Chua Tian Chu and another *v* Chin Bay Ching and another
[2011] SGHC 126

Case Number : Suit No 778 of 2009

Decision Date : 20 May 2011

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Adrian Ee (Ramdas & Wong) for the plaintiffs; Ramalingam Kasi (Raj Kumar & Rama) andCollin Choo (Derrick Wong & Lim BC LLP) for the defendants.

Parties : Chua Tian Chu and another — Chin Bay Ching and another

Building and Construction Law – Damages – Liquidated Damages

20 May 2011 Judgment reserved.

Andrew Ang J:

Introduction

1 The plaintiffs, Mr Chua Tian Chu ("Mr Chua") and Ms Cheang Poh Ling Pauline, were the purchasers of a property located at 22A Kheam Hock Road, Singapore ("the property"), pursuant to a sale and purchase agreement ("the Agreement") entered into with the defendants, Mr Chin Bay Ching ("Mr Chin") and Ms Tjia Mui Kui on 30 November 2006. The defendants were the vendors as well as the developers of the property. The agreed purchase price of the property was $5,680,000.

2 Prior to the sale of the property to the plaintiffs, Mr Chin had intended to renovate the detached bungalow standing on the land, built sometime in the late 1980s or early 1990s. Mr Chin engaged the services of an architectural firm by the name of Formwerkz Architects ("FA") and a main contractor, Kian Hong Seng Construction Pte Ltd ("KHSC"), to carry out re-construction works on the property. Upon submission of the original building layout plans ("BP01") drawn up with the assistance of FA, Mr Chin obtained the Building and Construction Authority's ("BCA") approval on 21 August 2006.

3 Shortly thereafter, in or around November 2006, the plaintiffs began negotiations with the defendants to purchase the property. The negotiations were principally in relation to BP01 (the original building layout plans designed by FA) and resulted in a list of amendments thereto to be incorporated into the Agreement. The finalised list of amendments was incorporated by way of the Fourth and Fifth Schedules annexed to the Agreement. While the Fourth Schedule consolidated the plaintiffs' amendments to BP01, the Fifth Schedule predominantly related to renovation works as well as additional fixtures and fittings to be integrated into the property. Additional changes were made to the Fifth Schedule on 4 December 2006, after the Agreement was signed and an amended list replaced the Fifth Schedule originally attached to the Agreement.

4 By 26 January 2007, a revised building layout plan ("BP02") had been drawn up. The defendants submitted the second application for BCA's approval in July 2007 which was subsequently approved on 7 September 2007. It is worthwhile noting that FA also prepared three other building layout plans on 1 February 2007, 23 October 2007 and 16 July 2008.

5 Clause 9.1 of the Agreement imposed a contractually stipulated deadline for the delivery of the

notice to take vacant possession of the property as "not later than 31st December 2007". Clause 9.3 of the Agreement provided:

> The Vendor *shall deliver vacant possession* of the Property to the Purchaser by *delivering a notice* to the Purchaser to Take Possession in respect of the Property. *On delivery* of vacant possession of the Property to the Purchaser, the Vendor *must* deliver to the Purchaser or his solicitors *a copy of the Temporary Occupation Permit* for the Property together *with the certificate from the Vendor's architect* that the building, drainage, sewerage and electrical works serving the Property have been constructed in accordance with the plans and specifications approved by the Building Authority and that water and electricity supplies have been duly connected to the Property. [emphasis added]

6 On 6 January 2009, more than a year after the contractually stipulated date, the defendants gave notice to the plaintiffs to take vacant possession of the property following BCA's issuance of the temporary occupation permit ("TOP") on 6 January 2009. The plaintiffs took the position that the defendants' notice to take vacant possession was only valid upon delivery of a copy of the TOP, *as well as* the architect's certificate referenced under cl 9.3 of the Agreement. At the plaintiffs' insistence, the defendants forwarded the architect's certificate on *16 January 2009* which attested to the fact that the building, drainage, sewerage and electrical works serving the property complied with approved plans and requisite specifications. In accordance with their interpretation of cl 9.3 of the Agreement, the plaintiffs took the view that the defendants' notice to take vacant possession was only valid upon delivery of the architect's certificate, on 16 January 2009 onwards.

7 Clause 4 of the Agreement set out the payment schedule agreed by the parties for the progress instalment payments of the purchase price. As at 15 January 2009, the plaintiffs had completed the payment of 20% of the purchase price in accordance with the time line set out in cll 4.1.1, 4.1.2 and 4.1.3. Under cl 4.1.4 of the Agreement, a further 70% was payable "*within 14 days* after receipt by the Purchaser or his solicitors of the Vendor's notice to take possession" with a photographic copy of the TOP issued by BCA.

8 On *30 January 2009*, 14 days from the date that the plaintiffs received the architect's certificate, the total sum of $3,976,000 fell due (*ie*, 70% of the purchase price). The plaintiffs only made payment of $3,834,077.81 having unilaterally deducted $141,922.19 from the total sum which fell due. The plaintiffs' deduction of $141,922.19 from the purchase price due was based on their calculation of the liquidated damages accrued from 1 January 2008 until 15 January 2009. The plaintiffs computed the quantum of liquidated damages deducted based on the contractually agreed interest rate of 12% per annum on the sum of $1,136,000 (*ie*, 20% of the purchase price paid) for the delay period of 380 days (*ie*, 1 January 2008 until 15 January 2009). By 30 January 2009, having paid 90% of the purchase price less the deduction, the plaintiffs nevertheless declined to take possession of the property owing to alleged defects and incomplete works.

9 Clauses 12.1 and 4.1.5 of the Agreement provided as follows:

> Clause 12.1 The Vendor [Defendants] must give to the Purchaser [Plaintiffs] a notice requiring completion of the sale and purchase of the Property ['Notice to Complete'] in accordance with this clause no later than fourteen days (14) days after the date of issue of Notice to Take Possession. [emphasis in original]
>
> Clause 4.1.5 The balance of the ten per cent (10%) of the Price shall be dealt with as follows:-

(a) on completion of the sale and purchase of the Property in accordance with Clause 12 hereof; a sum of $418,000.00 ['said sum'] shall be paid to the Vendor's solicitors to be held by the Vendor's solicitors as stakeholders and the said some or any balance thereof [after any deduction has been made in accordance with clauses 10 and 11 hereof] shall be paid over to the Vendor upon the notification of the receipt of the CSC [Certificate of Statutory Completion] issued by the Building Authority accompanied by a photographic copy duly certified as a true copy by the Vendor's solicitors; and

(b) on the completion of the sale and purchase of the Property a sum of $150,000.00 shall be paid to the Vendor at the expiry of 12 months from the date of notice to take vacant possession to the Purchaser in respect of the Property, or such balance remaining from the said $150,000.00 after any deduction has been made in accordance with clause 11 hereof.

10 On *2 February 2009*, the defendants solicitors gave the plaintiffs the Notice to Complete the sale. Pursuant to cll 12 and 4.1.5(a) of the Agreement set out above, $418,000 fell due upon the defendants' delivery of the Notice to Complete, to be paid to and held by the defendants' solicitors as stakeholders. Pursuant to cl 4.1.5(b), the remaining sum of $150,000 was payable to the defendants 12 months from the date of completion of the sale and purchase of the property, subject to deductions made for defects liability under cl 11.

11 The plaintiffs withheld payment of the $418,000 due under cl 4.1.5(a) on the basis that the property was not fit for occupation. They demanded that rectification works be conducted immediately by the defendants. The defendants were informed by the plaintiffs' solicitors to complete all the outstanding works identified in a list prepared by Mr Chua dated 30 January 2009. Furthermore, the plaintiffs gave the defendants one month's notice, expiring on 6 March 2009, to put the property in a state fit for occupation.

12 Clause 6.1 of the Agreement provided:

In addition to the charge of interests under **Clause 5**, the Vendor is entitled to give the Purchaser a not less than 21 days notice to pay any sum that remains unpaid for a period of 14 days or more after the due date of payment, or to comply with any or all terms or conditions of this Agreement, failing which the Vendor may at its own election (i) deem that the Purchaser is in breach and (ii) further deem that the Purchaser has repudiated this Agreement. [emphasis in original]

13 On 4 March 2009, the defendants served 21 days' notice on the plaintiffs under cl 6.1 of the Agreement demanding payment of the sum of $418,000 overdue under cl 4.1.5(a). The plaintiffs' repeated failure to complete the sale and purchase of the property, notwithstanding multiple extensions arranged between the parties, culminated in the defendants' rescission of the Agreement on *23 July 2009*. The defendants construed the plaintiffs' act of non-payment of the sums which fell due under the Agreement as a repudiatory act under cl 6.2 of the Agreement.

14 The plaintiffs commenced this action by way of writ on *11 September 2009* seeking specific performance, liquidated damages, the cost of the rectification works and, alternatively, damages. In the course of the trial, the parties managed to agree on the following issues:

(a) The defendants decided not to challenge the plaintiffs' unilateral deduction of $141,922.19 in liquidated damages for delay occasioned from 1 January 2008 to 15 January 2009; and

(b) A global sum of $410,000 as the rectification costs attributable to the defects in the

property was agreed. (Curiously, counsel for the defendants said that the issue of liability was left for the court's determination. It is also interesting to note that by agreeing to a global figure of $410,000 without any breakdown the parties in effect left the court to decide the question of liability on an all-or-nothing basis.)

