].

37 The *Mocambique* principle is one based on considerations of comity of nations. It recognises that where land (and this includes the building thereon) is concerned, a sovereign is entitled to assert a double prerogative, to make laws for its own country and to have those laws adjudicated in its own courts exclusively (see *Griggs* at [78]). If so, then it would make no sense for this court to decide, based on Thai law, as to whether Hat had received good title to Villa 2. A judgment either way would, in effect, decide on a matter that should be left entirely to the prerogative of the Thai courts. As observed by Lord Wilberforce, determinations as to foreign title "[involve] possible conflict with foreign jurisdictions, and the possible entry into and involvement with political questions of some delicacy" (*Hesperides Hotels Ltd v Muftizade* [1979] AC 508 at p 537). The present case goes further as the dispute to title possibly involves issues relating to Thai custom and tradition of the community given the expert witnesses' evidence that under Thai law, there is no official document to prove one's title to a building, unlike the case of one's title to land. [note: 94] Furthermore, an estoppel could arise as between the parties in Thailand subsequently, if this issue is finally decided by the Singapore courts. In these circumstances, I do not think that it is wise or expedient for this court to adjudicate on the issues of title that were raised by the parties.

38 For completeness, I should state that I do not find the cases relied on by Hat, *viz*, *Richard West and Partners (Inverness) Ltd v Dick* [1969] 2 Ch 424 (a decision of the Chancery Division) and *Ward v Coffin* (1972) 27 DLR (3d) 58 (a decision of the New Brunswick Queens Bench Division) to be on point. In neither of these cases was the question of title disputed between the parties. In addition, I note that there are cases which suggest that the parties can consent to the court adjudicating on such disputes of title (see, for example, *The Mary Moxham* (1876) 1 PD 107 and *Re Duke of Wellington* [1948] Ch 118). However, given the sensitivities involved (see [34] and [37] above), I do not think that these authorities ought to be followed. Instead, I would align with the view of Somervell LJ in *The Tolten* [1946] P 135, where he opined that (at p 166):

> I do not think the conflicting dicta in *The Mary Moxham* can be regarded as authority either way. All I wish to say about that case is that if the claim fell under the rule as subsequently laid down in the *Mocambique* case I doubt whether a mere consent would have entitled the court to entertain the claim.

To conclude, both the Ngs' claims and Hat's counterclaim involve the integral question of title that the court needs to resolve, and as such the claims are non-justiciable.

Other Arguments

39 The conclusion reached at [38] above is not the end of the matter for the Ngs. If the Ngs show that the issue of good title does not arise, for example, by operation of some waiver, estoppel or acceptance by application of some contractual principle, then arguably, it would not be in contravention of the *Mocambique* principle for this court to decide on the contractual dispute since no issue of good title would arise for determination. In this regard, the Ngs appear to have raised a host of such issues to resist Hat's defence and counterclaim in their submissions, which I should further observe, were not from a model of brevity. I will now turn to consider these arguments.

40 As highlighted above, while the Ngs were contractually obliged to transfer good title to Hat, this obligation does not extend to patent defects or defects of which Hat knew about at the time of contracting (see [29] above). In addition, the Ngs also argue that the defects alleged by Hat were matters of conveyance rather than matter of title. [note: 95] I will now consider if any of these exceptions apply.

Whether the defect in title was a patent defect

41 The learned authors of *M&W* describe the distinction between a latent and a patent defect in the following manner (at para 15-070):

> A defect is not patent merely because the purchaser has constructive notice of it. It must be one "which arises either to the eye or by necessary implication from something which is visible to the eye". Thus, an obvious right of way is likely to be patent, but a tenancy, a restrictive covenant and a local land charge are all latent incumbrances.

42 The defect here which Hat relies on is that Sarot did not have title to Villa 2. In my view, this is not a patent defect. The alleged defect was not one that was obvious to Hat, or arose by necessary implication from something visible to the eye. In this regard, the Ngs are right not to run an argument based on this ground.

