Chan Ah Beng *v* Liang and Sons Holdings (S) Pte Ltd and another application
[2012] SGCA 34

Case Number	: Civil Appeal No 88 of 2011 and Summons No 5443 of 2011
Decision Date	: 29 June 2012
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Yeh Siang Hui (J S Yeh & Co) and Ng Wai Keong Timothy (Timothy Ng LLC) for the appellant; Tan Hee Joek and Tan Hee Liang (Tan See Swan & Co) for the respondent.
Parties	: Chan Ah Beng — Liang and Sons Holdings (S) Pte Ltd

Contract – Breach

Damages – Measure of damages

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2011] SGHC 236.]

29 June 2012 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 This is an appeal against the decision of the High Court Judge ("the Judge") in Originating Summons No 251 of 2011 filed on 30 March 2011 ("the OS") (see *Liang & Sons Holdings (S) Pte Ltd v Chan Ah Beng* [2011] SGHC 236 ("the GD")).

2 We should note, at the outset, that the Appellant had appointed M/s Kertar & Co ("KC") to act for him in separate subordinate courts proceedings and also in the OS before the Judge (see [10]–[11] below). However, the Appellant discharged KC on 17 June 2011 and chose to appear in person before the Judge at the final hearing on 27 June 2011. Subsequently, the Appellant appointed M/s J S Yeh & Co ("JSY"), who had always acted for the Appellant in the conveyancing matter, to also act for him in this present appeal.

The facts

Background to the sale

3 The Appellant was the owner and occupier of the premises known as Apartment Block 201C, Tampines Street 21 #01-16, Singapore 523201 ("the Property"). He occupied and used the Property for his business of selling market produce.

4 On 26 July 2010, the Appellant granted the Respondent an option to purchase the Property at $1.2m in exchange for an option fee of $12,000 ("the Option"). [note: 1] The Respondent exercised the Option on 12 August 2010.

Relevant terms of the Option

5 Clauses 10.1, 9, 8, 6, 10.3 and 4 of the Option are central to the present dispute and will be reproduced in full. Clause 10.1 of the Option states as follows:

> The sale and purchase of the Property shall be subject to:-
>
> (i) the written approval from the [Housing Development Board ("HDB")] and such terms and conditions as the HDB may impose from time to time at its absolute discretion;
>
> ...

Clause 9 of the Option states as follows:

> The Vendor and the Purchaser shall use their best endeavours to obtain the HDB's approval to the sale and purchase herein and the Vendor shall proceed with the submission of the HDB application form to the HDB within fourteen (14) days from the date of exercise of the Option. The administration fee amounting to S$535.00 payable to the HDB shall be borne by the Vendor.

Clause 8 of the Option states as follows:

> The sale and purchase shall be completed:-
>
> (i) within [fourteen] (14) weeks from the date of exercise of this Option; or
>
> (ii) within fourteen (14) days upon receipt of the HDB's approval; or
>
> (iii) in the event that provisional approval is granted by the HDB, within fourteen (14) days upon receipt of the HDB's letter confirming that all unauthorised works in the Property has been rectified by the Vendor;
>
> whichever date is later.

Clause 6 of the Option states as follows:

> The sale is subject to the Purchaser giving the vendor a tenancy term of one (1) year only for a monthly rental of $8,000.00 with effect from the date immediately after the contractual date of completion.

Clause 10.3 of the Option states as follows:

> Without prejudice to any of the aforesaid conditions, in the event that the HDB does not grant written approval to the sale and purchase herein due to circumstances beyond the control of either parties and the parties herein having done all that is necessary for the HDB's approval, the Agreement shall forthwith be treated as null and void and the Deposit paid herein shall forthwith be refunded to the Purchaser without any interest compensation or deduction whatsoever and neither party shall have any claim or demand against the other whether for costs damages compensation or otherwise.

Finally, Clause 4 of the Option states as follows:

> The sale is subject to "**THE SINGAPORE LAW SOCIETY'S CONDITIONS OF SALE 1999**" so far as the same is applicable to a sale by private treaty and is not varied by or inconsistent with the

special conditions herein. In the event of any inconsistency, the terms herein shall prevail. [emphasis in original].

6 Clause 4 of the Option essentially incorporated the Singapore Law Society's Conditions of Sale 1999 ("Conditions of Sale") by reference. In particular, Conditions 6 and 8.2 are material to this case, and read as follows:

> **6. Outgoings, Rents and Profits until Completion**
>
> 6.1 The Vendor must discharge the outgoings down to and including the date fixed for completion.
>
> 6.2 Subject to Condition 6.3, after the date fixed for completion the Purchaser –
>
> (a) must discharge all outgoings; and
>
> (b) will be entitled to all the rents and profits or possession.
>
> 6.3 The Purchaser is not to be let into actual possession or receipt of rents and profits until the date of actual completion of the purchase.
>
> 6.4 Where necessary, the outgoings, rents and profits are to be apportioned between the parties.
>
> ...
>
> **8. Late Completion Interest**
>
> ...
>
> 8.2 Interest Payable by Vendor
>
> 8.2.1 If –
>
> (a) the sale is not completed on or before the date fixed for completion; and
>
> (b) the delay in completion is due solely to the default of the Vendor,
>
> he must pay interest (as liquidated damages) commencing on the day following the date fixed for completion up to and including the day of actual completion. Interest will be calculated on the purchase price at 10% per annum.

The impediments to the sale

7 On 6 September 2010, the Respondent's solicitors, M/s Tan See Swan & Co ("TSS"), submitted the application for resale/transfer of the Property to HDB. [note: 2] HDB inspected the Property on or about 15 September 2010. On 9 November 2010, HDB wrote to both JSY and TSS stating that it was unable to process the resale application unless and until the Appellant rectified the following breaches that were discovered:

(a) Unauthorised cold room (chiller);

(b) Unauthorised brackets installed at frontage of the Property;

(c) Excessive display of goods at the common area; and

(d) Tampines Town Council's ("the Town Council") action against the Appellant in DC Suit No 3475 of 2010 ("the DC Suit") for trespass arising from the display of goods at the common area without a Temporary Occupation Licence. [note: 3]

On 16 November 2010, HDB highlighted a further impediment to the sale of the Property, namely that the Appellant owed rental arrears in relation to two other HDB commercial properties that he occupied. [note: 4] The quantum of arrears was confirmed by HDB on 13 December 2010. [note: 5]

8 On 17 December 2010, TSS first gave notice to JSY that the Respondent would charge interest for late completion pursuant to Condition 8.2 of the Conditions of Sale ("Condition 8.2") (reproduced above at [6]). [note: 6] We pause to note – parenthetically – that Condition 8.2 is presently Condition 9.2 of the Law Society's Conditions of Sale 2012 in a slightly amended form.

9 We agree with the Appellant that the main impediment to the sale was the DC Suit as it was the definitive cause for HDB to withhold its consent to the sale of the Property. Hence, we do not intend to restate the unfolding of events in relation to the rest of the impediments. It suffices for the purposes of this appeal to note that the remaining impediments ceased being an issue in relation to the sale at various dates between the scheduled date of completion (18 November 2010) to the date that the OS was filed (30 March 2011).