15 The following witnesses appeared for the plaintiffs and the defendants respectively:

(a) The plaintiffs' witnesses:

Mr Chua, the purchaser; and

Mr Alan Tay Shiaw Shih ("Mr Tay"), a qualified person from FA.

(b) The defendants' witnesses:

Mr Chin, the vendor and developer;

Mr Wong Tim Fatt ("Mr Wong"), was assistant architect from FA;

Mr Berlin Lee ("Mr Lee"), a representative of Formwerkz Pte Ltd ("FPL").

Mr Wong Boon Ping ("Mikey"), a representative from Shine Interiors Pte Ltd ("SI").

The material issues

16 With the defendants' acceptance of liability under cl 9.4 for the delay occasioned prior to 16 January 2009 as well as the quantification of a global sum of rectification costs, the following outstanding issues remain before this court:

(a) Whether the defendants had validly rescinded the Agreement?

(b) If not:

(i) Which party was to bear liability for the agreed rectification cost of $410,000?

(ii) Whether the plaintiffs were entitled to liquidated damages amounting to $1,476,102.67?

(iii) Alternatively, whether general damages and/or damages for the loss of use and enjoyment of the property for 17 weeks ought to be awarded to the plaintiffs?

Was the defendants' rescission of the Agreement valid?

17 Clauses 6.1 and 6.2 provide for a 21-day notice and the consequences of failure to comply with such a notice in the following terms:

Clause 6.1 In addition to the charge of interests under Clause 5, the Vendor is entitled to give the Purchaser a not less than 21 days notice to pay any sum that remains unpaid for a period of 14 days or more after the due date of payment, or to comply with any or all terms or conditions of this Agreement, failing which the Vendor may at its own election (i) deem that the Purchaser is in breach and (ii) further deem that the Purchaser has repudiated this Agreement.

Clause 6.2 Upon the Vendor electing the repudiation of the Purchaser, this Agreement is to be treated as annulled and the Vendor has the right to:-

(a) demand that the Purchaser remove his caveat or other encumbrance on or over the Property, and the Purchaser shall do so forthwith;

(b) resell or otherwise dispose of the property as the Vendor deems fit and proper as if this contract had not been entered into;

(c) recover from the money paid by the Purchaser towards the Price (excluding interest) previously paid by the Purchaser all interest owing and unpaid at the date of annulment; forfeit and keep 20% of the Price (excluding interest) previously paid by the Purchaser.

[emphasis added]

18 As earlier mentioned, the plaintiffs withheld making payment of the outstanding 10% of the purchase price. After months of correspondence between the parties, the defendants elected to accept what they considered to be the plaintiffs' repudiation and rescinded the Agreement on 23 July 2009.

An act of repudiation?

19 Was the plaintiffs' non-payment of sums which fell due under cl 4.1.5 repudiatory of the Agreement?

20 J W Carter in *Breach of Contract* (The Law Book Company Limited, 2nd Ed, 1991) at p 216 defines repudiation as a "clear indication of absence of readiness or willingness to perform". Stephen Furst *et al*, *Keating on Construction Contracts*, (Sweet & Maxwell, 8th Ed, 2006) ("*Keating*") at p 205 states that:

> 'Repudiation' is *a drastic conclusion* which should only be held to arise in *clear cases of a refusal*, *in a matter going to the root of the contract, to perform contractual obligations*. It may consist of a renunciation, an absolute refusal to perform the contract, or it may arise as the result of a breach, or [the] *breaches of contract* [*should be*] *such that 'the acts and conduct of the party evince an intention no longer to be bound by the contract'*. [emphasis added]

21 In *Brani Readymixed Pte Ltd v Yee Hong Pte Ltd* [1994] 3 SLR(R) 1004 , the Court of Appeal affirmed the common law position that the mere failure or delay in making payment *per se* would not amount to a repudiation of the contract.

22 On 16 June 2009, the defendants served on the plaintiffs the final 21 days' notice under cl 6.1 demanding the payment of $418,000 by *2 July 2009*. The plaintiffs repeatedly protested their willingness to complete the Agreement by way of their solicitor's letters on 22 June 2009, 27 July 2009 and 31 July 2009.

23 Curiously, on 19 June 2009, three days after the final 21-day notice under cl 6.1 was served on the plaintiffs, Mr Chua received a set of keys to the property for the first time. Prior to the expiry of the notice period, on 22 June 2009 the plaintiffs informed the defendants' solicitors that they were "*willing and ready to complete the matter*" subject to the proviso that liquidated damages accrued in the region of $600,000 would be off-set from the payment owed. In spite of the defendants' decision to rescind the Agreement, a week later on 31 July 2009, the plaintiffs reiterated that they were willing

to complete the transaction by offering to transfer the sum of $418,000, albeit under protest. The plaintiffs' conduct was antithetical to the conduct one would expect of a party intending to terminate an agreement.

Right of set-off under the Agreement

24 In *AL Stainless Industries Pte Ltd v Wei Sin Construction Pte Ltd* [2001] SGHC 243, Woo Bih Li JC cited (at [194]) with approval Chow Kok Fong's *Law and Practice of Construction Claims* (Sweet & Maxwell Asia, 2nd Ed, 1993) as a useful guide to determining when non-payment constituted a repudiatory breach:

> It is suggested that *it would not be sufficient if the non-payment arises only from the employer's belief that the amount due to the contractor should be set off against the contractor's liability for liquidated damages or defective work*. ... [emphasis added]

25 Admittedly, the plaintiffs' decision to withhold the payments due under cl 4.1.5 gave rise to the defendants' election to rescind the Agreement under cll 6.1 and 6.2. However, the plaintiffs' act of non-payment should not be viewed in isolation. On 22 June 2009, prior to the expiry of the 21-day notice period, the plaintiffs were willing to complete the sale and purchase of the property, albeit under protest. While the right to "annul" the Agreement was conferred upon the defendants by cll 6.1 and 6.2, the plaintiffs were also given the right to deduct liquidated damages and rectification costs under cll 9.5, 12.5 and 11.3 from the instalment sums due under cll 4.1.5(a) and (b). Accordingly, the plaintiffs were merely exercising their right of set off by offering to make payment of the $418,000 due under protest. The relevant clauses were as follows:

> [Delay in delivery of vacant possession:]
>
> > Clause 9.5 Any liquidated damages payable to the Purchaser under this clause may be deducted from any installment of the Price due to the Vendor.
>
> [Delay in giving Notice to Complete:]
>
> > Clause 12.5 Any liquidated damages payable to the Purchaser under clause 12.4 may be deducted from any installment of the Price due to the Vendor.
>
> [Defects liability]
>
> > Clause 11.3 If the Vendor, after having been duly notified under Clause 11.2, fails to carry out the rectification works to make good the defect within the specified time, the Purchaser has the right to cause the rectification works to be carried out and to recover from the Vendor the costs of those rectification works. The Purchaser may deduct the cost of those rectification works from clauses 4.1.5(a) and 4.1.5(b) of the Payment Schedule.

26 The plaintiffs were operating on the basis that cll 9.5 and 12.5 were triggered by reason of the Notice to Take Vacant Possession and the corresponding Notice to Complete having been delayed in excess of a year and a half from the contractually stipulated dates. Furthermore, cl 11.3 was also triggered by the fact that from 5 March 2008 onwards the plaintiffs gave the defendants repeated notices to rectify the meticulously identified defects. From the plaintiffs' perspective, by reason of the defendants' conduct over the period of 1 January 2008 until 23 July 2009, a right to deduct liquidated damages and rectification costs under cll 9.5, 12.5 and 11.3 of the Agreement had arisen.

27 The defendants were incorrect in maintaining that the setting off mechanism to deduct sums accrued for liquidated damages or rectification costs was only triggered after payment was first made in accordance with cll 4.1.5(a) and (b). As I pointed out in the course of proceedings, "If there are accrued sums due, does it stand to reason that the stakeholder should be paid in full nevertheless, and then refund in the next second?" Furthermore, cll 9.5 and 12.5 expressly accorded the plaintiffs the right to set off any liquidated damages rightfully accrued. Accordingly, the plaintiffs' refusal to make payment of the remaining 10% of the purchase price was in pursuance of their right to set off liquidated damages and rectification costs accrued rather than evincing "clear indication of the absence of readiness or willingness to perform".

28 The plaintiffs did not breach cl 6.1 by taking the position that they would only furnish the outstanding sums under protest, as this position was consistent with the rights they believed were accorded to them under cll 9.5, 12.5 and 11 of the Agreement. Rather than evincing an unwillingness to complete the Agreement, the plaintiffs' conduct was clearly consistent with their stand that liquidated damages and rectification costs accrued should be set off before any payment to the defendants was made.