Whether Hat knew of the defect in title through the due diligence report

43 Given that Hat had conducted due diligence but did not object to the transfer of title to Villa 2 to it, could it then be said that Hat knew and had therefore accepted the defect? Hat highlights that the DD Report was a "Land title due diligence report" as stated on its cover page and did not concern itself with title to Villa 2. The DD Report seemingly suggested that the Ngs owned Villa 2 as under the heading "Chronology of Ownership of the Building", it listed in detail the Construction Permit and the Assigned Construction Permit. The DD Report's scope recognised that it was made for the purpose of the purchase of Villa 2. However, I note that no direct conclusion was drawn with respect to Villa 2, especially in the "Summary" Chapter, and that the title of the report suggested that it related only to the Land.

44 The defect here is that Sarot did not have good title and, therefore, had nothing to transfer to Hat, despite the registration that took place on 23 May 2008. In this regard, it is not possible for me to hold that Hat knew of this at the time of agreeing to the One-Step Process or registration of Villa 2. The DD Report did not consider whether Sarot had title to Villa 2, and indeed, did not have to so consider as T&G was only concerned with the Ngs' title. At the time Samuel agreed to the One-Step

Process, as I found earlier, it was on the basis that Sarot had good title based on the Construction Permit. Samuel did not, at that time, proceed on the knowledge that Sarot had no good title to transfer. As a result, I am unable to hold that Hat knew about the defect at the time of the variation or transfer of title to Villa 2.

Whether Hat had accepted the defect in title

45 There remains the argument that Hat, through its conduct, had waived its right to object to the defects in title, for example, by performing an act that a prudent purchaser would not normally have until the seller has shown good title (see *Emmet on Title* (Sweet & Maxwell, Looseleaf Ed, 2010) at paras 5.072-5.073). However, such acceptance of title will not be implied if the purchaser had continued to insist upon his objections to title (see *Burroughs v Oakley* (1819) 3 Swanst 159).

46 *Bown v Stenson* (1857) 24 Beav 631 is an example where such acceptance of title was found. The purchaser there was contractually obliged to object to title within a specific period, failing which title would be considered accepted. The court found that the purchaser, after receiving the abstracts, had not raised any objections, but instead, sought and obtained possession to the property. Further, when asked by the seller's solicitors for the draft conveyance, the purchaser's solicitors did not object to title and, instead, promised part-payment of the purchase price. The court held (at p 636-637):

> I am of the opinion that this was a waiver of all objections apparent upon the abstracts delivered, *but it will not, it is true, bind him as to objections to the title not appearing on those abstracts*…. If [the purchaser] had said, "I have since discovered such and such facts invalidating the title, of which the abstract contains no information," I should not compel him to complete the purchase without having these objections removed. [emphasis added].

47 On the facts of the case here, there is no evidence that Hat had completed registration of Villa 2 despite knowing that Sarot did not have good title to Villa 2. Therefore, in my view, there is no basis to hold that Hat had, in such circumstances, accepted or waived the defect in title.

Whether Hat is precluded from raising defect in title by the terms of the Agreement

48 Clauses 2 and 3 of the Agreement outline the parties' respective obligations on the issue of title and they state:

> 2. The title shall be free from encumbrances. The property is a leasehold and is being sold "as is where is".
>
> 3. The Purchaser shall not require the delivery or production of any deeds or documents not in the possession of the Vendor nor shall the Purchaser make any requisition or objection in respect thereof.

49 Under cl 3 of the Agreement, Hat agreed not to require production of documents that were not in the Ngs' possession, and that it would not "make any requisition or objection in respect thereof". What then is the effect of this clause? Did it preclude Hat from objecting to title? I am aware that this argument was neither pleaded nor raised by the Ngs, but in the light of the decision that I will make, the fact that it is not pleaded is no reason to refrain from making the observations which follow. In *Re National Provincial Bank of England and Marsh* [1895] 1 Ch 190 ("*Marsh*"), the court dealt with a clause of a similar effect, which stated as follows:

> The title shall commence with an indenture of conveyance on sale dated the 23rd January 1869, and *the prior title*, whether appearing in any abstracted document or not, shall not be required, investigated or objected to.

50 The purchasers subsequently discovered *aliunde* that the seller's title was defective and sought to rescind the transaction. The court recognised that there were two possible interpretations to such clauses, *viz* (at p 193):

> (a) the purchaser is precluded from making requisitions upon or inquiries from the vendor as to the latter's title, but does not prevent the purchaser from showing that the vendor's title is defective;
>
> (b) the purchaser is precluded both from making requisitions upon or inquiries from the vendor as to the latter's title, and also from making any inquiry or investigation to the vendor's title anywhere.