The major impediment to the sale – the DC Suit

10 The Respondent's director, Chuang Mui Yau ("Chuang"), exhibited the cause papers of the Town Council's claim against the Appellant in the DC Suit in her third affidavit dated 21 June 2011. [note: 7] The pertinent details of the DC Suit are as follows:

(a) The Appellant had been issued eleven summonses between June 1993 and April 2009 for obstructing common property (all of which were compounded);

(b) Since 1 January 2007, the Appellant had required but had not been granted a Temporary Occupation Licence to display goods at the outdoor display area at the Property's frontage;

(c) The action for trespass in the DC Suit commenced on 14 October 2010;

(d) On 10 November 2010, the Appellant through KC filed a defence and counterclaim, *inter alia*, denying the Town Council's right to sue him;

(e) The Town Council obtained an order for an injunction against the Appellant on 10 November 2010, restraining him from using the common area at the Property's frontage to display his goods;

(f) As a result of the Appellant's persistent default in complying with the injunction order, a committal order was ordered against him on 18 March 2011; and

(g) On 27 April 2011, the Town Council obtained default judgment against the Appellant for his failure to comply with an earlier "unless" order.

11 The Appellant's persistent default in complying with the injunction order dated 10 November 2010 is evidenced by the following events:

(a) On 24 May 2011, at the second hearing before the Judge, KC showed to the Judge two photographs purportedly proving that the common area was clear of obstructions; [note: 8]

(b) However, on 25 May 2011, the Town Council's solicitors wrote to KC and copied to TSS stating, *inter alia*, that the Appellant was found to have continued using the common area during the inspection on 23 May 2011; [note: 9]

(c) KC replied to the Town Council's solicitors on 25 May 2011, reiterating that the Appellant had cleared all obstructions and enclosing the two photographs shown to the Judge at the second hearing on 24 May 2011 that purportedly proved that the common area was free of obstructions. [note: 10] KC also wrote to HDB, repeating the contents of their letter to the Town Council's solicitors and requested approval of the sale; [note: 11]

(d) HDB replied on 25 May 2011 to both parties' solicitors stating that it had been advised by the Town Council's solicitors that the obstruction to the common area had not been removed. Hence, the Appellant's application for the transfer of the Property was rejected. The Respondent was advised to resubmit the application after the Appellant had settled the DC Suit with the Town Council; [note: 12] and

(e) On the Respondent's behalf, Chuang took it upon herself to visit the Property to verify the situation. He took photographs on 25 May 2011, [note: 13] 29 May 2011 [note: 14] and 20 June 2011, [note: 15] respectively and showed them to the Judge. The photographs show that merchandise was still displayed at the common property despite the Appellant's claim to the contrary.

12 In a similar vein, the Appellant's persistent default in complying with the settlement of the default judgment obtained on 27 April 2011 is evidenced by the following events:

(a) On 6 June 2011, the Town Council's solicitors wrote to the Appellant and copied to JSY, KC and TSS, stating that the settlement terms of the DC Suit were as follows: [note: 16]

(i) That the Appellant agreed and abided by the default judgment dated 27 April 2011,

(ii) That the Appellant agreed to pay costs and disbursements incurred in the DC Suit in the sum of $28,629.50;

(iii) In consideration of the settlement and payment of costs and disbursements, the Town Council will waive damages, inform the Court that they do not wish to further prosecute the contempt application and inform the HDB that the DC Suit has been completed; and

(iv) In consideration of the settlement, the Appellant irrevocably agrees to and will instruct TSS to release the agreed costs and disbursements to the Town Council upon completion.

(b) By way of a letter dated 10 June 2011 to the Town Council's solicitors and copied to TSS,

JSY replied accepting the terms of the settlement; [note: 17]

(c) On 14 June 2011, TSS wrote to JSY and copied to the Town Council's solicitors. In its letter, TSS asked, *inter alia*, for the Appellant to give his irrevocable instructions to the Respondent to set aside the settlement sum to be paid to the Town Council upon completion; [note: 18]

(d) Also on 14 June 2011, the Town Council's solicitors wrote to JSY and copied to TSS requiring TSS as solicitors for the purchasers to confirm that they have irrevocable instructions from the Appellant to pay the Town Council the settlement sum from the proceeds of the sale. The letter further stated that upon receipt of such confirmation, the Town Council will write to the HDB to confirm that the DC Suit has been settled; [note: 19]

(e) On 15 June 2011, TSS wrote to the Town Council's solicitors and copied to JSY, confirming that the Respondent was agreeable to the arrangement provided that the relevant irrevocable instructions were duly provided for in writing by JSY; [note: 20] and

(f) On 17 June 2011, JSY replied to TSS' letter of 14 June 2011 and copied to KC and the Town Council's solicitors. Specifically in response to TSS' request for the Appellant's irrevocable instructions to set aside the settlement sum from the proceeds of the sale to pay to the Town Council, JSY said that they "confirm" it. [note: 21]

The OS hearings

13 At the request of KC, the Judge granted two adjournments on 3 May 2011 and 24 May 2011 to allow the Appellant to rectify his breaches. [note: 22] At the last hearing on 27 June 2011, the Appellant appeared in person (see the GD at [20]).

The decision below

14 The Judge found that it was plain from the history of the sale transaction that the Appellant had failed to comply with Clause 9 of the Option as he had not used his best endeavours to obtain HDB's approval to the sale. In fact, the Appellant had, by his conduct, prevented HDB from granting the requisite approval in time for completion on 18 November 2010 (see the GD at [23]–[25]). The Judge therefore granted the Respondent the reliefs claimed, in particular:

(a) Specific performance by the Appellant of the Option within 14 days of the order of court, with liberty given to TSS to deduct a sum of $28,629.50 to pay to the Town Council's solicitors upon completion;

(b) The Appellant be ordered to complete the sale of the Property to the Respondent within 14 days upon receipt of the approval from the HDB for the resale/transfer; and

(c) Damages by an account of *rental* at the rate of $8,000.00 per month or $266.69 per day *for the period commencing from 18 November 2010 to the actual date of completion.*

We pause to note an important point at this particular juncture: Although it was not specifically mentioned in the Order of Court, the Judge had in her GD explained that the damages (by way of an account of rental) were awarded pursuant to Clause 6 of the Option (see the GD at [22]).

15 The Judge also noted that, as far back as December 2010, TSS had given notice to JSY that the Respondent would be charging interest to the Appellant for late completion. Furthermore, at the final hearing on 27 June 2011, the Appellant had *agreed* to pay both interest and costs (although we note that he had disputed the period for which interest was to be calculated on and that he was not asked to submit on the quantum of costs. [note: 23]). Consequently, the Judge also granted the Respondent the following reliefs claimed against the Appellant:

(a) Interest for late completion at 10% per annum pursuant to Condition 8 of the Conditions of Sale commencing from 18 November 2010 until the actual date of completion; and

(b) Costs fixed at $6,000.00, excluding reasonable disbursements, to be reimbursed to the Respondent by the Appellant.

Appellant's application to adduce further evidence on appeal in Summons No 5443 of 2011

16 As a preliminary matter, the Appellant applied to adduce fresh evidence before this court in relation to three categories of documents, as follows:

(a) Category 1: Eight documents that were not brought to the Judge's attention by the hearing on 27 June 2011;

(b) Category 2: Twenty-one documents that had not yet come into existence before the hearing on 27 June 2011;

(c) Category 3: The Appellant's depositions in paragraphs 4–9 of his Affidavit filed on 30 November 2011.

17 It is settled law that in order to justify the reception of fresh evidence at the appellate stage, three conditions must be cumulatively fulfilled (see the leading English decision of *Ladd v Marshall* [1954] 1 WLR 1489 ("*Ladd v Marshall*") at 1491):

> [F]irst, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence … must be apparently credible, though it need not be incontrovertible.