Operation of cll 4.1.5(a) and (b)

29 The "*Hong Kong Fir* approach" (see *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha* Ltd [1962] 2 QB 26) was endorsed by the Court of Appeal in *Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd* [2009] 4 SLR(R) 602 at [31] wherein the court found that a party may validly elect to rescind the contract when the other contracting party's non-payment deprived it of substantially the whole benefit which it intended to obtain from the Agreement. By 23 July 2009, in accordance with the time line set by the agreement, the plaintiffs had already paid the defendants about 90% of the total purchase price. As outlined above, the final 10% of the purchase price was payable in accordance with the terms of cll 4.1.5(a) and (b).

30 However, under cl 4.1.5(a), when payment fell due, the moneys were to be paid to and held by the defendants' solicitors as stakeholders until the issuance of the Certificate of Statutory Completion ("CSC"). Pursuant to cl 4.1.5(b), the remaining sum of $150,000 was payable to the defendants only after 12 months had elapsed from the date of completion of the conveyance of the property. Furthermore, the sums payable under cl 4.1.5(b) were also *subject to* any deductions made for liability incurred for rectification works under cl 11.

31 Under the Agreement, the defendants were not going to *immediately* receive the payments made under either cl 4.1.5(a) or (b). It was clear that under the Agreement, the remaining 10% of the purchase price was intended to be set aside to safeguard the interests of the plaintiffs in the event that difficulties with the certification of the property or expenses for defects liability were incurred. Accordingly, I do not think that the defendants were substantially deprived of the benefit of the Agreement they entered into. In light of the fact that the sums withheld by the plaintiffs amounted to only 10% of the total purchase price and, in any event, would not have been in the defendants possession either until the issuance of the CSC or till the expiry of the 12-month defects liability period, a finding that the plaintiffs' conduct gave rise to the defendants' right to rescind the Agreement would be unsound.

Allocating liability for the agreed sum of $410, 000 for defects in the property

32 The relevant provisions in the Agreement are as follow:

Defects Liability Period

Clause 11.1: The Vendor must make good at the Vendor's own costs and expense any defect in the property which becomes apparent within the defects liability period, namely the *period of twelve (12) months from the date the Purchaser receives the Notice to Take Possession in respect of the Property*.

Clause 11.2: The Vendor must make good such defect within one month of his receiving notice from the Purchaser requiring the Vendor to make good such defect, failing which, the Purchaser may do the following:- ...

Clause 11.3: If the Vendor, after having been duly notified under **Clause 11.2**, fails to carry out the rectification works to make good the defect within the specified time, the *Purchaser has the right to cause the rectification works to be carried out and to recover from the Vendor the costs of those rectification works. The Purchaser may deduct the cost of those rectification works from clauses 4.1.5(a) and 4.1.5(b) of the Payment Schedule*.

[emphasis added in italics]

33 As rectification costs were fixed at a lump sum of $410,000, the issue of liability was to be determined on a global basis. Both the plaintiffs' and defendants' cases lacked precision owing to a failure to separate liability arising from *defects* pursuant to cl 11 from *incomplete works*. Due to the parties' quantification of rectification costs on a lump sum basis, I was spared the tedious task of determining, one by one, whether the plaintiffs' "defects" listed were truly defects, and the attendant costs of rectification.

34 The plaintiffs persuasively argued that the defendants had agreed to rectify the "defects" which were meticulously identified by way of Mr Chua's regularly updated lists. Mr Chua compiled the first list of "defects" in the property on 5 March 2008. The markings (which I understood to be cancellations) on items 1, 9, 10, 15, 33, 36 and 38 of the said list supported the plaintiffs' contention that the items remaining (*ie*, those that were not marked off the list) were "defects" which the parties had mutually agreed were part of the scope of rectification works expected of the defendants. Mr Chin's signature under the term "*Agreed by*" on the said document supported the plaintiffs' contention. In the absence of contradictory evidence, this document established that the defendants had agreed to rectify 37 out of 44 items.

35 BCA's representative, Mr Chan Sin Kai, highlighted that during the joint on-site visit on 13 February 2009:

> ... the developer [Mr Chin] agreed to complete all outstanding items as listed by you [the Plaintiffs] ... and he confirmed that he would be rectifying all outstanding items/works as listed by you [Mr Chua].

The document in question was an updated defects list dated 30 January 2009, prepared by Mr Chua and contained 64 outstanding items which required rectification. BCA's correspondence independently corroborated the plaintiffs' assertion that the defendants agreed to rectify the "defects" identified. In fact, under cross-examination, Mr Chin conceded that he was "definitely responsible for part of the defects because no house can come with no defects".

36 In light of the weight of the evidence as to the existence of the defects and the defendants' acceptance of liability to rectify at least some, the agreed sum of $410,000 is to be paid by the defendants to the plaintiffs by way of rectification costs.

Plaintiffs' claim for liquidated damages amounting to $1,476,102.67

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Limit to liquidated damages recoverable

37 The relevant clauses in the Agreement pertaining to liquidated damages were as follows:

> Clause 9.1: The Vendor must deliver vacant possession of the Property to the Purchaser not later than **31st December 2007**.
>
> Clause 9.4: If the Vendor, for any reason does not deliver vacant possession of the Property to the Purchase by 31st December 2007 the Vendor must pay to the Purchaser liquidated damages to be calculated on a daily basis at the rate of 12% per annum on the total sum of all the installments paid towards the Price, and which *shall run from the day immediately after 31st December 2007 until the day the Purchaser receives a Notice to Take Possession from the Vendor in respect of the Property*.
>
> Clause 12.1: The Vendor must give to the Purchaser a notice requiring completion of the sale and purchase of the Property ('Notice to complete') in accordance with this clause no later than *fourteen days (14) after the date of issue of Notice to take possession*.
>
> Clause 12.4: If for any reason the vendor does not give a Notice to Complete by the date specified in Clause 12.1, the Vendor must pay to the Purchaser liquidated damages, calculated on a daily basis at the rate of 12% per annum on the total instalments paid by the Purchaser towards the price, and *shall run from the date on which completion should have taken place until the actual date of completion*.
>
> [emphasis added in italics]

38 In the plaintiffs' Statement of Claim (Amendment No 2), the claim for liquidated damages amounted in aggregate to $1,476,102.67. It bears noting that the plaintiffs' claim for liquidated damages underwent several changes from $618,113.11 to $369,422.34 to the present claim for $1,476,102.67. The plaintiffs have already succeeded in obtaining liquidated damages amounting to $141,922.19 for the period of 1 January 2008 to 15 January 2009. Under cll 9.4 and/or 12.4, the plaintiffs have claimed additional liquidated damages amounting to $1,476,102.67 calculated in accordance with the table below:

[LawNet Admin Note: Table is viewable only to LawNet subscribers via the PDF in the Case View Tools.]

39 An examination of the plaintiffs' sub-claims will show that four of the plaintiffs' six sub-claims pursuant to cl 9.4 and/or cl 12.4 were for overlapping periods of alleged delay. (Sub-claim 3 under cl 12.4 was for the identical sum of $141,922.19 in sub-claim 1. Similarly, sub-claim 5 duplicated sub-claim 4. Curiously, the last sub-claim did not involve duplication, a choice between cll 9.4 and 12.4 being left open.) This was on the basis that concurrently with time running against the defendants for failure to deliver Notice to Take Vacant Possession under cl 9.4, time could also run against the defendants for failure to give Notice to Complete under cl 12.4. Effectively, therefore, the plaintiffs were claiming twice the agreed rate of 12% for liquidated damages computed on the same amount of progress instalment paid. Instinctively, one recoils at such exorbitant claims sounding more in penalty than in liquidated damages.

40 A closer examination reveals that one does not have to depend on instinct alone. The plaintiffs

simply misinterpreted cll 12.1 and 12.4. Time did not begin to run under cl 12.4 until 14 days after the date that Notice to Take Vacant Possession was actually given. The giving of Notice to Take Vacant Possession under cl 9.1 was thus a condition precedent to the operation of cl 12.4. The plaintiffs' error was to start time running 14 days after the contractual date fixed for the giving of Notice to Take Vacant Possession. A plain reading of cl 12.1 shows this was untenable.

41 I move on now to consider sub-claim 5. It will be recalled that Notice to Take Vacant Possession was given, at the latest, by 16 January 2009 when, at the insistence of the plaintiffs, the defendants forwarded the architect's certificate to the plaintiffs. It will also be recalled that the plaintiffs duly paid 14 days thereafter (on 20 January 2009) the 70% progress payment which fell due, albeit, with a deduction of $141,922.19 for liquidated damages under cl 9.4. On the face of it therefore, the plaintiffs appeared to accept that the Notice to Take Vacant Possession had been given.

42 However, the plaintiffs' position was that notwithstanding their payment, the defendants' Notice to Take Vacant Possession was not properly given because the premises were not fit for occupation. (Presumably, in line with that position, in sub-claim 2 the plaintiffs sought a further sum of $5,228.72 by way of liquidated damages under cl 9.4 for the period 16 to 29 January 2009. In other words, despite receipt of the architect's certificate they requested for, the plaintiffs' still considered Notice to Take Vacant Possession as not having been validly given right up to the date they made payment on 30 January 2009. This sub-claim, however, appears to be an afterthought for if it had earlier occurred to the plaintiffs, they would not only have deducted liquidated damages of $141,922.19 for delay up to 15 January 2009 but would have computed damages right up to the day they made payment and deducted it from the 70% progress instalment.)