51 On the facts of that case, the court found that there were other terms in the contract to the effect that "title should not be inquired into". As a result, the only reasonable meaning of the term would be that inquiry was "altogether precluded for every purpose", and that the title was accepted by the purchaser without objection or inquiry (at p 195). Significantly, in one of the cases cited by the court, *viz*, *Waddell v Wolfe* (1874) 9 QB 515 (per Justice Blackburn), if the seller meant to express that the purchaser was bound to accept whatever the title was, he would need to do so in clear and unambiguous words (see *Marsh* at p 198 and, further, the decision of Chan Sek Keong JC in *Algemene Bank Nederland NV v Tan Chin Tiong* [1985-1986] SLR(R) 1154 at [7]).

52 Here, I do not accept that Hat was precluded from raising any objection to title by reason of cl 3 of the Agreement. Clause 3 simply provides that Hat could not make any requisitions arising from documents not in the Ngs' possession and object as a consequence – there is no language suggesting that Hat is precluded from independently investigating the Ngs' title. Indeed, cl 3 is silent about the issue of title. In addition, a term that Hat was so precluded would contradict the obligation (which the Ngs admit to owing, see [37] above) to give good title to Villa 2. As such, even if the Ngs had raised this issue, I do not think that it would have assisted their case.

Argument based on Promissory Estoppel

53 The Ngs appear to argue that Hat is estopped from asserting that it required them (the Ngs) to transfer good title, relying (especially) on the e-mail sent by Samuel on 5 March 2008. [note: 96] In that e-mail, Samuel stated that Hat was seeking "'title" of some "kind"', and that if the Ngs were unable to procure Sarot's performance, they could transfer whatever they had to Hat, and leave Sarot to Samuel's "devices". In short, the Ngs are arguing that even if there was a mistake in using Sarot to procure the transfer of title to Villa 2 under the One-Step Process, Hat would have been estopped from requiring good title from the Ngs. It is trite principle that it is necessary to show an unequivocal representation and reliance on the representation in order to succeed under the doctrine of promissory estoppel (*Chitty on Contracts* (Beale gen ed) (Sweet & Maxwell, 2008, 30th Ed) ("*Chitty on Contracts*") at para 3-086). Here, however, I do not think that Samuel had made an unequivocal representation that Hat did not require good title. Samuel had, as I mentioned earlier, premised his statements on the basis that Sarot had title to Villa 2 (see [9] above). In my view, this showed that Samuel was not, as the words read on their own might suggest, waiving Hat's right to receive good title to Villa 2.

54 Even if it was possible to construe the representation as unequivocal, the other difficulty is that there is no evidence that the Ngs had relied on this representation. Maria's subsequent reply did not suggest that she had done anything in reliance of the representation. Furthermore, I found it telling that the Ngs did not make express mention to these representations made by Samuel in their respective Affidavits of Evidence-in-Chief, and nothing was said in cross-examination to suggest that they had relied on those representations. As such, even assuming that the Ngs had properly pleaded the ground of promissory estoppel, their claim would have failed on these grounds.

Whether the defects relied on by Hat were matters of conveyance

55 A defect is considered a matter of conveyance if it is removable as of right by the seller (see *Emmet on Title* at para 5.007). These have to be acts that the seller can perform immediately and independently of others' consent (*id*). I find it difficult to see how the defects alleged by Hat can be considered a matter of conveyance. To support its contention, the Ngs submitted that "there was no doubt that the Plaintiffs were the owners of [Villa 2]", but did not explain how they could remove the alleged defects as of right or independently of others' consent. I therefore dismiss this unmeritorious aspect of the Ngs' argument.

Whether Hat was concerned with good title to Villa 2

56 I will now deal with the Ngs' submissions that Hat was not seeking to receive good title to Villa 2, relying on the e-mails sent between Bolliger and Samuel, especially Samuel's responses (see above at [12] and [14]). [note: 97] I am of the view that these e-mails have little or no evidential value, insofar they are relied on to show that there was no requirement under the Agreement to transfer good title, as they would not have been probative of the objective intentions of the parties since they were not sent or copied to the Ngs at the time of the transaction (see generally *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [131]). Similarly, given that these e-mails were not made known to the Ngs, I do not think that it can be relied on to constitute any waiver, estoppel or acceptance by Hat.