18 The *Ladd v Marshall* test has been cited and followed by this court on numerous occasions: see, for example, *Cheong Kim Hock v Lin Securities (Pte) (in liquidation)* [1992] 1 SLR(R) 497 at [21]; *Cheng-Wong Mei Ling Theresa v Oei Hong Leong* [2006] 2 SLR(R) 637 at [39]; and *Sim Cheng Soon v BT Engineering Pte Ltd and another* [2006] 3 SLR(R) 551 at [7]–[9]. The three conditions must be cumulatively satisfied: *Su Sh-Hsyu v Wee Yue Chew* [2007] 3 SLR(R) 673 at [15].

1st Category: Eight documents that were not brought to the Learned Judge's attention by the hearing on 27 June 2011

19 The Appellant claims that these documents, which involve correspondence between parties' solicitors, HDB and the Town Council, would demonstrate that he had used his best endeavours to obtain HDB's approval to the sale. [note: 24]

20 It is the Appellant's case that the first limb of the *Ladd v Marshall* test is fulfilled since he could not have adduced these documents with reasonable diligence, as reasonable diligence on his part as a

litigant-in-person would not have alerted him to the legal significance of the said documents. [note: 25]

21 The Respondent – not surprisingly – disputes that the first *Ladd v Marshall* criterion is satisfied and raises several points. Firstly, being unrepresented *per se* cannot satisfy the first *Ladd v Marshall* criterion. Otherwise, it would always be open to unrepresented litigants to use this as a reason to adduce further evidence upon appeal. Further, there is no reason to think that the Appellant was not in possession of or was unaware of these documents at the material time since his conveyancing solicitors, JSY, had never ceased to act for him in the conveyancing matter. The Appellant has not raised such allegations either. The Appellant had chosen not to file any affidavit prior to the final hearing before the Judge and was fully content to rely on the evidence adduced by the Respondent in the three affidavits filed. In any event, the Appellant was unrepresented for only ten days prior to the final hearing on 27 June 2011. [note: 26]

22 We agree with the Respondent's arguments and find that these documents were in the possession of the Appellant or, at the very least, could have been easily obtained with reasonable diligence and ought to have been placed before the Judge at the proceedings below. In the circumstances, we did not allow this category of documents to be admitted.

2nd Category: Twenty-one documents that had not yet come into existence before the hearing on 27 June 2011

23 The Appellant claims that these documents may potentially demonstrate that he was not to be blamed for the delay in completion for the period commencing 28 June 2011 (the day after the court order was granted) to 26 July 2011 (the date of actual completion). Consequently, the Appellant argues that he should not be made to pay interest and damages (by an account of rent) in respect of that particular period of time. [note: 27]

24 The first *Ladd v Marshall* criterion is clearly satisfied since the documents had not yet come into existence and were therefore impossible to obtain before the hearing on 27 June 2011. These documents might also have an important influence on the outcome of the case since the liability to pay interest for late completion under Condition 8 of the Conditions of Sale is dependent on the blameworthiness of the Appellant. Since the parties have not raised any issue with the credibility of those documents, the third *Ladd v Marshall* criterion was also satisfied.

25 We therefore allowed this category of documents to be admitted.

3rd Category: Appellant's depositions in paragraphs 4 to 9 of his affidavit

26 The third category of evidence which the Appellant sought to adduce relates to the depositions found in paragraphs 4 to 9 of the Appellant's affidavit. The depositions in turn relate to both (a) the first category of evidence and (b) the second category of evidence. By logical extension, since we did not allow the first category of evidence to be admitted, we also did not allow the depositions relating to the first category of evidence to be admitted. However, although we allowed the second category of evidence to be admitted, we did not also allow the depositions relating to the second category of evidence to be admitted. As the contents of the documents in the second category of evidence can speak for themselves, we did not think that the depositions relating to the second category of evidence would probably have an important influence on this case. In the circumstances, therefore, we did not allow the third category of evidence to be admitted.

Issues to be determined

Issues to be determined

27 Turning, then, to the substantive issues before this court, they are as follows:

(a) The consequences of admitting the twenty-one documents that had not yet come into existence before the hearing on 27 June 2011;

(b) Whether the Judge had erred in her finding of fact that the Appellant had breached Clause 9 of the Option by failing to use his best endeavours to obtain HDB's approval;

(c) If the Appellant had indeed breached the terms of the Option, whether the Judge had erred in law by awarding the Respondent both interest and damages (by an account of rental), and if so, which relief should be awarded; and

(d) The Appellant's appeal against the award of costs against him.

Our decision

Issue 1: Consequences of admitting the twenty-one documents that had not yet come into existence before the hearing on 27 June 2011

28 The Appellant's case in this regard is that, at the time of the hearing on 27 June 2011 before the Judge, it was impossible to determine as a matter of fact whether the Appellant and/or the Respondent would have caused undue delay to the completion of the sale and be in breach of Clause 9 of the Option for a future period in time. Therefore, according to the Appellant, the Respondent's alleged right to interest and/or damages by an account of rent from 28 June 2011 up to the actual date of completion had not yet accrued by the time the OS was disposed of. The Appellant therefore sought to rely on these documents to demonstrate that he was not to be blamed for the delay in completion for the period beginning 28 June 2011 (the day after the court order was granted) to 26 July 2011 (the date of actual completion).

29 With respect, the Appellant's argument is unpersuasive. If the Appellant was found to have caused undue delay to completion, surely he should be held liable to rent and/or damages in respect of the entire delay and not just up to the date of the OS. After all, the Appellant's actions had the overall consequential effect of delaying completion that should have taken place as scheduled on 18 November 2010 but did not occur until 26 July 2011. It is of course possible that, after the OS was disposed of, the Respondent might be in breach of Clause 9 of the Option. Should such a situation occur, then a separate right would accrue to the Appellant which would enable him to bring an action against the Respondent for breach of contract. Such a right is independent of the Respondent's right to damages and/or interest for the period between the contractual and actual date of completion, which had accrued by the time that the OS was disposed of.

30 Hence, although we allowed these documents to be admitted, they did not ultimately have any bearing on the present appeal. Accordingly, we need not consider them further.

Issue 2: Whether the Judge erred in her finding of fact that the Appellant had breached Clause 9 of the Option by failing to use his best endeavours to obtain the HDB's approval

31 We should state, from the outset, that this ground of appeal was not raised in the Notice of Appeal filed by the Appellant. [note: 28] We will nonetheless address this issue since it arose during the course of the appeal.