43 Coming back to sub-claim 5, it may be that the plaintiffs sought to recover liquidated damages on an alternative basis. Instead of saying that Notice to Complete ought to have been given 14 days after the contractual date fixed for the giving of Notice to Take Vacant Possession, it may be that the plaintiffs contended that Notice to Complete ought to have been given 14 days after Notice to Take Vacant Possession was actually given. But if the plaintiffs accepted that Notice to Take Vacant Possession was actually given, no further liquidated damages should have been sought under cl 9.4 for failure to give valid Notice to Take Vacant Possession. If, on the other hand, the plaintiffs insisted that Notice to Take Vacant Possession was never validly given, then the claim for liquidated damages under cl 9.4 continued but the claim under cl 12.4 should not have commenced. The plaintiffs could not blow hot and cold, arguing that Notice to Take Vacant Possession was never validly given for purposes of cl 9.4 but was indeed actually given for the purpose of cl 12.4.

Was valid notice given?

44 Clause 9.2 of the Agreement reads:

> Clause 9.2: Before delivering vacant possession of the Property to the Purchaser, the Vendor *must* ensure that the Property has been completed *so as to be fit for occupation and must remove all surplus materials and rubbish from the Property*. [emphasis added]

45 The plaintiffs submitted that the defendants gave notice to take vacant possession of a property that was "uninhabitable and unsafe let alone fit for occupation". In *Topfell Ltd v Galley Properties Ltd* [1979] 1 WLR 446, vacant possession in relation to a property was defined as "a state in which it can be occupied and enjoyed". Owing to the state of the property, the plaintiffs argued that vacant possession was not delivered under cl 9.1. From their claims, the plaintiffs appeared to be arguing that from 16 January 2009 till the last day of trial on 22 November 2010, vacant possession of

the property had not been delivered to them. The following defects were identified by the plaintiffs in support of their position:

(a) the main door was not erected;

(b) the house was not painted and cleaned;

(c) failure to clear construction debris, surplus materials and rubbish; and

(d) hazardous works and incomplete works such as a gap in the roof terrace.

46 The plaintiffs relied on the case of *Yin-Marguerite v Pt Jaya Putra Kundur* [1999] 1 SLR(R) 309 to establish that the question whether notice was correctly issued was one of fact. The court found that valid notice could not be issued when the units were not ready merely in an effort to forestall liability for liquidated damages. The crux of the plaintiffs' argument was that due to the safety hazards and other incomplete works identified, the property was not in a state fit for occupation. On their argument, the notice to take vacant possession was invalid and should not have been issued on 16 January 2009.

Issuance of the TOP on 6 January 2009

47 Examining the effect of BCA's issuance of the TOP was a convenient starting point to crystallise the salient issues relating to the validity of the notice issued. The architect, Mr Tay's, evidence clarified the specific compliance requirements imposed by BCA on developers prior to the issuance of a TOP:

Q: You as a QP [Qualified Person of the project] said that you have to comply with statutory requirement to obtain TOP. *What is it that you have to comply as a QP in order to satisfy the statutory requirement to obtain TOP*?

A: Okay. Usually ... you have to do a site inspection to ensure that the builder built according to the approved plan and to check for any deviation and to ensure that the site or the project itself is ready for a TOP inspection to be jointly carried out with a BCA officer. And after the inspection itself, the BCA officers will usually give us a list of comment or directions whether there are things that doesn't comply or doesn't meet their stipulated safety requirement. Usually we have to either seek waiver or to ensure that the work is sort of rectified to comply to this comments. And after all this is being done, and BCA is satisfied with the works, they will issue us TOP.

[emphasis added]

48 Under s 12(4) of the Building Control Act (Cap 29, 1999 Rev Ed), a TOP is *prima facie* evidence that a building is suitable for occupation. The issuance of the TOP by BCA prior to the issuance of the defendants' Notice to Take Vacant Possession weighed against the plaintiffs' submissions. Moreover, although the plaintiffs had made multiple written complaints to BCA regarding the condition of the property, BCA had dismissed their complaints and maintained the validity of the TOP. Three main issues were identified by the plaintiffs as capable of invalidating the Notice to Take Vacant Possession, *viz*, the safety hazard posed by the gap in the roof terrace, the defendants' failure to install a main door and, under cl 9.2, the failure to remove all "surplus material and rubbish" from the property.

49 BCA's representative, Mr Tan Eng Huat ("Mr Tan"), had observed in a letter dated 5 February 2009 to Mr Tay that the "big gap at the roof terrace" was a safety hazard. Additionally, the architect Mr Tay's evidence was that "strictly speaking" the property was not fit for occupation as the defendants had omitted to install the main door. However, he clarified that generally speaking the state the property was in was due to the scheduled construction works:

> A: TOP issued BCA meant temporary occupation permit. That means the building itself is in the minimum state that if you want to have occupation, you can with no issue of safety and initially, that means primarily, all the supply, everything must work in a sense – there's electrical supply, there's water supply, all the safety barriers must be up ... even with that TOP, it was stated that, clearly, it's not a full completion as such. *Why? Because at that point in time, we are aware, BCA is aware, client is aware that subsequent work has to be carried out ... it is not a full completion because there's a whole lot of what we term as ID works, interior fitting out works*. [emphasis added]

Outstanding works after the issuance of TOP

50 First and foremost, having examined the photographic evidence adduced, I am persuaded that while the property looked more or less complete during the TOP inspection in early January 2009, soon thereafter, the deterioration of the state of the property as well as the construction debris present was a direct result of the scheduled construction works being carried out. The discrepancy between Mr Chua's and Mr Tan's evidence excerpted below supported this finding. Under cross-examination about the defects in the property, Mr Chua remarked that:

> ... in 2009 after the TOP was served, [I] went into the property and by this time, *I'm able to see everything in a total perspective, because there's no construction work*, on the floor of the living room and dining room. [emphasis added]

However shortly thereafter on 3 February 2009, at the Plaintiffs' request BCA's Mr Tan conducted an inspection of the premises and he noted that "some works were still being carried out".

51 I am satisfied that there was an informal understanding between the parties that interior decor and carpentry works for the property would take place after the issuance of the TOP (dealt with in detail below). Accordingly, it was disingenuous of the plaintiffs to use the state of the property after the TOP had been issued, and interior decor and carpentry works had started, to attack the validity of the Notice to Take Vacant Possession on the grounds that the house was not painted and cleaned and that there was failure to clear construction debris surplus material and rubbish.

52 Mr Wong, the assistant architect, persuasively explained that as the construction works were held back pending the issuance of the TOP, if the main door with customised glass panelling requested by the plaintiffs was installed at the TOP stage, it might have been damaged by the construction works scheduled to take place following the issuance of the TOP. The defendants' omission to install the main door before and after the issuance of the TOP was entirely within the contemplation of the parties. The defendants' intention was to avoid unnecessary costs and to protect the customised door from exposure to construction works. As Mr Chua was not planning on immediately occupying the property owing to the scheduled construction works, the defendants did not install a temporary main door only to have it discarded when Mr Chua's customised door was installed. From the evidence, it would appear that the cost saving from omitting a temporary door was to be credited to the plaintiffs.

53 In a letter dated 11 March 2009, BCA wrote to Mr Chua noting that the remaining:

> ... outstanding items listed by you [the Plaintiffs] are mainly fittings, which do not fall within the scope of the Building Control Act and Regulations and therefore are not regulated by the BCA. ... the statutory requirements pertaining to the issuance of the TOP have been complied with.

The plaintiffs' act of payment

54 On a slightly different note, under the Agreement the purchaser was required to make payment progressively in stages in the order set out under cl 4. Firstly, the plaintiffs demanded that pursuant to cl 9.3 a valid Notice to Take Vacant Possession could only be issued, *inter alia*, by provision of the architect's certificate. Fourteen days after the defendants furnished the said certificate on 30 January 2009, in compliance with cl 4.1.4, the plaintiffs duly made the payment of 70% of the total purchase price, withholding a sum of $141,922.19 for liquidated damages up to the date the architect's certificate was given to the plaintiffs and no further. The plaintiffs' conduct invited the direct inference that the envisioned stage referenced in the Agreement under cl 9.3 had been satisfactorily reached. This act indicated that the plaintiffs accepted that the defendants' Notice to Take Vacant Possession was valid, at the latest by 16 January 2009 after the plaintiffs received the architect's certificate.

55 As observed earlier, the operation of cl 12.1 is contingent upon the prior satisfaction of cl 9.1. If the plaintiffs were of the view that the defendants had failed to deliver Notice to Take Vacant Possession, discussions between the parties in relation to the Notice to Complete under cl 12.1 would not have arisen. When the defendants issued Notice to Complete the sale and purchase of the property on 2 February 2009, whilst the plaintiffs were reluctant to proceed further, rather than declaring the Notice to Complete as invalid, the plaintiffs sought multiple extensions to complete the transaction. This is evidenced by their e-mails dated 20 March 2009 and 18 April 2009. By their own conduct, it may be inferred that the plaintiffs considered the defendants' Notice to Take Vacant Possession to be valid.