Who is to complete the transfer of Villa 2 now?

57 Hat's case is that Southern Land has title to Villa 2. Its expert, Pichitpon, takes the position that regardless of whether the Ngs ever held title to Villa 2, at the time of the purported transfer of Villa 2 on 23 May 2008, Southern Land had and still has title to Villa 2. [note: 98] Hat adopts the same view in its submissions. [note: 99] For this very reason, Hat contends that the Ngs were remiss in their obligation to transfer good title to it, for if the Ngs had no title to Villa 2, they could not procure any transfer of good title to it (*ie*, Hat). At this juncture, I must emphasize that I cannot and do not make such a finding. Instead, I will consider the merits of Hat's defence and counterclaim, by taking (without deciding) its case at its highest (*ie*, that Southern Land has title to Villa 2).

58 As I mentioned earlier, the Ngs were under an obligation to transfer good title to Villa 2 to Hat. The mode of performance originally contemplated by the parties is enshrined under cl 9 of the Agreement, which states:

> [The Ngs] shall (at the request of [Hat] and at no cost to [the Ngs]) execute the usual Deed of Assignment in [Hat's] favour. Provided that nothing herein shall obliged [the Ngs] to participate in any claims or legal proceedings against any party referred to in the Deed of Assignment.

In other words, both parties contemplated, at the time of entering into the Agreement, an

assignment of the Ngs' interest in the Property.

59 Insofar as the parties had originally contemplated that the transfer of title to the Property was to be by way of an assignment, it is clear that the intended mode of performance was subsequently varied by the parties. On 4 January 2008, Maria wrote to inform Samuel that Surasak, the Ngs' Thai lawyers, had advised that the registration of the Property be carried out in two parts, *viz*, the Land and Villa 2. [note: 100] Samuel knew that the transfer would be bifurcated, as he was able to point out, subsequently on 20 January 2008, that the completion date may have to be pushed back due to the requirement to post a notice for 30 days in respect of Villa 2. [note: 101] Colin also gave unchallenged evidence to this effect. [note: 102] More tellingly, on 1 February 2008, Samuel sent Maria an e-mail suggesting that they meet up to "discuss an amendment to our [Agreement] which separates the two transactions (Land and [Villa 2])". An agreement on how the Property would be transferred was eventually reached between the parties. On 5 February 2008, T&G proceeded to inform Surasak (*ie*, the Ngs' Thai lawyers) that it was preparing two separate documents, first for Hat to purchase Villa 2 from the Ngs and, next, for Hat to register the lease for the Land with Southern Land. T&G also asked Southern Land to prepare documents to register the lease and superficies for the Land between Southern Land and Hat and stated that it (Hat) was preparing a Land Lease Agreement (presumably to be entered into by Southern Land and Hat). [note: 103] Those acts clearly evinced an intention to transfer Villa 2 and the Land separately. Importantly, Samuel had agreed with Maria's statement that the parties agreed to split the payment into two parts, with one payment being due when the Land was transferred and the other being due when Villa 2 was transferred. [note: 104] It is therefore clear that the parties had agreed to vary the mode of performance, such that the Property would be transferred in two tranches, one for Villa 2 and another for the Land.

60 Although the inspiration for the bifurcation came from Maria (on the advice of her Thai lawyers), it is clear that Hat was the driving force in effecting the bifurcation. As highlighted above (at [59]), Hat (through its Thai lawyers) contacted Surasak (the Ngs' Thai lawyers) and Southern Land to complete the necessary documentation. More importantly, in the two e-mails which T&G sent to Southern Land and Surasak (which I have already referred to in the previous paragraph), T&G implicitly suggested that the 2001 Lease and the superficies agreement entered into between the Ngs and Southern Land would be cancelled, and that in its place, Hat would enter into and register a fresh lease and superficies agreement with Southern Land. [note: 105] This was, in substance, the procedure by which the transfer of title to the Land was eventually effected on 7 March 2008 (see above at [10]), and no dispute arises from this transfer of title to the Land.