32 To appeal against the Judge's finding of fact that he had not used his best endeavours to obtain HDB's approval for the sale of the Property, the Appellant must show that the Judge's finding of fact clearly went against the weight of the evidence and was plainly wrong. As Kan Ting Chiu J stated succinctly in the Singapore High Court decision of *Ong Khim Heng Daniel v Leonie Court Pte Ltd* [2000] 3 SLR(R) 670 at [42]:

> A covenant to use best endeavours is not a warranty to produce the desired results. It does not require the covenantor to drop everything and attend to the matter at once; the promise is to use the *best endeavours to obtain the result within* the agreed time. Nor does it require the covenant to do everything conceivable; *the duty is discharged by doing everything reasonable in good faith with a view to obtaining the required result within the time allowed*. [emphasis added]

33 In a similar vein, Choo Han Teck J, in the Singapore High Court decision of *Group Exklusiv Pte Ltd v Diethelm Singapore Pte Ltd* [2003] 4 SLR(R) 582 ("*Group Exklusiv*"), observed thus (at [11]):

> Mr Chan referred to a number of authorities in respect of his argument that the plaintiffs ought to have appealed. The authorities relied upon, namely, *Ong Khim Heng Daniel v Leonie Court Pte Ltd* [2000] 3 SLR(R) 670 which in turn, relied on *IBM United Kingdom Ltd v Rockware Glass Ltd* [1980] FSR 335, and *Tan Soo Leng David v Wee, Satku & Kumar Pte Ltd* [1997] 3 SLR(R) 257 stressed that the proper construction of contractual clauses in which the purchaser was obliged to use his best endeavours to apply for planning approval, is that "best" does not mean "second best". But these authorities do not stand for the proposition that the purchaser was required to make a heroic effort in order to comply with a "best endeavours" clause. When a contract for the sale and purchase of property is made subject to approval from some authority, be it for planning approval or a change of use, the agreement must be viewed as a contract that both parties were happy with and desired its full performance and that the purchaser will, in Geoffrey LJ's words in the *IBM* case at 345, "take all those reasonable steps which a prudent and determined man, acting in his own interests and anxious to obtain planning permission, would have taken". Whether all reasonable steps were taken or the best endeavours made is a question of fact in each case. The facts that are relevant in such cases must include the nature of the approval sought, the practice, if any, of those in the trade concerned, the availability of an appeal process, evidence of futility of further efforts and so on. The facts of the three cases cited above are distinguishable. Hence, in *Ong Khim Heng Daniel*, which followed *IBM United Kingdom Ltd* the courts found that the purchaser had not quite made the effort, but the court in *Tan Soo Leng David* found that reasonable efforts had been made.

34 And, in the Singapore Court of Appeal decision of *Travista Development Pte Ltd v Tan Kim Swee Augustine and others* [2008] 2 SLR(R) 474 ("*Travista*"), Chan Sek Keong CJ, delivering the grounds of decision of the court, observed thus (at [22]):

> The appellant argued that it had used its best endeavours to obtain the QC, but could not do so within three months from the date of the S&PA, *ie*, by 12 March 2007. Before we deal with the evidence relied upon by the appellant in support of this argument, it is apposite that we set out the legal obligation imposed by a contractual best endeavours clause. The law is well established. A best endeavours clause in a contract obliges the covenantor to "take all those reasonable steps which a prudent and determined man, acting in his own interests and anxious to obtain planning permission [or to perform such other applicable obligation], would have taken" (see *IBM United Kingdom Ltd v Rockware Glass Ltd* [1980] FSR 335 ("*IBM v Rockware*") at 345; referred to in *Justlogin Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2004] 1 SLR(R) 118 at [47]). As Kan Ting Chiu J stated succinctly in *Ong Khim Heng Daniel v Leonie Court Pte Ltd* [2000] 3 SLR(R) 670 ("*Ong Khim Heng Daniel*") at [42]:

> A covenant to use best endeavours is not a warranty to produce the desired results. It does not require the covenantor to drop everything and attend to the matter at once; the promise is to use the best endeavours to obtain the result *within the agreed time*. Nor does it require the covenantor to do everything conceivable; the *duty is discharged by doing everything reasonable in good faith with a view to obtaining the required result within the time allowed*. [emphasis added]

The test to determine whether a party has exercised its best endeavours is an objective one. But, it is also a composite test in that the covenantor may also take into account its own interests. While the covenantor has a duty to use its best endeavours to perform its contractual undertaking within the agreed time, the duty is discharged upon the covenantor "doing everything reasonable in good faith with a view to obtaining the required result within the time allowed" (*per* Kan J in *Ong Khim Heng Daniel* at [42]). This test also involves a question of fact. As stated by Choo Han Teck J in *Group Exklusiv Pte Ltd v Diethelm Singapore Pte Ltd* [2003] 4 SLR(R) 582 at [11]:

> The facts that are relevant in such cases must include the nature of the approval sought, the practice, if any, of those in the trade concerned, the availability of an appeal process, evidence of futility of further efforts and so on.

35 It ought, however, to be noted that, whilst the relevant test is now well-established in the local legal landscape (see also, for example, the Singapore Court of Appeal decision *Oversea-Chinese Banking Corp Ltd and another v Justlogin Pte Ltd and another* [2004] 2 SLR(R) 675 at [21] (affirming *Justlogin Pte Ltd and another v Oversea-Chinese Banking Corp Ltd and another* [2004] 1 SLR(R) 118) and the Singapore High Court decisions of *MacarthurCook Property Investment Pte Ltd and Another v Khai Wah Development Pte Ltd* [2007] SGHC 93 at [61] and *Indulge Food Pte Ltd v Torabi Marashi Bahram* [2010] 2 SLR 540 at [64]), the actual decision arrived at by the court as to whether or not the contracting party concerned had in fact satisfied the duty to use best endeavours depends, in the final analysis, upon the precise factual matrix in question (see also *Group Exklusiv* at [11] (cited above at [33])). Indeed, this is inherent in the very nature of the test itself. Put simply, whilst the test is relatively easy to state, the actual decision itself is anchored heavily in the sphere of application.

36 As a preliminary matter, we should highlight a point that the Judge did not specifically address. This relates to the governing date of completion in light of a "best endeavours clause" such as Clause 9 of the Option. As set out at [5] above, Clause 8 of the Option defined the completion date as "*(i) within fourteen (14) weeks from the date of exercise of [the] Option; or (ii) within fourteen (14) days upon receipt of the HDB's approval ... whichever date is later*". According to the principle established by this court in *Travista*, the governing date of completion should be construed as 18 November 2011 pursuant to Clause 8(i) of the Option. This is so unless the Appellant can demonstrate that, in spite of having used his best endeavours to resolve the issues that prevented HDB from granting approval, he could not have done so. To hold otherwise would "[render] nugatory [an] aspect of the appellant's "best endeavours" obligations" (see *ibid* at [19]).

37 As already alluded to above, the Appellant's main argument before this court relates to the DC Suit. Counsel for the Appellant, Mr Yeh Siang Hui ("Mr Yeh"), submitted that the Appellant should not be found to be in breach of Clause 9 of the Option because using one's best endeavours to obtain HDB's approval to the sale does not equate to having to compromise or forego one's rights against another party, even if the HDB makes the resolution of one's dispute with the other party a condition precedent for the approval to the sale. This, Mr Yeh argues, is implied as a matter of law in any legal system through the two principles: that no person should be judged unheard and that every litigant

has a right to a fair hearing.

38 The Appellant's argument, whilst attractive at first blush, was, in our view, fundamentally flawed. Let us elaborate.

39 In considering the Appellant's argument, the chronology of events is of the first importance. It will be recalled that the Respondent had exercised the Option on 12 August 2010. At *that* particular point in time (or, at the very least, shortly thereafter), the Appellant *ought to have removed* the display of his goods that were *later* to *become the subject of the DC Suit*. Indeed, it was clear beyond peradventure in so far as *the Appellant* was concerned that this display of his goods was, in the view of the Town Council, *an ongoing breach of the Town Council's rules and regulations*. That this clear fact could not have escaped the Appellant's attention was underscored by the fact that eleven summonses had been issued by the Town Council against the Appellant between June 1993 and April 2009 inasmuch as the Appellant was alleged to have obstructed the common property. Significantly (in our view), all these summonses had been compounded.