56 In light of BCA's defence of the validity of the TOP and the plaintiffs' conduct outlined above, I am reluctant to make a finding that the Notice given to take vacant possession of the property was invalid. Admittedly, there was a gap in the roof terrace at the time TOP was issued. However, it was soon remedied. The important point to bear in mind is that while the property was strictly not in a state fit for immediate occupation, the overarching reason for the property being in that state when it was sought to be handed over was that it had been agreed between the parties that construction works for the interior decor and carpentry would be commenced immediately after the issuance of the TOP to accommodate Mr Chua's requirement for something more sophisticated than that to be provided under the Agreement. (This is further mentioned in [85] to [88] *infra*.) Therefore any claim for liquidated damages (if any) over and above that already conceded by the defendants ought properly to have been under cl 12.4 for delay in giving Notice to Complete.

Liquidated damages recoverable for late completion of the sale and purchase

57 The plaintiffs had a *prima facie* contractual entitlement to liquidated damages for the delay in completing the sale and purchase of the property. In their defence, the defendants submitted that the delay occasioned was predominantly caused by Mr Chua. Examination of Mr Chua's contribution to the delay during the period from 30 January 2009 until 22 November 2010 required consideration of the amendments/alterations requested by him prior to and following the issuance of the Notice to take Vacant Possession on 16 January 2009. Such consideration was for the purpose of determining whether time was set "at large".

Was time set "at large"?

58 An early expression of the principle pertaining to time being set at large or the "prevention principle" in construction contracts was seen in the Edwardian English case of *Wells v Army & Navy Co-operative Society* (1903) Construction Law Year Book, Vol 4, 65 CA at 69–70, where Vaughan Williams LJ opined that:

> In the contract one finds the time limited within which [the developer] is to do his work. This means, not only that he is to do it within that time but it means also that he is to have that time within which to do it.

59 In *Dodd v Churton* [1897] 1 QB 562 at 566, Lord Esher MR famously described the rationale behind the principle as follows:

> ... The principle is laid down in Comyns' Digest, Condition L (6.), that, *where one party to a contract is prevented from performing it by the act of the other, he is not liable in law for that default*; and, accordingly, a well recognised rule has been established in cases of this kind, beginning with *Holme v Guppy*, to the effect that, *if the building owner has ordered extra work beyond that specified by the original contract which has necessarily increased the time requisite for finishing the work, he is thereby disentitled to claim the penalties for non-completion provided by the contract*. The reason for that rule is that otherwise a most unreasonable burden would be imposed upon the contractor. ... [emphasis added]

60 The equitable remedy afforded by the prevention principle is derived from the well established legal maxim that no man shall take advantage of his own wrong. Setting time at large ensures that whoever "prevents a thing from being done shall not avail himself of the non-performance he has occasioned": H Broom, *A Selection of Legal Maxims, Classified and Illustrated* (8th Ed) at p 235. More recently, in *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601, Lord Denning MR sitting in the Court of Appeal held as follows (at 607):

> (1) It is well settled that in building contracts – and in other contracts too – when there is a stipulation for work to be done in a limited time, if one party by his conduct – *it may be quite legitimate conduct, such as ordering extra work – renders it impossible or impracticable for the other party to do his work within the stipulated time, then the one whose conduct caused the trouble can no longer insist upon strict adherence to the time stated*. He cannot claim any penalties, or liquidated damages for non-completion in that time. [emphasis added]

6 1 *Halsbury's Laws of Singapore*, vol 2 (LexisNexis, 2003 Reissue) states as follows (at para 30.150):

> Time can be set 'at large' by reason of acts of prevention on the part of the employer or his agents, ... Such acts of prevention can include failures or omissions on the part of the employer to fulfil certain express or implied obligations. ... [including] the giving inadequate instructions, providing inadequate access to the site, late delivery of site, failure to secure approval of plans and failure in the provision materials. ... *Once the time becomes 'at large', the contractor will then apparently be under the general law obligation to complete 'within a reasonable time'*. [emphasis added]

62 An act of prevention was defined in *Yap Boon Keng Sonny v Pacific Prince International Pte Ltd* [2009] 1 SLR(R) 385 ("*Yap Boon Keng Sonny*") as (at [34]): "An act of prevention operates to prevent, impede or otherwise make it more difficult for a contractor to complete the works by the date stipulated in the contract." Acts of prevention can include failures or omissions on the part of the purchaser to fulfil certain express or implied obligations such as, *inter alia*, the giving of

inadequate instructions, providing inadequate access to the site, late delivery of the site, failure to secure approval of plans and failure to provide the materials required. Within the context of this dispute, the purported *acts of prevention* included Mr Chua's unilaterally ordering extra work to be carried out outside the scope of the Agreement and the delay occasioned by the appointment of independent subcontractors for the interior decor and carpentry works of the property.

63 When an employer/purchaser is found to have performed acts of prevention, in the absence of an extension of time clause in the agreement, the contractual time for completion is no longer binding. Accordingly, the right to claim liquidated damages under the contract for any delay occasioned is lost as there is no longer a fixed completion date from which damages may be calculated. Keith Pickavance, *Delay and Disruption in Construction Contracts* (Sweet & Maxwell, 4th Ed, 2010) ("*Pickavance*") at p 316, observed that the prevention principle is applicable, setting time at large even if the delays caused by the purchaser form *only part of the total delay*. In fact, even if the developer would have been unable to complete on time in the absence of the acts of prevention of the purchaser, the liquidated damages clause will still cease to apply if the purchaser was responsible for some of the delay.

64 Reiterating this principle, Salleh Abbas FJ in *Sim Chio Huat v Wong Ted Fui* [1983] 1 MLJ 151 ("*Sim Chio Huat*"), clarified that it was immaterial whether the hindrance or delay caused by the plaintiffs was a *cause of part or the whole delay*. Liquidated damages would cease to apply unless there was an extension of time clause incorporated into the relevant contract. Thus, the enquiry into whether the conduct of Mr Chua constituted an act of prevention capable of setting time at large was *independent* of the question of the *extent of delay* caused by the said act/acts or the possibility that the delay was partly caused by the defendants. Thus, *even if* Mr Chin was partly responsible for the delay in relation to certain works, so long as the plaintiffs' conduct was partly to blame for impeding/preventing the works of the defendants, time would be set at large.

Nature of the Agreement

65 The plaintiffs addressed the issue of time being set at large in an almost cursory fashion. They asserted that the nature of the Agreement was outside the parameters of the equitable remedy, rendering it inapplicable. The plaintiffs argued that the nature of their relationship with the defendants was one of purchaser and vendor. As they were not contracting parties to a building contract, they were not in a position to prevent the completion of work. However, *Keating* ([20] *supra*) defined a building contract as (at pp 1 and 2):

> ... any contract where *one person agrees for valuable consideration to carry out ... building or engineering works for another*. ...
>
> ...
>
> ... *The employer for whose benefit the work is carried out* and the contractor who must carry out the work are the principal parties to a construction contract.
>
> [emphasis added]

66 The plaintiffs were without a doubt the employers in this Agreement as all the re-construction works carried out at the property were indisputably for their benefit, albeit in the context of a sale and purchase. Contrary to the plaintiffs' assertion, the Agreement was a *quasi*-construction contract as it was both a contract for the sale of land as well as a contract for the reconstruction of the property built on the land. Inspecting the terms of the Agreement readily revealed that at the heart

of the sale and purchase of the property was the construction of the said property. It was plain beyond doubt that the Agreement was not a sale and purchase of the property as it was, but, rather, the property was sold subject to construction works to be carried out.

67 Consequently, the plaintiffs' conduct was capable of constituting acts of prevention. In the context of this dispute, the purported *acts of prevention* included variations such as Mr Chua unilaterally ordering extra work to be carried out outside the scope of the Agreement and the delay occasioned by the appointment of subcontractors for interior decor and carpentry works.

Acts of prevention: Variations

68 In the interest of simplifying the factual matrix at hand, the changes or alterations made were classified either as (a) *within* the Agreement and incorporated by way of the Fourth and Fifth Schedules (BP02); or (b) *outside* the contractual bargain, having been initiated by the plaintiffs both prior to and after the issuance of the TOP. In light of the defendants' acceptance of liability under cl 9.4 for the delay up to 15 January 2009, the enquiry centred on the plaintiffs' conduct subsequent to the issuance of the TOP and the architect's certificate, *ie*, 16 January 2009 onwards.

69 The document titled "*Issues mutually agreed by Vendor and Purchaser*" contained a list of "defects", some of which, upon closer scrutiny, were works ordered by Mr Chua *outside* the terms of the Agreement. To the extent that other items in the list were indeed defects in respect of which rectification works were expected of the defendants, they were not regarded as works outside the scope of the Agreement. Mr Chua repeatedly asserted that Mr Chin had agreed to the additional works even if they were outside the scope of the Agreement.

70 In spite of Mr Chin's agreement to accommodate and carry out Mr Chua's requests for additional works, so long as the additional works were outside the scope of the original Agreement, in the absence of a clause relating to extension of time or ordering of extra works, any and all works ordered by Mr Chua outside the Agreement were capable of constituting acts of prevention. Lord Esher MR's remark in *Dodd v Churton* ([59] *supra*) bears repeating (at 566):

> .. if the building owner has ordered extra work beyond that specified by the original contract which has necessarily increased the time requisite for finishing the work, he is thereby disentitled to claim the penalties for non-completion provided by the contract.

