Ajit Chandrasekar Prabhu and another *v* Yap Beng Kooi and another [2015] SGHC 280

Case Number : Suit No 735 of 2013

Decision Date : 27 October 2015

Tribunal/Court : High Court

Coram : Aedit Abdullah JC

Counsel Name(s) : Lim Tong Chuan and Joel Wee (Tan Peng Chin LLC) for the plaintiffs; P Padman, Keith Tnee (Tan Kok Quan Partnership) for the defendants.

Parties : Ajit Chandrasekar Prabhu — Lim Boon Eng — Yap Beng Kooi — Goh Seok Tor

Land – Sale of land – Contract

Land – Sale of Land – Completion

27 October 2015

Aedit Abdullah JC:

Introduction

1 In this case, a number of the main claims in issue concerned concepts at the heart of conveyancing: what constitutes a defective title, and what amounts to failure to give vacant possession. Despite the efforts of the Plaintiffs in this case I did not agree with their arguments which attempted to push the boundaries of these concepts.

2 The dispute arose from the purchase of a property by the Plaintiffs from the Defendants. It was discovered that the required regulatory approval had not been obtained for the construction of a particular room. The Plaintiffs claimed damages for breaches of warranty that all works had been authorised. In addition, the Plaintiffs claimed losses stemming from the unauthorised structure, namely defective title, lack of vacant possession and non-completion of the conveyance. These losses consisted of the cost of rectification, as well as claims for temporary accommodation, or in the alternative, the loss of opportunity to rent out the property. Rectification costs were claimed on the basis that the room had to be put into a state suitable for what it was supposedly described to be, a gym. The Defendants however denied that there was any such representation that the room was meant to be a gym.

3 As it was not disputed that there was a breach of the warranty that regulatory approval would be obtained for the room, damages were awarded for rectification of the breach, but not to the extent that the room could be used as a gym based on the specifications put forth by the Plaintiffs' witnesses. I also awarded damages for alternative accommodation while the work was carried out. However, I rejected the arguments that there was defective title, failure to deliver vacant possession and non-completion. Accordingly, the other damages claimed by the Plaintiffs were rejected. The Plaintiffs have appealed.

Background

4 The Defendants were the owners of a property located at Camden Park, Singapore ("the

Property"). In late 2012, they put the Property on sale. In early 2013, the Plaintiffs viewed the Property, which included a structure, the top portion of which was a room described as, *inter alia*, a rumpus room and a gym. The precise description used by the first defendant ("1st Defendant") was in issue in the case. After paying an option fee of $250,000, the Plaintiffs were granted an Option to Purchase ("the Option") over the Property, which incorporated the Law Society of Singapore's Conditions of Sale 2012 ("the Law Society Conditions"). The consideration for the Property, as stated in the Option, was $25m. The Option was exercised, with completion targeted for end April 2013. The Plaintiffs paid the balance amount on 29 April 2013 and keys were given to them. Renovation works were started on the Property by mid-2013.

5 In July 2013, the Plaintiffs' solicitors wrote to the Defendants contending that, among other things, the room was constructed without the relevant approvals. Rectification costs, loss of use and alternative accommodation costs were claimed on behalf of the Plaintiffs. In August 2013, the present proceedings were commenced.

The Plaintiffs' Case

6 The Plaintiffs' claims for damages were founded breach of warranty, failure to provide good title and a failure to give vacant possession. Breach of warranty arose through the fact that there was, contrary to cl 11 of the Option and cl 10.1 of the Law Society Conditions, an unauthorised structure on the Property. The Plaintiffs additionally claimed (a) a defect in title because of the unauthorised structure; (b) that there was a failure to give vacant possession because of the inability to occupy the Property in view of the rectification work to be done; and (c) that there was no actual completion of the conveyance. The Plaintiffs claimed damages representing the work required on the Property, but did not seek to rescind the contract.

7 The Plaintiffs contended that there was a failure to fulfil the obligation to provide good title because the Property was subject to encumbrances that were covered by the contract between the parties and the Defendants failed to disclose a latent defect of title. The defect in title arose because the room in question breached the building regulations. Citing a number of authorities, it was contended that the room could never be approved by the regulator. The Court of Appeal case of *Huang Ching Hwee v Heng Kay Pah and anor* [1992] 3 SLR(R) 452 ("*Huang Ching Hwee*"), determined that unauthorised works were only not a defect in title in limited circumstances. The Property in question here could not in fact be occupied legally because there was a regulatory prohibition against it.