40 More importantly, it ought to have been clear to both the Appellant and JSY that the continued display of the goods could – if not removed – seriously jeopardise the successful completion of the sale of the Property to the Respondent. Although the Appellant might not have foreseen the precise form which a concomitant legal action (*viz*, the DC Suit) would take, that is besides the point as any such legal action (with its attendant (and negative) consequences in so far as the transaction between the Appellant and the Respondent is concerned) ought to have been reasonably contemplated by the Appellant. It also bears emphasising that it was expressly provided in the HDB Terms and Conditions (which the parties had agreed to be bound to pursuant to Clause 10.1 of the Option (reproduced above at [5])) that the parties to the sale must *not* have any outstanding judgments or court cases against them. It is therefore not open for the Appellant to argue that he did not know that his persistent wrongdoing (and consequently, the DC Suit) would affect the HDB's grant of approval for the sale.

41 Put simply, the objective evidence with regard to the Appellant's actions in so far as the display of his goods is concerned demonstrates a *completely contrary* approach to what he *ought to have done*. Notwithstanding the knowledge that the Property was supposed to be transferred to the Respondent by 18 November 2010, the Appellant persisted in displaying his goods, *thus jeopardising this entire transaction*. *And it was this unreasonable conduct that led to the commencement of the DC Suit on 14 October 2010* – which was, significantly, approximately two months *after* the Respondent had exercised the Option to purchase the Property *and* approximately one month *before* the contractual date of completion on 18 November 2010. Mr Yeh's argument to the effect that the Appellant was entitled to vindicate his legal rights *vis-à-vis* the DC Suit was therefore merely a legal red herring. In point of fact, had the Appellant exercised his best endeavours pursuant to Clause 9 of the Option, *the DC Suit would not have been commenced in the first instance*. Indeed, in the apt words of the Judge (see the GD at [23]):

> It was plain from the history of the sale transaction set out earlier in [10] to [17] that the defendant had not only failed to comply with cl 9 of the Option in that he had not used his best endeavours to obtain the HDB's approval to the sale and purchase *but had also by his conduct, prevented the HDB from granting the requisite approval in time for completion on 18 November 2010.* He persisted in using the common property at the front of the Property to display his goods without a TOL, despite repeated summonses being issued against him between 1993 and 2009 by the Town Council. He constructed a cold room without prior approval from the HDB and when his transgression was discovered in September 2010, he dragged his feet and made no attempts to rectify his breach until January 2011 and even then, it was only after repeated pressing by the

plaintiff's solicitors. *He **caused** the Town Council **to resort to legal action** including the taking out of an injunction and committal orders before he agreed to rectify his default.* Further, he was less than truthful when he repeatedly claimed (through his counsel) that he no longer obstructed the common property with his goods when that was not true even as of 20 June 2011. [emphasis added in italics and bold italics]

42 It is significant, in our view, that, notwithstanding the Appellant's alleged ignorance of the HDB's rules and regulations before the Judge (see the GD at [20]), he was in fact legally represented by both KC (until 27 June 2011) and JSY (in the conveyancing matter). In any event, as already noted above, the issue relating to the display of goods at the common property was a longstanding one – stretching as far back as 1993.

43 That the Appellant's conduct throughout was unreasonable and was *the very antithesis* of best endeavours was emphasised – most correctly, in our view – by the Judge. For example, the Judge referred to the Appellant's "recalcitrance and pugnacious attitude" as being "not only inexcusable but reprehensible" (see the GD at [24]). In this regard, the fact that the Appellant had *no intention whatsoever* of removing the display of goods was clear from his conduct *throughout* as rooted in the objective evidence itself. This patent lack of *bona fides* was evident *even after* the DC Suit had been commenced. Indeed, the Appellant's conduct after the DC Suit commenced (see the narrative at [11]–[12] above) constituted part of an integrated pattern of conduct that (it bears reiterating) stretched back to as far back as 1993.

44 For example, the injunction was ordered against the Appellant on 10 November 2010 but he was found to have been in breach of that order even until as late as 20 June 2011. Had he simply complied with the said order, the committal proceedings would not have been commenced against him. The compliance with the terms of the injunction was a simple matter that was entirely within the Appellant's control since he was operating his business at the Property at all material times. We also note that the Appellant was less than candid when he repeatedly claimed through KC that he no longer obstructed the common property with his goods when that was, in point of fact, untrue. Further, when the Judge pointed out to the Appellant at the final hearing that he was in breach of the Option due, *inter alia*, to the outstanding DC Suit, he did not deny his breaches. In fact, he even admitted that he had for 30 years displayed his goods at the common area and did not understand why he could not continue to do so. We should add that, even taking the Appellant's arguments at their highest, his compliance with the said order was not at all incompatible with his defence of the DC Suit. Indeed, his non-compliance with the terms of an injunction was a flagrant breach of a court order that resulted in committal proceedings being commenced against him.

45 In our view, it is also somewhat telling that, having been (as already noted) the cause of the DC Suit, the Appellant sought to benefit from this situation by giving notice (on 2 June 2011) to the Respondent's solicitors that he (the Appellant) intended to rescind the sale pursuant to Clause 10.3 of the Option (reproduced above at [5]) in the event that the HDB did not grant written approval for the sale. It was clear beyond peradventure that, having been the cause of the DC Suit, Clause 10.3 was clearly inapplicable as the refusal by the HDB to grant written approval was, in the circumstances, clearly *not* "beyond the control of either parties [*sic*]". Not surprisingly, therefore, the Respondent's solicitors *rejected* the Appellant's attempt to rescind the sale. More importantly, the Judge quite correctly observed thus (see the GD at [24]):

> The court could not condone [the Appellant's] wrongful conduct by allowing him to rescind the sale and purchase under cl 10.3 of the Option as it could not be said that the sale was delayed or could not take place due to circumstances beyond the [Appellant's] control and he had done all that was necessary to obtain the HDB's approval to the sale.

46 It is evident from the facts that the Appellant had not done everything reasonable in good faith to settle the DC Suit so as to obtain the HDB's approval to the sale in time for contractual completion on 18 November 2010. Having therefore found that the Appellant had *not* used his best endeavous to obtain the HDB's approval and had thereby been in breach of Clause 9 of the Option, we turn now to consider the issue of the reliefs granted.

Issue 3: Whether the Judge had erred in law by awarding the Respondent both interest and damages (by an account of rental) and, if so, which relief should be awarded

47 The Appellant's case with regard to this particular issue is that the Judge had erred in law by awarding the Respondent both interest and damages (by an account of rent) as that would amount to double compensation.

48 The resolution of this issue turns on the following sub-issues which will be dealt with *seriatim*:

(a) Whether the Respondent is entitled to recover damages (by an account of rent) for late completion pursuant to Condition 6 of the Conditions of Sale;

(b) Whether Condition 6 falls within the ambit of the liquidated damages provision under Condition 8 of the Conditions of Sale;

(c) The effect of Clause 6 of the Option; and

(d) The relief to be granted.