In *Sim Chio Huat* ([64] *supra*), the court held that (at 154):

> Amongst the conclusions reached by the learned author [Hudson's Building and Engineering Contracts, 10th Ed, at p 624] after considering these cases is that in cases *where an agreement contains no clause for extension of time for completion, the acts of prevention by the employer whether authorised by the contract or whether in breach of it or whether the prevention is a cause of part or of the whole of the delay invalidate the liquidated damages* clause because by such acts in the words of Parke B in *Holme v Guppy (supra)*and Lord Denning MR in *Trollope and Colls (supra)* 'the time becomes at large'. Consequently there is no date from which damages could run and therefore no damages could be claimed. [emphasis added]

In Duncan Wallace, *Hudson's Building and Engineering Contracts*, vol 2 (Sweet & Maxwell, 11th Ed, 1995), p 1157 clearly states:

> (a) that acts of prevention by the owner, whether authorised by or breaches of the contract, will set time at large and invalidate any liquidated damages clause, in the absence of an

applicable extension of time clause. *Variations whether authorised under the original contract or subsequently agreed, will be regarded as acts of prevention (or of waiver) for this purpose*; [emphasis added]

71 Simply put, one of the main purposes of the prevention principle is to protect a contractor who may be unable to adhere to the time line stipulated in the contract by reason of additional works ordered by his employer. The application of this equitable remedy in fact pre-supposes that the contractor agreed to carry out the additional works and that, as a result, the delay was caused at least in part by the additional works. The rationale of the prevention principle would be undermined if additional works ordered by the employer which hindered or delayed the works of the contractor were incapable of constituting acts of prevention just because the contractor agreed to carry out the additional works.

72 Accordingly, any variations authorised or unauthorised outside the scope of the Agreement were capable of constituting acts of prevention in the absence of an extension of time clause or a clause governing additional works. Furthermore, in the absence of an express term incorporating all the additional works ordered by Mr Chua in the 5 March 2008 list into the original Agreement (*ie*, subject to the timeline stipulated by cl 4 of the Agreement), I find that all such works were outside the scope of the original Agreement and, accordingly, were capable of constituting acts of prevention.

Changes necessitated by the terms of the Agreement

73 Any and all works *within* the contractual bargain, including works within the Fourth and Fifth Schedules to the Agreement, were subject to the strict time line set out in the Agreement. In the event of delay, the defendants were liable for the relevant liquidated damages stipulated in the Agreement. As *Keating* ([20] *supra*) observes at p 321, in the absence of ambiguity in the construction contract, the contractor (defendants) would be liable for any delay occasioned notwithstanding the "impossibility" of performing the contract within the stipulated time-frame:

> The wording of the contract may be such that the contractor binds himself absolutely to complete the contract work with extras within the stipulated time, subject to payment of liquidated damages in default, even though extras may be ordered and no extension of time is granted. *Such a contract, though it is very onerous and the contractor may have committed himself to an impossibility, will be enforced provided the extras were such as were contemplated by the contract*. ... [emphasis added]

74 On 22 December 2006, the defendants' solicitors sent a letter to the plaintiffs attaching a letter from Ms Gwen Tan of FA which highlighted the likely delays caused by the amended layout plan awaiting BCA's approval (BP02) and warned the plaintiffs of additional professional fees chargeable for the requested changes encapsulated in the Fourth and Fifth Schedules to the Agreement. Architect Ms Gwen Tan's warning and any difficulty faced by the defendants in adhering to the time line stipulated by cll 9 and 12 did not excuse the defendants from compliance with the terms of the Agreement.

75 I accepted the defendants' evidence that the application for the TOP could have been made much earlier if not for the need to update and submit BP02 to BCA and other relevant authorities in accordance with the plaintiffs' changes. While 95% of the work had been carried out by 10 June 2008, the preparation of revised drawings required five months (June to November 2008), delaying the application for the TOP to November 2008. Nevertheless, no matter how onerous, as the changes incorporated in BP02 had been contractually agreed as part of the Agreement, they were subject to

the time line provided under the Agreement.

Changes ordered outside the terms of the Agreement

76 Contrary to the plaintiffs' position that all the changes requested were within the four corners of the contract, the evidence showed that the plaintiffs made several requests for variations directly to the architects (FA) and the main contractor (KHSC) even though they were under the employ of the defendants. Mr Chua vehemently denied that he had communicated directly with the representatives of FA and KHSC. In fact, it appears that in the interest of ensuring that the plaintiffs were satisfied with the property, Mr Chin had expressly authorised Mr Chua to approach the architects with any query or change which he had in mind. I am satisfied that Mr Chua did bypass the defendants, communicating not only with the architect but also with the main contractor in relation to non-contractual variation works. I accept the General Manager of KHSC, Mr Poh Kee's evidence that:

> 5 In the course of carrying out the works, there were numerous changes made to the design of the property. ... *I had informed him* [*Mr Chua*] *that any change would be considered a variation work as it is different from the building plans and that while I can carry out his instructions, he would need to clear with the architects first*. The owner had informed me that he would speak to the architects and that the changes were reflected in his contract with Mr Chin. The following instructions were given directly by the owner to me:-
>
> During construction phase
>
> (1) The installation of a water sprout at the swimming pool.
>
> (2) The installation of a water foundation outside the guest room on the 1st storey.
>
> (3) The installation of the electrical isolator for the water foundation.
>
> (4) The construction of a room with a shower in Bedroom 5 at the attic floor.
>
> (5) The installation of an aluminium sliding door in place of windows at Bedroom 5; tiling works, construction of a floor trap and glass railing on the roof outside Bedroom 5.
>
> ...
>
> 1 1 *As a result of the numerous changes to the works, I had informed Mr Chin on several occasions that extensions of time should be granted to us as we would not be able to complete the project within the time that was originally granted to us*. I had also informed Mr Chin that we would have to claim for additional costs due to the numerous changes. ...
>
> [emphasis added]

77 Furthermore, Mr Tay gave evidence that multiple verbal instructions were given by Mr Chua during site meetings which resulted in revisions and inevitable delay. The defendants' assertion that Mr Chua had repeatedly interfered with the construction works at the property was documented in the written correspondence from the defendants' solicitors to the plaintiffs dated 23 January 2009:

> It appears that Mr Chua Tian Chu came earlier, met with the main contractor and indicated to the contractor that he wanted some (if not all) of the windows and frames to be changed. Kindly note that this direction (if what the main contractor said is true) is totally out of line. Our clients

will reject his direction. It shows that your clients, *Mr Chua is again interfering and giving unilaterally* [*sic*] *instructions to the main contractor without our clients' authority. Our clients object to this. Should there be variations, the proper negotiations/instructions should be directly* [*sic*] *to our clients*. [emphasis added]

78 Having established that Mr Chua was accustomed to approaching FA and KHSC directly, the crucial question remained as to whether the variation works ordered were within the boundaries of the Agreement. Contrary to the plaintiffs' submission that all the changes made were contractually agreed, the amendments/alterations made at the plaintiffs' requests resulted in three revised building plans prepared by FA on 1 February 2007, 23 October 2007 and 16 July 2008. I accept the defendants' submission that it was not in their interest to repeatedly amend the building plans causing delay and attendant costs.

79 Under-cross examination, Mr Chua accepted that he instructed Mr Poh Kee to install the water sprout at the swimming pool, outside the scope of works detailed under the Fourth and Fifth Schedules to the Agreement. In addition, under cross-examination while discussing the defects list dated 5 March 2008 and notwithstanding his justifications, Mr Chua conceded that changes were made outside of the Agreement in relation to the new store-room at the back of the garage, the construction of new boundary walls and the replacement of a wall between the dry kitchen and dining room with a folding door:

Q: You see, you have entered into this separate agreement with the vendor to rectify or install whatever items that's outstanding and to rectify all those items which are defective. Now you are coming to tell this Court, this is not a complete list?

A: Okay, to be even more exact, this is an outcome of the discussion between all parties and *in fact I can even tell you that it include new items that is not in the sales and purchase* because as in the reconstruction of a building, there are things that developer or whoever, or architect cannot foresee and because of the construction requirement, they got to build a certain way. ... *Okay, so for example, this item 20, originally there are no folding doors between dining and guest room but because of necessity* ... we agree on this item.

[emphasis added]

80 The layout of certain rooms completely changed from the first building plan to the next. For example, several changes were made to the layout of the water-closet, bidet, bath and shower area. Under cross examination, Mr Chua accepted that certain changes made on his instructions were outside the scope of the Agreement:

Q: And one other change that's requested was the bedroom 4, the compressor unit was relocated. The compressor unit was along the grid line, between grid lines 4 and 5 and latitude is 'B'. This compressor unit was originally on the grid line 5, but it was relocated to grid line 'A' and between 4 and 5.

Court to Mr Kasi:So you are saying changes were made?

Mr Kasi:Changes were made at the request of Mr Chua.

Q: Mr Chua do you agree that these changes were made at your request?