61 It is noteworthy that the 2008 Land Lease confers a number of valuable rights and imposes various obligations on Hat in respect of Villa 2, as follow:

(a) Clause 4.3 – Hat was to maintain Villa 2 and to keep it in good condition at its own expense;

(b) Clause 4.4 – Hat was entitled to make any additions, alterations, modifications or improvements to Villa 2 without Southern Land's prior consent, subject to the law, with Southern Land agreeing to co-operate and sign all documents necessary to obtain a permit to do the same;

(c) Clause 4.5 – Hat was to pay for the general utility charges;

(d) Clause 5.1 – Hat was entitled to sublet or transfer Villa 2 without Southern Land's

consent;

(e) Clause 5.4 – Hat was entitled to insure Villa 2 throughout the term of the lease and would be the beneficiary of the policy; and

(f) Clause 5.9 – Southern Land admitted that Hat owned and had the right to deal with (including demolishing) "the building, structures, additions, alterations, modification or improvements constructed or made on the [Land]".

The 2008 Land Lease is in *pari materia* with the 2001 Lease which the Ngs obtained from Southern Land. In this regard, two points are noteworthy. First, Hat effectively received, under the 2008 Land Lease, the *same* rights that the Ngs had *prior* to 7 March 2008 (when the 2001 Lease was terminated). As such, Hat stepped into the Ngs' shoes on 7 March 2008 by entering into the 2008 Land Lease with Southern Land. Second, from the terms of the 2008 Land Lease (which took effect from 7 March 2008), it is clear that Southern Land had conferred on Hat a longer lease than the Ngs had prior to 7 March 2008 as well as a number of valuable rights *in relation to Villa 2*, rights which I should add are typically conferred to the *owner* of a building. Indeed, Pichitpon agreed during cross-examination that by cll 5.1 and 5.9 of the 2008 Lease, Southern Land recognised Hat as the owner of Villa 2 and that Hat could do whatever it wanted. [note: 106] However, the expert witnesses on Thai law (*ie*, Pichitpon and Supachai Arunthamsakul (Hat's expert witnesses) and Supasak Chirasavinuprapand (the Ngs' expert witness)), all agree that cl 5.9, by itself, did not confer legal ownership of Villa 2 on Hat. In other words, Hat was the *de facto* owner of Villa 2 and the only missing step towards Hat obtaining "good title" to Villa 2 would be the proper registration of a standard form sale and purchase agreement transferring title to Villa 2 into Hat's name, as required by section 1299 of the Thai Civil and Commercial Code. [note: 107]

62 At this juncture, again taking (without deciding) Hat's defence at its highest, if Southern Land was indeed the legal owner of Villa 2, it would follow that the key to the present dispute was the mistake made by the parties in purporting to transfer good title to Villa 2 using Sarot and his Construction Permit (be it through the One-Step Process or the Two-Step Process). It follows that what ought to have been done on 7 March 2008 was for Southern Land to execute a standard form sale and purchase agreement in respect of Villa 2 and to thereafter register the same at the Phuket Land Office in order to transfer title to Hat.

63 From that analysis, the next question which arises is: on whom should the responsibility of procuring the registration of the agreement to purchase Villa 2 by Hat from Southern Land rest? In my view, this obligation would fall squarely on Hat for the following reasons. Before entering into the 2008 Land Lease, it is clear that Hat was the driving force behind procuring the transfer of title to the Land and Villa 2, having sent out various e-mails seeking the relevant stakeholders to do the necessary. Once the 2001 Lease was terminated (*ie*, on 7 March 2008), the Ngs no longer had any contractual nexus with Southern Land. (There is no suggestion that Thai law is different from Singapore law.) It could not compel Southern Land to register title to Villa 2 in Hat's name. Such power would have been vested in Hat by virtue of the 2008 Land Lease, which, as I have observed, conferred important rights and obligations, vis-à-vis Villa 2, on Hat. It should be noted that this arrangement (to cancel the 2001 Lease and execute the 2008 Land Lease) was suggested and put into practice by Hat and its lawyers. With the benefit of legal advice, Hat should or ought to have known that the implication of asking the Ngs to terminate the 2001 Lease and entering into a fresh lease with Southern Land (*ie*, the 2008 Land Lease) would have been that the Ngs were no longer in the position to ask Southern Land to register title to Villa 2 in Hat's name. Hat itself had recognised that it could ask Southern Land to transfer title to Villa 2 if the One-Step Process failed (see [14] above). Having agreed to vary the mode of performing the Agreement to such an extent, it could not now turn the tables against