8 The Defendants also failed to deliver vacant possession as required under cl 15 of the Option. According to the Plaintiffs, the authorities showed that there will be a failure to deliver vacant possession if there is a physical impediment substantially preventing possession. The Plaintiffs contended that the existence of the unauthorised modifications required remedial work, and such work substantially deprived the Plaintiffs of possession. From such failure to deduce good title and to give vacant possession, there was therefore no completion of sale. Further the Plaintiffs argue that, contrary to the arguments of the Defendants, no estoppel arose to the effect that there was completion.

9 The Plaintiffs' witnesses were Mr Ng Kian Huan Edmund, their architect ("PW1"), Mr John Lim Kheng Hock, their structural engineer ("PW2"), and the first plaintiff ("1st Plaintiff") himself. In particular, PW2 testified that the structure as built was in violation of regulations and would not be approved. The Plaintiffs had a fourth witness, Mr Suey Hueh King, who was not needed for cross-examination.

10 The Plaintiffs took issue with the evidence of the Defendants' witnesses, especially the 1st Defendant's denial that he had represented the room to be a gym, as well as the expert reports concerning the rectification work needed for the room, and what would be needed to allow it to be used as a gym. It was further argued that an adverse inference should be drawn under illustration (*g*) of s 116 of the Evidence Act (Cap 97, 1997 Rev Ed) as the Defendants failed to call the interior designers, architects and structural engineers.

11 The Plaintiffs claimed losses for the rectification work and accommodation costs, or alternatively the rental representing the loss of opportunity, and interest for late completion. It was argued that there was no real challenge from the Defendants on these.

The Defendants' Case

12 At trial, the Defendants did not deny (a) that regulatory approval for the room was not obtained; (b) that the Defendants were in breach of the warranty in the Option and Law Society Conditions; and (c) importantly, that the room should be rectified. However, the Defendants denied the Plaintiffs' claim that the room was unsafe, and averred that the rectification costs were not as large as the Plaintiffs claimed.

13 The Defendants maintained that the conveyance of the Property was completed in April 2013. While the Defendants accepted that there was breach of warranty, they denied any defect in title. *Huang Ching Hwee*, they say, was authority for the position that for unauthorised works to create a defect in title there must actually be an intention to impose liability by the regulator, which has been brought to the notice of the persons concerned. Given that there was no certainty or inevitability that the regulators would have issued a notice or order under the relevant Act, or enforced that Act with respect to the room, there was no defect in title. They argue that the Plaintiffs' attempt to distinguish *Huang Ching Hwee* should not be accepted. Completion occurred as required by the contract. In any event, any defect in title would not prevent completion.

14 Vacant possession was also duly delivered. The Defendants argue that physical impediments were not sufficient to prevent delivery of vacant possession. Mere interference with occupation and enjoyment of property is insufficient to prevent vacant possession from being delivered. The interference must be to a substantial part of the property, and must prevent the purchaser from enjoying the property and the right to deal exclusively with the property. On the facts, vacant possession was given as the room only occupied a small proportion of the entire Property, and the Plaintiffs had registered themselves as proprietors and had undertaken renovations. The Plaintiffs could have also let or sold the Property onwards. Any rectification of the room could have been readily made.

15 The Plaintiffs were not entitled to claim the loss of use of the balance of the purchase price. Furthermore, the costs claimed for rectification were excessive – there was no contractual agreement that the room was to be used as a gym, and in any event, the entire agreement clause ousted any representation that the room was to be used as a gym. Even if the room was to be converted into a gym, the amount claimed was excessive as the requirements used by the Plaintiffs were excessive. Similarly, the Plaintiffs' claims for alternative accommodation and market rental were contradictory and were not supported by evidence.

16 The Defendants relied on evidence from three witnesses. The first witness was the 1st Defendant himself. Second was Mr Kook Tiak Liong, a Director of a construction company whom the Defendants sought to rely on for an expert opinion on the costs of rectification ("DW2"). The third witness was Mr Chin Kiew Sion, the Defendant's engineering witness ("DW3").