A: *Okay. Yes ,I made these changes on the condenser unit, but that was in the mutually*

agreed agreement way back in 5th March 2008 [Rather than in the Agreement] ...

...

A: ... So this is the condenser unit. Yes, I agree I have made the changes and I believe Mr Chin has agreed to it.

[emphasis added]

81 In addition, many changes in positioning of the toilet accessories were also reflected in the drawings made on 1 February 2007, 23 October 2007 and 16 July 2008. Mr Wong indicated that contrary to the plaintiffs' submissions, the enlargement of the area around the maid's water-closet on Mr Chua's instructions was unnecessary for accommodating the additional accessories listed in the Agreement. The re-configuration of the whole area around the maid's water-closet so as to accommodate a towel rail and soap-holder was even less "necessary". Mr Wong indicated that Mr Chua proposed the enlargement as he "wanted a bigger room" rather than because of any structural necessity. Another major change made was the removal of the wall between the dry kitchen and dining area upon Mr Chua's instructions that the "kitchen was too dark".

82 Similar to the changes highlighted thus far, it appeared that Mr Chua requested the defendants to change the "fixed glass louvre windows" to windows which could be opened; a change like many others which were instructed outside the ambit of the Agreement:

Q: Mr Chua, subsequent to this, you informed Mr Chin that it makes the place very hot and you asked for a change to open louvre windows. Is that correct?

A: I think there must be a lapse of memory. I complained the things that were very hot way back in March 2008, that's why we have asked for window that can be opened and stayed in open position and instead of a fixed window that is going to be very hot because of afternoon sun and so on and so forth. So that request was made way back in March 2008 and agreed upon by both parties.

83 The consequential changes arising from the "re-design" or variation of the swimming pool in the property were the subject of heated dispute between the parties. Briefly, the dimensions of the pool were lengthened and the shape of the pool was changed to a small L-shape that wrapped around the living area. These changes resulted in the underground surface water channel, the walkway and many other parts of the property having to undergo significant overhaul at the defendants' expense and time. Under the Fourth Schedule of the Agreement, as the re-design of the pool was limited to modifications relating to its *dimensions*, it was clear that the scope of the changes instructed by Mr Chua in terms of the design, shape and positioning of the pool, were outside the scope of the Agreement. In *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2)* [2007] EWHC 447 at [56], it was held that:

(i) Actions by the employer which are perfectly legitimate under a construction contract may still be characterised as prevention, if those actions cause delay beyond the contractual completion date.

84 Having examined the slew of changes instructed outside the terms of the Agreement, it is important to note that some of these changes in turn resulted in consequential changes such as the hacking of wall tiles and removal of fixtures. Furthermore, while certain changes were ordered by Mr Chua for pragmatic reasons, it did not detract from the fact that the changes caused delay and

were capable of being characterised as acts of prevention. Mr Chua's interference and orders for variations worsened any delay caused by the defendants. As the defendants merely needed to satisfy the court that part of the delay was occasioned by the variations made by Mr Chua, I was not required to quantify the precise period of delay caused by each of the material changes discussed.

Interior decor and carpentry work as an act of prevention

85 The Fifth Schedule to the Agreement set out the basic specifications for the architectural interiors which the defendants were contractually obliged to provide. While the Agreement provided for basic architectural interior decor and carpentry works, the plaintiffs wanted "something more sophisticated". Mr Lee testified that he approached Mr Chua offering the services of FPL to *upgrade* the "basic" interior design work to be provided under the Agreement.

86 On 26 May 2008, Mr Chua entered into a contract with FPL, a subsidiary of FA, for the interior design of the property. FPL's representative, Mr Lee, recommended Mr Chin to enter into a contract (SH011-08) with SI for all the carpentry works *within* the scope of the Agreement, such as the wardrobes, doors, vanity and mirror cabinets in the property. He also recommended Mr Chua to enter into a separate contract (SHD15-08) on 2 June 2008 with SI to undertake all the carpentry works *outside* the scope of the Agreement with Mr Chin.

87 Mr Lee explained that he had recommended SI to both Mr Chin and Mr Chua with a view to saving costs and time. If Mr Chin had engaged a different subcontractor to undertake the interior decor and carpentry works whilst Mr Chua engaged SI to upgrade the works, that which Mr Chin's subcontractor built would have had to be removed and replaced with SI's upgrade resulting in wastage of time and money. With the engagement of a common subcontractor, the plaintiffs only needed to pay the incremental cost of the upgrade while the defendants bore the cost of the basic interior decor and carpentry works which were to be provided under the Agreement.

88 FPL's contract with Mr Chua for the development of an interior design concept for the property expressly included the "delivery of carpentry and supervision of work". Mr Lee had recommended that Mr Chua should use one carpenter for all the works in the property so as to ensure that the quality of work was uniform. It was Mr Lee who introduced Mikey to Mr Chua as a carpentry contractor who was trustworthy and capable of performing carpentry works which were compatible with FPL's interior design concept.

Mr Chin's role in his contract with SI

89 At the heart of their argument, the defendants sought to establish that the delay occasioned from 30 January 2009 onwards was beyond Mr Chin's control. As Mr Chin did not have a contractual relationship with FPL, he was unable to control the speed of development and implementation of the interior design of the property. SI's work was contingent on FPL's work. The progress of FPL's work was dependent on Mr Chua's instructions. Accordingly, any delay in communications between Mr Chua and FPL directly impacted upon SI's ability to carry out its works.

90 As regards SI, Mr Chin submitted that he was not in a position to control its work as he was merely the "paymaster". Mikey clarified that Mr Chua was responsible for all the "design approval" and Mr Chin's contract was "basically [entered into] to make sure he [paid] me [Mikey] for the work done". In fact, when the said contract between Mr Chin and SI was signed in February 2009, Mr Chin made a note on the contract instructing SI to liaise directly with Mr Chua for instructions relating to design and materials. Furthermore, in a letter from Mikey to Mr Chua dated 3 March 2009, Mikey stated: "... we will liaise with [FPL] on all design matters" while Mr Chin would be "solely responsible

for the payment for the works".

91 The limited role played by Mr Chin with respect to SI's work was highlighted by the testimony of Mr Lee, Mr Wong and Mikey to the effect that SI sought directions from Mr Chua or FPL for *all* their works. An e-mail from Mr Chin to Mr Chua dated 12 June 2009 reiterated this position:

> ... had finished all the works 2 weeks ago. But till today Mr Mikey had not proceed [*sic*] to finish his work. *Pls note that it had been very very unfair to me that the interior contractor is engaged by you ... (and you had just confirm* [*sic*] *the design on the 12 of May). They delay* [*sic*] *the work and you had* [*sic*] *been using this to hold back my payment and claim me LD. Pls note that I have no control over them and you know that without them finish* [*sic*] *the work I cannot proceed with my works*. I had been very nice. I attend to all your request [*sic*] all the times [*sic*]. [emphasis added]

Delay caused by Mr Chua's contract with FPL

92 I am satisfied that Mr Chua's decision to enter into and manage the contracts with SI and FPL as a substitute to the "basic" architectural fixtures envisioned under the Agreement played a significant part in the delay occasioned after the issuance of the TOP. Mr Wong's evidence was that if the interior decoration and carpentry had been limited to basic works as per the original Agreement, it would have been completed much earlier. Mr Wong and Mr Chin also testified that if not for the additional interior design and carpentry works necessitated by Mr Chua's arrangement with FPL and SI, the "basic" architectural interior would have been completed before the issuance of the TOP on 6 January 2009.

93 The plaintiffs' decision to appoint FPL and SI to modify the type of interior design and carpentry work for the property prevented the defendants from carrying out the works in the Agreement within the time period envisaged. The evidence showed that Mr Chua worked with FPL to determine and approve the interior design. Notwithstanding the fact that Mr Chin was in a contractual relationship with SI, I am satisfied that Mr Chin was limited to the role of "paymaster". In fact, in January 2009, once the TOP was issued and works re-commenced, Mr Chin's inability to proceed with his works under the Agreement was caused by the fact that SI was carrying out works. Mikey indicated, as late as 18 June 2009, that "once the works have been completed, I will hand over the property to the developer, Mr Chin for his follow-up."

Mr Chua's involvement in the work of SI and FPL

94 Having established that under both contracts with SI, Mr Chua was in the pivotal position of directing the works carried out through FPL, the relevant question to address was whether his conduct caused the delay occasioned by the defendants. Contrary to the plaintiffs' submission that all design related decisions had been made by May 2008, the evidence adduced by the defendants established that Mr Chua was still making decisions affecting the defendants' and SI's ability to carry out works on the property as late as May to June 2009. An e-mail dated 13 May 2009 from Mr Chin to Mikey stated that:

> Spoken to you yesterday, *you told me that Mr Chua had not confirm* [*sic*] *the contract on the toilet with you*. Pls confirm that he have [*sic*] confirm it today and let me know when you can start work. As Mr Chua had given me a [deadline] to fulfil. *If you cannot finish you*[*r*] *work we can never proceed*. [emphasis added]

95 Furthermore, Mikey's testimony indicated that even after the carpentry works were completed,

Mr Chua requested additional changes such as the modification of the mirror cabinets on account of insufficient storage being provided. An e-mail from Mr Chin to Mr Chua dated 16 April 2009 read as follows:

> Attached please find the design for the boundary wall. ...
>
> I have been chasing Berlin almost everyday for him to come out with the design after the meeting we had on site. ... *Berlin told me that he had been calling you almost everyday and write email to you but you did not* [*respond*] ...
>
> On the power room, Berlin had suggested a free standing basin and will come with the design. ... but the *Main Contractor said you had given him instruction on site to do it as what is being built now. ... pls confirmed* [*sic*] *this so Berlin don't have to design the new layout*.
>
> Pls let me know the Aluminium window cost. Berlin told me that you had told him to design some flat window projected out then follow by 45 degree window, he said that design guideline would not allow, because of spring line. Pls discuss with Berlin and let me know what is the outcome?
>
> ... Its [*sic*] seem like the interior contractor is doing the design? Can I take it as final drawing if the drawing is issue by him? Pls confirm. Because he told me to hack and redo lots of things in the toilets. I am waiting for his drawing???? Or Berlin drawing????