Ngs and accuse the Ngs of being in breach of their obligation to confer good title, when Hat was the party that had not sought out Southern Land to effect transfer of title to Villa 2. Quite plainly, the Ngs had given Hat all the rights they had, and Hat was happy to receive these rights, knowing (objectively speaking) that by this process, all that remained was registration of title to Villa 2 with Southern Land which only it (*ie*, Hat), and not the Ngs, could effect.

64 I must also point out that Hat had done various acts which were consistent with that of the owner of Villa 2. First, it entered into possession of Villa 2, as it had collected the keys to Villa 2 from Maria on 3rd June 2008. [note: 108] Furthermore, Hat paid for various utility charges in respect of Villa 2 from 1 April 2008 onwards (see [11] above). [note: 109] Again, these acts only serve to illustrate that Hat was happy to receive rights to Villa 2 under the 2008 Land Lease and that it had regarded itself as the *de facto* owner to Villa 2.

65 For the above reasons, it seems to me that Hat has no case against the Ngs for breach of contract assuming one accepts its case at its highest.

66 Even if, for the sake of argument, it was the Ngs who were in breach of contract, I do not see how the remedy of specific performance, which Hat is seeking, would be available. Where a person has agreed to sell land which he does not own, the court will not compel the purported owner to convey such land to him because it would be impossible for the purported owner to do so (see *Chitty on Contracts* at para 27-041 and *The Law of Contract* (Edwin Peel gen ed) (Sweet & Maxwell, 12th Ed, 2007) at para 21-033). As such, if Southern Land is the party with title to Villa 2 (as Hat contends), it would necessarily follow that the Ngs do not have title to Villa 2, and for this reason, no decree of specific performance can be made in Hat's favour against the Ngs. On the other hand, if the Ngs had not been in breach of contract and the obligation to secure registration of title to Villa 2 resided with Hat, it would seem to me, to the contrary, that the order for specific performance ought to be made in the Ngs' favour against Hat, given (for the above reasons) that Hat was the only party that could procure such registration from Southern Land.

Conclusion

67 Having reached the conclusion that the dispute on title is non-justiciable on grounds of the *Mocambique* principle, the normal course would be for me to dismiss the action. However, I note that the circumstances of the present case are exceptional. Both parties had submitted, wrongly as I have concluded, that the *Mocambique* principle would not infect the present proceedings. In my view, resolution of the core dispute on title depends on a determination of Thai law by the Thai courts, and this court ought not to treat these questions of Thai law as questions of fact to be resolved based on the experts' evidence (see also [37] above). Looking back to the time of the trial, the issues before me were not properly crystallised so much so that much time and effort were expanded by both parties in advancing and/or defending their respective cases. In addition, for the reasons explained above, it seems to me that even if I accept Hat's case on the issue of title (a finding which I do not and cannot make), Hat would still not have succeeded against the Ngs for the alleged breach of their contractual obligation to give good title.

68 Given the special circumstances as described, I propose to and do order a stay of the present action for the parties to sort out the fundamental issues relating to title, such that the *Mocambique* principle is not offended and only the contractual issues remain alive before this court. In this regard, the parties are to do the needful without any unnecessary delay. Having heard the diametrically opposed views held by the parties, they will probably need to obtain a conclusive ruling from the Thai courts as to whether Hat had received good title to Villa 2 through the One-Step Process, be it (*inter*

alia) a consequence of the Ngs (or even Sarot) being able to give good title and/or of Southern Land's involvement during the registration process which was after the 2008 Land Lease had been registered, giving Hat *de facto* ownership of Villa 2. Once a ruling from the Thai courts is obtained, this court will be placed in a position to determine the contractual rights or obligations of each party (including the claim against Bolliger). Meanwhile, the money which Hat has paid into court will remain there.