The Decision

17 I found that there was indeed a breach of warranty as the construction of the room had not been given the required regulatory approval. This was a breach of cl 10.1 of the Law Society's Conditions, which was incorporated into the contract. The Option itself contained in cl 11 a similar warranty, which was also breached. However, such breach did not lead to any defect in title or a failure to give vacant possession and complete the conveyance. The rectification cost that could be claimed was only that which would rectify the defects in the room and allow it to be used as part of the residence. The cost of rectification could not include the cost of work required to turn the room into a useable gym as there was no operative representation that the room was a gym.

18 I thus awarded the Plaintiffs the cost of rectification of the defective structure to the extent that the room was brought into compliance with the law. In addition, I accepted that the Plaintiffs were entitled to alternative accommodation costs for the period of rectification.

19 A number of issues were argued which were in the end not germane or directly material to my decision. This included the relevant standard required of a room to be used as a gym, adverse inferences to be drawn against the Defendants, shortcomings in DW2's affidavit, estoppel, general issues as to the credibility of the Defendants witnesses and the availability of a claim for loss of rental. These are dealt with briefly in the grounds.

Breach of Warranty

20 It was not disputed that there was a breach of warranty because of the failure by the Defendants to obtain the required regulatory approval. Clause 11 of the Option read:

> The Vendor confirms that no changes from the Specifications and Approved Building Plans have been made except changes which has *[sic]* been approved or are required by the Commissioner of Building Control or other relevant Authorities. The Vendor shall provide the Purchaser a copy of the Building Plans.

Clause 1 of the Option incorporates the Law Society Conditions. Clause 10.1 of the Law Society Conditions read:

> The Vendor represents and warrants to the Purchaser that the Vendor has not carried out any unauthorised additions or alterations to the Property.

21 The 1st Defendant admitted that he had not obtained the required approvals. That alone would be sufficient to constitute a breach of warranty. The consequence of breach would be damages for rectification. As noted above, the Defendants did not contest that repair works were needed to bring the structure into compliance with the law. The dispute, however, was on what the repairs precisely entailed. This will be dealt with below.

Defect in Title

22 I found that there was no defect in title arising from the unauthorised alterations or structures entitling the Plaintiffs to the claims they had made. The Plaintiffs relied on *Huang Ching Hwee* for the proposition that the unauthorised work rendered the title defective, breaching the obligation in cl 2 and 3 of the Option that title was to be free from encumbrances and properly deduced. These clauses read:

2. The Property is sold subject to any restrictive and other covenants and conditions, easements and reservations affecting the Property but otherwise free from encumbrances.

3. Subject to clause 2, the title to the Property shall be properly deduced but the Purchaser shall not require the delivery or production of any deed or document not it the Vendor's possession nor shall the Purchaser make or raise any requisition or objection in respect thereof.

23 Clauses 2 and 3 were concerned with encumbrances properly speaking and do not on their face cover the failure to obtain regulatory approval for the room. The Plaintiffs argued that the unapproved room was an unauthorised construction, which was only discoverable upon inspecting the approved plans, and was constructed in violation of building regulations, and this could not be discovered without the structural plans and calculations.

24 I found that the failure to obtain approval for the room in question did not amount to an encumbrance under cl 2 of the Option. It would only be an encumbrance if there was actual regulatory action taken, such as the sending of a notice from the authority: *Huang Ching Hwee* at [55]–[56]. There must be actual action taken by the authority, not just an expectation or likelihood of such action.

25 The cases cited by the Plaintiffs do not assist them. As noted by the Defendants, the cases specifically cited such as *Vukelic v Sadil-Quinlan & Associates* (1976) 13 ACTR 3, *Maxwell v Pinheiro* (1979) 46 LGRA 310 ("*Maxwell v Pinheiro*"), *Borthwick v Walsh* [1980] 1 BPR 9259 and *Watkin v Wilson* [1985] 1 NLZR 666, were all considered and were not followed by the Court of Appeal in *Huang Ching Hwee*. There was a deliberate choice by the Court of Appeal (at [50]) to prefer the analysis in the contrary line of cases such as *McInnes v Edwards* [1986] VR 161 ("*McInnes v Edwards*") which the Court of Appeal found was consistent with academic and professional opinion. The trend in the Australasian cases cited by the Plaintiffs was thus not followed by the Court of Appeal and was clearly rejected.