96 In *Yap Boon Keng Sonny* ([62] *supra*), the act of prevention identified by Judith Prakash J was the employers' decision to appoint a subcontractor for interior decoration works, rejecting the one provided by the contractor. The learned judge held that the delay, resulting in late completion, was caused by the plaintiff seeking another interior decoration contractor, setting time at large. In the case at hand, the appointment of independent design and carpentry contractors by Mr Chua impeded Mr Chin's role as the developer of the property. In sum, the delay occasioned by the interior design and carpentry works after the issuance of the TOP was attributable to the substitution of basic architectural fittings for "sophisticated" ones, the time taken in the preparation and approval of FPL's designs, SI's reliance on FPL's design for carpentry works and FPL and SI's reliance on Mr Chua's instructions. Consequently, the defendants' ability to complete the works under the Agreement was severely compromised.

97 In light of the scope of variations ordered by Mr Chua outside the four corners of the Agreement as well as the appointment of FPL and SI for interior decor and carpentry works beyond that provided for under the Agreement, Mr Chua's conduct, at *minimum*, was in part responsible for the delay occasioned. Accordingly, I find that time was set at large. Save for the sum of $141,922.19 conceded by the defendants, the plaintiffs' claim for liquidated damages therefore had to fail.

No pleadings on the issue of time being "at large"

98 Were the defendants precluded from relying on the equitable remedy of time being set at large because they did not raise or plead it? The courts have repeatedly stated that it is crucial for the parties to plead material facts on which they seek to rely. As long as the material facts have been pleaded, it is unnecessary to give a label such as, for example, the name of the defence.

99 In *Orient Centre Investments Ltd v Societe Generale* [2007] 3 SLR(R) 566 at [45], the Court of Appeal held that a party who wished to rely on a clause in a contract which was capable of giving rise to an estoppel only needed to plead it for its legal effect without expressly pleading estoppel. Jeffrey Pinsler's *Singapore Court Practice* (LexisNexis, 2009) ("*Pinsler*"), para 18/7/4 states (at p

366):

> As it is only material facts which may be stated in the pleading, the advocate must avoid setting down his legal arguments or theories of the law ... The legal result of the facts is entirely a matter for the court.

100 In *M K (Project Management) Ltd v Baker Marine Energy Pte Ltd* [1994] 3 SLR 823, the court adopted Lord Denning MR's proposition *In Re Vandervell's Trusts (No 2)* [1974] Ch 269 at 321: "It is sufficient for the pleader to state the material facts. He need not state the legal result". While the defendants did not raise the defence that time was set at large by reason of the acts of prevention of the plaintiffs, the material facts relied upon to support such a conclusion were pleaded.

101 One must keep in mind that at the epicentre of procedural rules relating to pleadings is the objective that pleadings should give the other party fair notice of the case which it has to meet and to define the issues at hand. Parties are intentionally precluded from "throwing a spanner" into the works at the conclusion of proceedings. The overarching goal guiding the rules relating to pleadings is the intention to guard against either party being prejudiced. In the case at hand, it was in fact on *my* direction that the parties were instructed to consider the issue of time being set at large. The plaintiffs were afforded the opportunity to address this latent legal characterisation of the existing material facts, as were the defendants. I am not satisfied that the plaintiffs have been in any way unfairly prejudiced by the delayed re-characterisation of the material facts.

102 In *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413 (at [51]–[52]), the Court of Appeal stated that if the plea was alluded to in the evidence and the facts were already before the court, no injustice would result from its consideration by the court. If one were to distil the arguments presented in relation to liquidated damages, while the plaintiffs argued that the defendants were responsible for the delay, the defendants argued that the plaintiffs' conduct caused the delay. No injustice arose from allowing the defendants to rely on the defence of time being set at large as the plea was clearly alluded to in the presentation of evidence.

103 In any event, this court is vested with the discretionary power to re-characterise the legal issues from the pleaded facts. As Buckley LJ said in *Belmont Finance Corporation Ltd v Williams Furniture Ltd* [1979] Ch 250 at 269: the "... court must have jurisdiction to grant any relief that it thinks appropriate to the facts as proved." In *Lever Brothers Ltd v Bell* [1931] 1 KB 557, at 582–583, cited with approval in *Multi-Pak Singapore v Intraco* [1992] 2 SLR 793, Scrutton LJ declared:

> ... The practice of the Courts has been to consider and deal with the legal result of pleaded facts, though the particular legal result alleged is not stated in the pleadings, except in cases where to ascertain the validity of the legal result claimed would require the investigation of new and disputed facts which have not been investigated at trial. ...

Plaintiffs' claim for damages in the alternative

104 In principle, when time is set at large, the obligation to complete by the specified date is replaced by an implied obligation to complete within a reasonable time. Notwithstanding the unavailability of liquidated damages, general damages may be recoverable at common law for any delay occasioned after the reasonable date for completion. The assessment of reasonable delay is a question of fact for which the plaintiffs bore the burden of establishing that the time actually taken by developer (30 January 2009 onwards) was excessive under the circumstances. The plaintiffs did not discharge their burden. In the absence of sufficient evidence to establish a *reasonable date* for completion and any unreasonable delay thereafter, I am unable to determine the question of the

defendants' liability. Accordingly, allowing an assessment of damages to be heard by the Registrar would be wholly inappropriate as it would be tantamount to allowing a re-trial as the Registrar would be forced to make a finding on the extent of unreasonable delay *prior to* the calculation of damages, if any, available to the plaintiffs. The determination of the defendants' liability for delay, if any, is a condition precedent to the damages analysis.

105 The plaintiffs sought leave to amend their statement of claim towards the end of the trial to include a plea for general damages in the event that liquidated damages were unavailable. However, damages are not to be awarded simply because a party alludes to them in a court of law. In *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR(R) 537 at 561,the Court of Appeal stated that the loss must be shown to have actually occurred and to be legitimately recoverable in law before any award can be made. The burden is on the party claiming damages.

106 Despite the plaintiffs' election for a trial on liability and quantum, they failed to address the primary question of whether the delay occasioned was unreasonable and, *if so*, whether any losses were suffered as a consequence. As the determination of liability preceded the analysis on damages recoverable, on the evidence before me, I could not proceed to address the question whether damages, if any, should be awarded to the plaintiffs.

Conclusion

107 In the result, I find that the defendants wrongfully rescinded the Agreement by mischaracterising the plaintiffs' conduct as a repudiation of the Agreement. I therefore order, specific performance of the Agreement. I allow the plaintiffs' claim for rectification costs in the agreed sum of $410,000. I find that time was set at large by the plaintiffs' conduct. As such, apart from the sum of $141,922.19 already deducted (as conceded by the defendants), liquidated damages are unavailable for the delay from 16 January 2009 onwards. In the absence of proof of unreasonable delay and consequently of damages, I dismiss the plaintiffs' claim for damages in the alternative.

108 I will hear the parties on costs.

PLAINTIFFS' CALCULATION OF LIQUIDATED DAMAGES UNTIL 22 NOVEMBER 2010
ANNEX 'A' (STATEMENT OF CLAIM (AMENDMENT NO 2)

*** [Retaining the plaintiffs' original numbering]**

S/N	Sale and purchase agreement	Start date	End date	Total No of days	Purchase price paid pursuant to cl 4.1	Interest rate applied	Liquidated damages claimed
1	Clause 9.4 (conceded by the defendants)	01/01/2008	15/01/2009	380	$1,136,000 (20% x $5,680,000)	12%	$141.922.19
2	Clause 9.4	16/01/2009	29/01/2009	14	$1,136,000	12%	$5,228,72
3	Clause 12.4	15/01/2008	29/01/2009	380	$1,136,000	12%	$141.922.19
4	Clause 9.4	30/01/2009	22/11/2010	662	$1,136,000	12%	$247,243.76
5	Clause 12.4	30/01/2009	22/11/2010	662	$1,136,000	12%	$247,243.76
8	Clause 9.4 or 12.4	30/01/2009	22/11/2010	662	$3,834,077.81 (70% x $5,680,000 less $141,922.19 deducted on 30.01.2009)	12%	$834,464.24
						Total of (2) + (3) + (4) + (5) + (8)	**$1,476,102.67**