Whether the Respondent is entitled to recover damages (by an account of rent) for late completion pursuant to Condition 6 of the Conditions of Sale

49 We will first consider the position under general law. As observed by the learned authors in Professor Robert M. Abbey & Mark B. Richards, *A Practical Approach to Conveyancing* (Oxford University Press, 13th Ed, 2011) at para 9.84:

> The common law position is that where completion is delayed in an open contract, the *buyer will be entitled to any income from the property* but must bear all outgoings. Furthermore, *if the seller remains in the subject property he or she will be required to pay a fee for occupation* unless the delay has arisen as a consequence of any default by the buyer. ... If the seller causes the delay he must pay the outgoings. Accordingly the position at common law seems to be that the intention is to deal with the parties as if completion had actually taken place even though in reality no such step has been taken. [emphasis added]

The same principles are echoed in more details in J Farrand & A Clarke, *Emmet and Farrand on Title* (Sweet & Maxwell, 2010), as follows (at paras 8.015–8.016):

> **8.015 Rent and interest under open contract** – Under an open contract completion should take place as soon as a good title is shown, and *after that time the vendor receives the rents and profits as a trustee and must account for them to the purchaser when completion takes place* (*Re Highett and Bird's Contract* [1903] 1 Ch 287; *Bennett v Stone* [1903] 1 Ch 509)
>
> It follows that, under such a contract, if the purchase is not completed at the proper time, that is when a good title has been shown, the purchaser must pay interest …. *As the purchaser is entitled to rents and profits from this time no hardship is caused by this rule*, except that the

rate of interest would be inadequate at the present time. …

Correspondingly, a vendor who remains in occupation must make allowance to the purchaser of a fair occupation rent from the date when the purchaser has to pay interest to the date of actual completion (*Metropolitan Railway Company v Defries* (1877) 2 QBD 387), unless the delay in completion has been the fault of the purchaser and the vendor has been obliged to remain in possession for the protection of the property and not for his own benefit ...

8.016 Rent and interest where completion date fixed – The vendor is entitled to retain possession or to take rents and profits until the actual time when the transaction is completed, and even though delay was due to the state of his title (*Gedye v Montrose* (1858) 26 Beav 45) unless the contract expressly provides otherwise. But if completion is delayed, then *when it does take place the purchaser will be entitled to the rents and profits as from the day fixed for completion* ...

[emphasis added]

50 It is clear, therefore, that, under general law, an innocent purchaser is entitled to rents or profits derived from the property from the contractual date of completion. Where the vendor is in possession of the property, this includes a fair occupation rent. The reasoning is simple – equity looks upon that as done which ought to be done. Hence, the purchaser becomes the owner of the property in equity from the date of contractual completion.

51 We turn now to consider Condition 6 of the Conditions of Sale (reproduced above at [6]). In this regard, we would, with respect, disagree with the court's view in *Cheong Lay Yong v Muthukumaran s/o Varthan and another* (*K Krishna & Partners and another, third parties*) [2010] SLR 16("*Cheong Lay Yong*") that Condition 6 of the Conditions of Sale is of no application to the issue of an innocent purchaser's entitlement to rent (see *Cheong Lay Yong* at [49]–[53]). In *Cheong Lay Yong*, the court found Condition 6 to be confusing and ambiguous. According to it, Condition 6.2 provides that, after the date fixed for completion, the purchaser will be entitled to all rents and profits. However, the court reasoned, Condition 6.2 is expressly made subject to Condition 6.3, which draws a distinction between contractual completion and *actual* completion; in particular, it provides that the purchaser is not entitled to receive rent and profits until the date of actual completion. On the other hand, Condition 6.4 allows for apportionment of rent and profits "where necessary", but it is unclear how the phrase "where necessary" is to be construed. Hence, the court was of the view that Condition 6 was of no application, and it proceeded to base his award of damages (by an account of rent) on other grounds. (The other aspects of the decision in *Cheong Lay Yong* relevant to the present appeal will be dealt with further below at [58]).

52 We find that Condition 6 can be construed quite differently by drawing a distinction between entitlement under Condition 6.2 on the one hand and receipt under Condition 6.3 on the other. In other words, the purchaser is *entitled* to, *inter alia*, rent after contractual completion, *but* he is not to *receive* it *until* the date of actual completion. This interpretation accords with principles at general law to the effect that a purchaser is, in principle, entitled to rent after contractual completion since he becomes the beneficial owner of the property once the date fixed for completion has passed. One might then question the purpose of subjecting Condition 6.2 to Condition 6.3 and drawing, in the process, a distinction between entitlement and receipt. We surmise that one possible reason could be to avoid any uncertainty on the part of an existing third party tenant as to who he is obliged to pay the rent to. We pause here to note – parenthetically – that two learned commentators have observed that, absent reliance on Condition 6.2 as a basis for the award of rent, it is difficult to justify such an award on the equitable doctrine of conversion as applied to contracts for the sale of land (see Tham

Chee Ho & Lee Pey Woan, "Contract Law" (2010) 11 SAL Ann Rev 239 at paras 11.130–11.132).

53 Hence, on the plain reading of Condition 6 of the Conditions of Sale, the Respondent is entitled to rent after the date of contractual completion. We turn now to consider whether Condition 6 falls within the ambit of the liquidated damages provision under Condition 8 of the Conditions of Sale.

Whether Condition 6 falls within the ambit of the liquidated damages provision under Condition 8 of the Conditions of Sale

54 We must emphasise, at the outset, that Condition 8 provides that the defaulting party who causes delay to completion must pay to the innocent party interest as *liquidated damages*. As the learned author in *McGregor on Damages* (Sweet & Maxwell, 18th Ed, 2009) ("*McGregor*") states (at para 1-002):

> Liquidated damages are damages which have been agreed between contracting parties in advance of any breach of contract. They are not the equivalent of compensation; rather they form an acceptable and agreed alternative to compensation. The amount agreed needs to be a genuine estimate of what the loss is likely to be but in the event that amount could be, indeed is likely to be, either greater or less than the actual loss.

55 It is an established principle of law that an innocent party cannot claim unliquidated damages in addition to the liquidated damages which were designed to deal with the loss that has occurred; neither can it elect to ignore the liquidated damages provision and sue only for unliquidated damages (see, for example, the English decisions of *Diestal v Stevenson* [1906] 2 KB 345 and *Talley v Wolsey-Neech* (1978) 38 P & CR 45). However, the courts will allow unliquidated damages to be claimed in addition to liquidated damages if the damages which is the subject matter of the former claim arises wholly or partially from some other breach that does not fall within the ambit of the liquidated damages provision (see, for example, the English decisions of *Aktieselskabet Reidar v Arcos Ltd* [1927] 1 KB 352, *Total Transport Corp v Amoco Trading Co, The Altus* [1985] 1 Lloyd's Rep 423). All these principles were succinctly stated in a leading textbook which we have already referred to as follows (see *McGregor* at paras 13-021–13-023):

> The courts implement the intention of the parties in the case of liquidated damages by holding the claimant entitled to recover the stipulated sum on breach, without requiring proof of the actual damage and irrespective of the amount, if provable, of the actual damage. ...
>
> In most cases where the claimant has recovered his liquidated damages the stipulated sum has been greater than the actual, or at least the provable, damage. *However, just as this cannot diminish his damages, so he cannot increase them by ignoring the liquidated damages clause in the rare case where the actual damage is demonstrably greater than the stipulated sum*, a situation most likely to arise where one sum is stipulated to be paid on a number of varying, yet uncertain, breaches and the most serious breach is the one which occurs. ...
>
> *The claimant will, however, be entitled to sue for unliquidated damages in the ordinary way, in addition to suing for the liquidated damages, if other breaches have occurred outside those which fall within the ambit of the liquidated damages provision or, it seems, if only part of the loss arising from a single breach is regarded as falling within the provision's ambit.*
>
> [emphasis added]

56 This leads us to the question of what was intended to be caught by the liquidated damages

provision in Condition 8. The scope of a similar liquidated damages provision was considered by the Singapore Income Tax Board of Review decision of *ZT v The Comptroller of Income Tax* [2009] SGITBR 1 ("*ZT*"). In *ZT*, the appeal concerned the taxability of the compensation received by the appellant-purchaser for delay in completion under Condition 8(b) of the Law Society's Conditions of Sale 1981 which reads as follows:

> If the delay in completion is attributable solely to the default of the Vendor, he shall pay to the Purchaser by way of liquidated damages interest at the rate of 10% per annum on the purchase price of the property from the day following the date fixed for completion up to and including the day of actual completion. Provided that if vacant possession of the property sold has been delivered by the Vendor to the Purchaser before the date of actual completion then such damages shall be abated by a sum equivalent to a rent calculated on the annual value of the property fixed under the Property Tax Act.