26 The Court of Appeal clearly determined that it was not appropriate to find an encumbrance on anything less than an actual notice that the provisions of the law, which may have been breached, are to be invoked. At [51], the Court of Appeal stated:

> It is difficult to lay down any precise rules, but we think that the *Carlish* case ([39] *supra*) provides a useful guide for deciding when a potential or inchoate statutory liability becomes an encumbrance and a blot on title. The mere fact that a state of affairs exist which might bring into operation the provisions of a law imposing a liability or burden is not enough to constitute a defect of title. Any intention to invoke the provisions of the law should have been manifested and brought to the notice of those concerned before the conclusion of the contract, before any question of a defect of title can arise.

The Plaintiffs argued that the Court of Appeal's decision was premised on specific facts, but in light of the clear statement of the Court of Appeal, the Plaintiffs' position was untenable. The Plaintiffs relied on the following passage in *Huang Ching Hwee* (at [53]), where the Court of Appeal dealt with what had been established in the case before them:

> There is no evidence in the instance case that the authorities had threatened to take action against the infringement. All that has been shown is that the approval for the works was not obtained, not that the works were of such a character that they actually contravened the requirements of any building regulations. We assume that it is always open to the owners for the time being to apply to regularise the position, and where no questions of safety is involved, there

is no reason to believe that approval to retain the works must necessarily be ruled out.

It was contended by the Plaintiffs that the present case is distinguishable as there was a clear breach, which would not be approved at all and would be unsafe.

27 The Plaintiffs take the relevant passage out of a discussion of the application of the general principle the Court of Appeal had enunciated at [51] to the specifics of the case before them. In the paragraph which follows [53] of *Huang Ching Hwee* (which was cited by the Plaintiffs and appeared to be the whole basis of their argument on lack of good title), the Court of Appeal goes on to mention that s 14 of the Building Control Act (Cap 29, 1990 Rev Ed) permitted waiver applications to be made. It was further noted (at [55]) that the potential for enforcement action is always there but there was never any certainty or inevitability about it. At [56], the Court of Appeal noted that it would give rise to great uncertainty and unnecessary disputes in conveyancing practice if the mere potential of enforcement action was to be treated as going to title. Finally at [57], the Court of Appeal stated that common requisitions made by solicitors to the Building Control Division are concerned with whether any order or notice has been served or not. The whole thread of the Court of Appeal's discussion went against the arguments of the Plaintiffs that the decision in *Huang Ching Hwee* was limited to situations where there was no evidence of breach and there was no safety issue ruling out approval. The real concern of the Court of Appeal was to ensure that there was certainty in the conveyancing process and no second-guessing of the actions of the regulators; the latter being the very thing that the Plaintiffs urged the court to do here.

28 It has to be underlined that in the present case there was no evidence of what the regulators would in fact do – there was nothing from the Building Control Authority ("the BCA"), at all in evidence. What was in evidence was the opinion of the Plaintiffs' expert that the BCA would never have approved the changes. That may be, but his opinion is not sufficient evidence of the actions of the regulator, which is what matters in determining whether there is good title.

29 The need for actual action to be taken by the regulator ensures that there is no second guessing of what regulatory action may be taken. Even where a breach of a provision occurs, it is not necessarily true in all cases that action will be taken by the authorities. There is discretion vested in both enforcement and prosecution. Sometimes this may turn on the availability of resources, prioritisation between different offences and the assessment of the seriousness of the breach. None of these would necessarily be apparent to the parties or their agents. Such second guessing would undermine the certainty required particularly in conveyancing practice.