69 There is, of course, a second and (in my view) more straightforward alternative that the parties may wish to consider for pragmatic reasons. Since Hat's case is that Southern Land had title to Villa 2, and that Southern Land ought to have transferred title to Villa 2 to it, it seems to me that Hat is in the position to do exactly that. In fact, Southern Land had throughout the dispute been co-operative, which is a stance consistent with there being no adverse claim to Villa 2 by Southern Land. Hat's expert witnesses testified that this allegedly defective registration (from Sarot) can be removed in one of two ways: either by applying to the Director-General of the Phuket Land Office or by obtaining a court order. They also testified that either Hat, the Ngs or even Southern Land could submit an application to the Director-General, and that the process would take approximately six months. [note: 110] The Ngs, apart from asserting that Pichitpon had never made such an application to the Director-General before, did not meaningfully challenge this aspect of Hat's witnesses' evidence. [note: 111] As such, either the Ngs or Hat could cancel the title Hat obtained through the One-Step Process. Hat and Southern Land by reason of the 2008 Land Lease could thereafter register a sale and purchase of Villa 2 to confer title to Villa 2 in Hat's name. Indeed, this may be the more practicable solution to resolving the dispute between the parties. To this end, it is hoped that the parties can take a practical view towards resolving this case, as neither will gain from remaining in this impasse caused by the application of the *Mocambique* principle. If there are any remaining issues which may arise if this pragmatic suggestion is taken up, for example, as to who should bear the cost of such cancellation, they can come back to court to resolve such ancillary disputes (provided that it does not offend the *Mocambique* principle).

70 In this judgment, the contractual issues between the Ngs and Hat, including the claim against Bolliger, are reserved pending the outcome of the stay order which takes effect from the date of this judgment until further order.

[note: 1] 2AB 342

[note: 2] 1AB 63

[note: 3] Colin's AEIC at p 14

[note: 4] 1AB 93 - 135

[note: 5] 1AB 137

[note: 6] DCS at para 15

[note: 7] 1AB 16

[note: 8] 1AB 157&158; Pichitpon's AEIC at exhibit "PE-2" at [11]; Transcripts of Evidence dated 23 September 2009 at pp 96-97

[note: 9] Transcripts of Evidence dated 10 September 2009 at p11

[note: 10] 2AB 252-254

[note: 11] 1AB 255-257

[note: 12] 1AB 264-268.

[note: 13] 1AB 268

[note: 14] Exhibit P4 at p 28

[note: 15] 1AB 274

[note: 16] 2AB 371

[note: 17] 2AB 390; Samuel's AEIC at Tab SC-26

[note: 18] 2AB 390

[note: 19] 2AB 373

[note: 20] 2AB 385

[note: 21] 2AB 381

[note: 22] 2AB 389

[note: 23] 2AB 411

[note: 24] 2AB 414

[note: 25] 2AB 417

[note: 26] 2AB 424

[note: 27] Plaintiffs' Exhibit P7

[note: 28] 2AB 460-462

[note: 29] 2AB 404 and 408

[note: 30] 3AB 639

[note: 31] 2AB 432; Sarot's AEIC at [16]

[note: 32] 2AB 453 and 504

[note: 33] 2AB 464-465

[note: 34] 2AB 564-565; 3AB 611

[note: 35] 2AB 464

[note: 36] 2AB 464, 472 and 477

[note: 37] 2AB 479

[note: 38] 2AB 487

[note: 39] 2AB 494

[note: 40] 2AB 497

[note: 41] 2AB 506

[note: 42] 2AB 529, 531 and 540

[note: 43] 2AB 543

[note: 44] 2AB 506

[note: 45] 2AB 545

[note: 46] 2AB 548

[note: 47] 2AB 560

[note: 48] 2AB 575

[note: 49] 2AB 563

[note: 50] 2AB 578 and 580

[note: 51] 2AB 581

[note: 52] 2AB 584

[note: 53] 2AB 586

[note: 54] 2AB 587 and 589

[note: 55] 2AB 592-594

[note: 56] 3AB 639

[note: 57] 3AB 644-645

[note: 58] 3AB 668, 672 and 676

[note: 59] 3AB 692

[note: 60] 3AB 693

[note: 61] Samuel's AEIC at [76]; Maria's AEIC at [21]; 3AB 726

[note: 62] 3AB 695

[note: 63] 3AB 697-700

[note: 64] 3AB 720

[note: 65] Maria's AEIC, Tab 3 at p 323

[note: 66] Maria's AEIC, Tab 3 at pp 336, 338 and 383

[note: 67] 3AB 732

[note: 68] 3AB 730

[note: 69] Plaintiffs' Exhibit P1

[note: 70] Statement of Claim (Amendment No 1) at para 7.4.1(i)