The tribunal found that (at [28]):

> Clearly the Compensation paid under clause 8(b) though termed as "interest" was for liquidated damages based on a pre-estimate of quantum of losses in the event that delay in delivery of possession of the Property (sic). *The loss is largely on loss of rental arising from the delay. That is the main element of the Compensation. In our view therefore the Compensation was for loss of rental pending re-development. …* [emphasis added]

We are of the view that the above interpretation of the Law Society's Conditions of Sale 1981 applies equally to the present Condition 8 of the Conditions of Sale 1999 (which is, in all respects, similar).

57 Useful comparisons of the Singapore Conditions of Sale can be made with the equivalent English provisions. The most recent edition of the English equivalent is the Standard Conditions of Sale (5th Ed) ("UK Standard Conditions of Sale"). The equivalent provision catering to payment of interest is Condition 7.2 of the UK Standard Conditions of Sale which states as follows:

> 7.2 **Late Completion**
>
> 7.2.1 If there is default by either or both of the parties in performing their obligations under the contract and completion is delayed, the party whose total period of default is the greater is to pay compensation to the other party.
>
> 7.2.2 Compensation is calculated at the contract rate on an amount equal to the purchase price, less (where the buyer is the paying party) any deposit paid, for the period by which the paying party's default exceeds that of the receiving party, or, if shorter, the period between completion date and actual completion.
>
> 7.2.3 Any claim for loss resulting from delayed completion is to be reduced by any compensation paid under this contract.

It is therefore implicit under Condition 7.2.3 of the UK Standard Conditions of Sale that the innocent party retains the right to claim for damages for delay, but any compensation paid will be deducted. Counsel for the Respondent, Mr Tan Hee Joek ("Mr Tan"), argued that the UK Standard Conditions of Sale are illustrative of how such conditions of sale are never intended to affect the rights of parties under general law unless they expressly provide so. Whilst we agree that this is the position under the UK Standard Conditions of Sale, Mr Tan has failed to address the fact that, unlike the UK Standard Conditions of Sale, Condition 8 of the Singapore Conditions of Sale expressly provides that damages

are payable as liquidated damages. This is a material distinction which clearly affects the rights of parties by limiting the right to claim damages to liquidated damages pursuant to Condition 8 of the Singapore Conditions of Sale. We also note that the UK Standard Conditions of Sale require interest received to be credited in the claim for damages. The necessary implication must be that to award both would be to award double compensation (which is impermissible).

58 In the circumstances, we are of the view that any rent received pursuant to Condition 6 *does* fall within the ambit of the liquidated damages provision in Condition 8 of the Conditions of Sale. We therefore differ from the approach adopted by the court in *Cheong Lay Yong* where both rent as well as interest as liquidated damages were awarded. The court's primary motivation in awarding both heads of damages in *Cheong Lay Yong* was the unjust result that would arise if the actual loss incurred by the innocent purchaser was greater than the interest that could be claimed under Condition 8.2 (see *Cheong Lay Yong* at [58]). In such a scenario, the innocent purchaser stands to make a loss while the defaulting vendor stands to gain. We respectfully disagree as the purpose of liquidated damages is for parties to agree in advance a genuine pre-estimate of loss, especially when the value of the loss is susceptible to volatile market fluctuations. Any resulting injustice is merely circumstantial as it is also equally possible that an innocent purchaser would make a gain should (taking the present situation as an illustration) the property market subsequently decline. In fact, it seems that Condition 8.2 actually serves to offer some protection to the purchaser because, regardless of how unfavourable the property market may subsequently become, the purchaser will be assured that it will still be able to recover an acceptable sum. Since parties had expressly agreed to the sum fixed as liquidated damages and there was also no reason to classify the clause as a penalty, the law requires that parties be held to what they have bargained for (see above at [54]–[55]). In the circumstances, only interest pursuant to Condition 8 of the Conditions of Sale should have been awarded to the purchaser.

59 On this issue, we further note Prof Yeo Tiong Min's observations in his chapter on "Restitution" in the Singapore Academy of Law Annual Review (2010) 11 SAL Ann Rev 517 (at paras 21.44 to 21.50):

> 21.44 The court laid considerable emphasis on the findings that the defendant had cynically breached the contract and had behaved badly towards the plaintiff: *Cheong Lay Yong* at [59]. While accepting that remedies may be alternative or cumulative, and that the former situation called for an election by the plaintiff (*Cheong Lay Yong* at [57]), the court held that in the exceptional circumstances of the present case, the account of rent should be in addition to the claim for damages for late completion to prevent the defendant from benefitting from his wrong. The court was concerned that otherwise the defendant could use the rental income to offset the damages payable and thereby profit from his wrong (*Cheong Lay Yong* at [58]–[59]). The court was careful to state that in other cases where there is a genuine dispute between the parties, there may be legitimate arguments why an account of rent should not be ordered in addition to the claim for damages for late payment: *Cheong Lay Yong* at [59].
>
> 21.45 Six comments may be made. First, while the court's disapproval of the defendant's conduct was understandable in the circumstances, it should also be noted that cynical breach as a ground for awarding gains made from breach of contract was deprecated in *Attorney-General v Blake* [2001] 1 AC 268 at 286 itself, and this passage was endorsed by the Singapore Court of Appeal in *Teh Guek Ngor Engelin v Chia Ee Lin Evelyn* [2005] 3 SLR(R) 22 at [18]. The High Court in the present case also relied on the distasteful way in which the defendant had behaved towards the plaintiff and had conducted the litigation, but this was addressed in the costs awarded: *Cheong Lay Yong* at [61]–[63].

21.46 Secondly, *Attorney-General v Blake* (above, para 21.39) was not directly applied, because the court found justification for the account of net rent from basic trusteeship principles. Thus, the plaintiff does not need to establish exceptional circumstances to establish a claim for net rent. The only question was whether the claim for net rent was inconsistent with the claim for damages for late completion.

21.47 Thirdly, while the existence of exceptional circumstances was used in *Attorney-General v Blake* to justify the award of gains from breach of contract, in this case, the existence of exceptional circumstances was used to allow the recovery of the defendant's gains *in addition to* the recovery of the plaintiff's losses.

21.48 Fourthly, the claims respectively for damages and net rent are either cumulative or alternative. If they are cumulative, then no exceptional circumstances are required for both to be allowed. Thus, exceptional circumstances are required only if the two are alternative, *ie*, they could lead to double recovery.

21.49 *Fifthly, whether the two claims are cumulative or alternative depends on a question of construction whether the loss from delay in condition 6 included the loss of the ability of the plaintiff to rent out the property as a result of late completion. This is arguably a loss attributable to the delay in completion.* Unfortunately, this critical question of construction did not receive much attention from the court, as the issue had not been argued.

21.50 *Sixthly, since the court justified its decision on exceptional circumstances, its decision must rest on the view that the remedies were alternative, ie, that the losses mentioned in condition 6 included the plaintiff's losses from her inability to exploit the property by rental after the contractual date of completion.* Thus, the unsalutary conduct of the defendant was used as exceptional circumstances to justify double recovery. This has a similar effect as an award of punitive damages for breach of contract.

[emphasis added]

60 We are therefore of the view that rent payable under Condition 6 does fall within the ambit of the liquidated damages provision under Condition 8.2. Since Condition 6 and Condition 8.2 are alternative remedies and Condition 8.2 specifically provides that interest is payable as *liquidated damages*, the Respondent must therefore be confined to claiming only interest pursuant to Condition 8.2.

The effect of Clause 6 of the Option

61 Having set out the position at general law and the position under the Conditions of Sale, we turn now to consider the effect of Clause 6 of the Option. A plain reading of Clause 6 (reproduced above at [5]) clearly entails that the Respondent's right to receive monthly rental of $8,000.00 takes effect from the date immediately after the contractual date of completion. This right accrues independently and regardless of whether there was a breach of the terms of the Option. The question that now arises is this: Does Clause 6 of the Option entitle the Respondent to damages (by an account of rent) in addition to interest pursuant to Condition 8.2?

62 As is the case with our analysis of Condition 8.2 above, the key principle that applies is that there must be no double compensation in favour of the Respondent should damages (by an account of rent) be awarded to the Respondent pursuant to Clause 6 of the Option in addition to interest pursuant to Condition 8.2. This is not only a general principle but is a foundational one that is rooted

in logic, commonsense as well as justice and fairness. Looked at in this light, it is clear, in our view, that there would, in fact, be double compensation in favour of the Respondent should both the abovementioned sums be awarded. Let us elaborate.

63 As already noted above (at [54]–[60]), liquidated damages awarded pursuant to Condition 8.2 *are* intended to encompass rent received by the Respondent. In the circumstances, awarding the Respondent *both* rent in the form of damages (by an account of rent) pursuant to Clause 6 of the Option *and* liquidated damages in the form of interest pursuant to Condition 8.2 *would* result in the Respondent being compensated *twice over*. It is worth noting, at this juncture, that although Clause 6 of the Option does operate differently from Condition 8.2 inasmuch as the former relates to a contractual obligation whereas the latter relates to a breach on the part of the Appellant, the *substantive result* is the *same*, *viz*, that the Respondent would be compensated *twice over*. It will be recalled that the Judge awarded the Respondent *damages* by an account of rental at the rate of $8,000 per month or $266.69 per day for the period *commencing from 18 November 2010 to the actual date of completion* (see above at [14(c)]) *as well as interest* (comprising *liquidated damages*) for late completion at 10% per annum pursuant to Condition 8 of the Conditions of Sale *also commencing from 18 November 2010 until the actual date of completion* (see above at [15(a)]). A moment's reflection will reveal – in no uncertain terms – the *double compensation in favour of the Respondent that results from such an approach.*

64 Accordingly, the Judge ought *not* to have awarded the Respondent damages (by an account of rent) pursuant to Clause 6 of the Option, in addition to interest pursuant to Condition 8.2. We therefore find in favour of the Appellant on this particular issue.

65 We also note – parenthetically– that the parties executed the actual tenancy agreement as running for one year beginning on the day after actual completion (*ie*, 27 July 2011 to 27 July 2012), although the tenancy contemplated under Clause 6 envisaged a tenancy to commence on the day after the contractual completion date (*ie*, 19 November 2010). Clause 6 would appear to be based on the assumption that completion would be effected in accordance with the contract. In the circumstances, the aforementioned tenancy agreement was not, strictly speaking, executed pursuant to Clause 6 as such. The role Clause 6 plays in the context of the present proceedings centres (as we have seen) on the issue as to whether or not damages (by an account of rent) pursuant to Clause 6 may be recovered *in addition to* interest pursuant to Condition 8.2.

The relief to be granted

66 The above analysis leads to the conclusion that the Respondent must be confined to claiming only interest as liquidated damages pursuant to Condition 8.2, and cannot claim (in addition) rent pursuant to Clause 6 of the Option.

67 We note that Clause 4 of the Option provides that, in the event of an inconsistency between the Conditions of Sale and the terms of the Option, the terms of the Option should prevail. Clause 4, however, does not come into play in the present case. This is because Clause 6 (as noted above at [63]) is an express term of the contract embodying a contractual obligation which ought to be performed but which, if breached, would result in the award of damages. Hence, Clause 6 does not relate directly to the issue of damages as such, except in so far as it will assist the court in quantifying the measure of loss should that particular clause itself be breached. Condition 8, on the other hand, is a liquidated damages clause, dealing not, as such, with the parties' obligations that are to be performed. Condition 8 deals, instead, with the consequences of a breach in the event of a delay by one party (which clause would, in the nature of things, constitute a genuine pre-estimate of all loss, including loss that would otherwise have been awarded to the Respondent as non-liquidated

damages (which would of course include the amount awardable for breach of Clause 6)). In the circumstances, there is no inconsistency between Clause 6 and Condition 8; they are complementary in nature for the purposes of Clause 4. Clause 4 therefore does not come into play. Accordingly, the Respondent is entitled to interest for late completion pursuant to Condition 8.2 of the Conditions of Sale for the period from 19 November 2010 to 26 July 2011. The Appellant's appeal against the Judge's order for the (additional) award of damages by an account of rental to be paid to the Respondent is therefore allowed.

Issue 4: The appeal against costs

68 The Appellant appeals against the Judge's award of costs against him on the basis that he had not been asked to submit on the quantum of costs. We find that the Appellant had in principle agreed to pay costs at the hearing before the Judge. In any event, the court is conferred the discretion to decide the issue of costs pursuant to Order 59 Rule 2(2) of the Rules of Court (Cap 322, R 5, 2007 Rev Ed), and there is no basis to say that this discretion was exercised improperly in the present case. Accordingly, we dismiss the Appellant's appeal against the Judge's award of costs against him.

Conclusion

69 For the reasons set out above, we allow the appeal in part. The usual consequential orders will apply. The parties have seven days from the date of this judgment to make written submissions with regard to the costs that ought to be awarded with regard to this appeal and the quantum of costs that ought to be awarded in the court below.

[note: 1] Appellant's Core Bundle vol II ("2ACB") at pp 5–10.

[note: 2] Respondent's Supplemental Core Bundle ("RSCB") at pp 3–10.

[note: 3] 2ACB at pp 17–19.

[note: 4] Record of Appeal ("RA") vol III(B) at p 14.

[note: 5] 2ACB at p 21.

[note: 6] 2ACB at pp 22–23.

[note: 7] RA vol III(A) at pp 107–244.

[note: 8] RSCB at pp 20–24.

[note: 9] *Ibid* at pp 25–26.

[note: 10] 2ACB at pp 53–55.

[note: 11] *Ibid* at pp 56–57.

[note: 12] RSCB at pp 25–26.

[note: 13] *Ibid* at pp 27–32.

[note: 14] *Ibid* at pp 33–36.

[note: 15] *Ibid* at pp 38–41.

[note: 16] 2ACB at p 62.

[note: 17] *Ibid* at p 63.

[note: 18] *Ibid* at p 64.

[note: 19] *Ibid* at p 66.

[note: 20] RA vol III(A) at p 234.

[note: 21] *Ibid* at p 236.

[note: 22] RSCB at pp 20–24.

[note: 23] 2ACB at pp 67–71.

[note: 24] Appellant's Case ("AC") at pp 110–116.

[note: 25] *Ibid* at pp 103–110.

[note: 26] Respondent's Case ("RC") at p 34.

[note: 27] AC at pp 116–138.

[note: 28] RA vol II at pp 4–6.

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