[note: 71] Statement of Claim (Amendment No 1) at para 7.4.5

[note: 72] Statement of Claim (Amendment No 1) at para 12

[note: 73] Defence and Counterclaim (Amendment No 1) at para 5(3)

[note: 74] Defence and Counterclaim (Amendment No 1) at paras 8(5) and 10

[note: 75] Defence and Counterclaim (Amendment No 1) at para 11

[note: 76] Defence and Counterclaim (Amendment No 1) at para 14(1)

[note: 77] Defence and Counterclaim (Amendment No 1) at para 23

[note: 78] Defence and Counterclaim (Amendment No 1) at para 23; Transcripts of Evidence dated 1 October 2009 at pp 81-82

[note: 79] Defence and Counterclaim (1st Amendment) at para 8(5)(c)

[note: 80] Further and Better Particulars dated 8 August 2008 at para 2 (Bundle of Pleadings at p 46); Further and Better Particulars dated 21 August 2008 at para 1 (Bundle of Pleadings at p 63); Further and Better Particulars dated 11 September 2008 at para 2 (Bundle of Pleadings at p 72)

[note: 81] Transcripts of Evidence dated 22 September 2009 at pp 51-52

[note: 82] Defendants' Closing Submissions at paras 239, 242, 244-246, 288

[note: 83] 3AB 747; Colin's AEIC at [77]; Maria's AEIC at [37]

[note: 84] 2AB 602

[note: 85] 2AB 677

[note: 86] 3AB 720, 722

[note: 87] Reply at para 4.5.2 (page 121 of Setting Down Bundle); 2AB 382 (at para 8)

[note: 88] 3AB 641

[note: 89] Transcripts of Evidence dated 10 September 2009 at pp 7, 14 and 19

[note: 90] Plaintiffs' Closing Submissions at para 577

[note: 91] Supasak Chirasavinuprapand's Supplementary AEIC filed 11 September 2009 at pp 26- 29

[note: 92] Plaintiffs' Closing Submissions at para 349

[note: 93] Pichitpon's AEIC at Exhibit "PE-2" at [71] and Annex X

[note: 94] Tanscripts of Evidence dated 23 September 2009 at p 2

[note: 95] Plaintiffs' Closing Submissions at para 586

[note: 96] 2AB 385

[note: 97] Plaintiffs' Closing Submissions at 298-328

[note: 98] See Pichitpon's AEIC, Exhibit "PE-2" at [81]-[82]

[note: 99] Defendant's Closing Submissions at paras 38(2), 181, 193, 209

[note: 100] 1AB 268

[note: 101] 1AB 275

[note: 102] Colin's AEIC at [23(1)]

[note: 103] 2AB 312

[note: 104] 2AB 328

[note: 105] 2AB 309

[note: 106] Transcripts of Evidence dated 28 September 2009 at p 158, Transcripts of Evidence dated 30 September 2009 at p 33

[note: 107] Transcripts of Evidence dated 28 September 2009 at pp 4-6 and 47-48; Transcripts of Evidence dated 30 September 2009 at pp 33 and 51; Transcripts of Evidence dated 23 September 2009 at pp 25-26; Transcripts of Evidence dated 25 September 2009 at pp 91-92; Transcripts of Evidence dated 30 September 2009 at p 136

[note: 108] 3AB 680

[note: 109] 2AB 476, 519-521, 565, 3AB 605-619, 621 and 686

[note: 110] Transcripts of Evidence dated 28 September 2009 at pp 49-52; Transcripts of Evidence dated 30 September 2009 at pp 137-139

[note: 111] Transcripts of Evidence dated 30 September 2009 at pp 56-58