30 One of the cases acknowledged by the Plaintiffs to be seemingly against their position, *Carpenter v McGrath* (1996) 40 NSWLR 39 ("*Carpenter*") was decided after *Huang Ching Hwee*. It is telling that in that decision, the New South Wales Court of Appeal declined to follow the *Maxwell v Pinheiro* line of cases preferring *Fletcher v Manton* (1940) 64 CLR 37 and *McInnes v Edwards*. Potential liabilities do not count. The Plaintiffs argued that the position taken in *Carpenter* was based on need to determine whether the building in question was the principal purpose of purchase (at 67–68). However, in the passage the Plaintiffs rely on, Cole JA was examining the limits of the judgment of Kirby P in *Pisano v Fairfield City Council* (1991) 73 LGRA 184. Cole JA clearly preferred the decision in *McInnes v Edwards*, quoting Kaye J in that decision that "the mere existence of circumstances which create the possibility or probability or risk that the property will at a future date be subject to a statutory charge or burden does not constitute a latent defect in title" (at 68).

31 The Plaintiffs' claim that there was a defect in title was thus not made out and failed.

Vacant possession

32 The other issue that was raised in respect of completion was that there was no vacant possession given by the Defendants. I found that vacant possession was indeed given.

33 Vacant possession entails that there be no impediment to the use and occupation of the property because of something actually on the property obstructing such use – this may be another person, refuse, an unwanted structure that was to be removed or legal impediments which affect the use of the whole of the land. As stated in *Emmet and Farrand on Title* (Sweet & Maxwell, Looseleaf Ed, September 2015 release) ("*Emmet*") at para 6.006:

> An undertaking that vacant possession will be given is primarily taken to mean that possession will be given free from any occupation by the vendor or a third party and free from any claim to a right to possession of the premises.…

A clear instance of a failure to deliver vacant possession would be when the premises are occupied by unauthorised persons such as ex-tenants or squatters.

34 Various cases, including those cited by the Plaintiffs, such as *Cumberland Consolidated Holdings, Limited v Ireland* [1946] KB 264, have extended the notion to cover things that constitute a substantial physical impediment. As noted by Rimer LJ in *NYK Logistics (UK) Ltd v Ibrend Estates BV* [2011] 4 All ER 539 at [44], discussed in *Emmet* (at para 6.006),

> … It means that at the moment that "vacant possession" is required to be given, the property is empty of people and that the purchaser is able to assume and enjoy immediate and exclusive possession, occupation and control of it. It must also be empty of chattels, although the obligation in this respect is likely only to be breached if any chattels left in the property substantially prevent or interfere with the enjoyment of the right of possession of a substantial part of the property.

Similarly, in *Chua Tian Chu v Chin Bay Ching and another* [2011] SGHC 126 (at [45]), it was stated, citing *Topfell Ltd v Galley Properties Ltd* [1979] 1 WLR 446 ("*Topfell*"), that vacant possession means "a state in which property can be occupied and enjoyed".

35 In a number of cases, the concept of vacant possession has been extended further. For instance, in *Topfell*, failure to give vacant possession was found where a statutory notice limited occupation of floor that was leased. In these instances, possession is ousted.

36 I do not read the cases as supporting the Plaintiffs claim. What the Plaintiffs are really claiming is a right to immediate, and full occupation, enjoyment and use, and not just vacant possession. A right of that nature could be contracted for but it entails a heavy obligation on the part of the vendor: potentially any defect in the physical structure, for instance, even hairline cracks, could breach such an obligation. The obligation to give vacant possession is not of that nature.

37 The concept of vacant possession is meant to ensure that the purchaser of a property is able to put it to its intended use – either enjoyment as a dwelling or commercial property, or to lease it out, or to sell it on. What counts as a material attenuation of vacant possession must therefore be substantial. In the present case, the Plaintiff argued that there was no vacant possession because of the repair works that were required. The Plaintiffs' position was not supported by authority. The inability to use premises because of repair works necessary to remedy any defect is not a hindrance or impediment to vacant possession. It does not affect the right of possession. There must be something that affects exercise of possession over the property at the point of completion, and that something should not arise from the Plaintiffs' own activities. There is a difference in quality between

not being able to enjoy the land because of some physical or legal impediment going to the whole of the property as opposed to not being able to enjoy the property fully because of work required to rectify some defect. That difference is material because in the case of the former, what obstructs enjoyment is the thing that gives rise to the need for the repair, rather than the repair efforts themselves.

38 Additionally, it may be that the defect or impediment continues after the point of completion. But it should exist at that point. This flows from the obligation to give vacant possession: *Cook v Taylor* [1942] Ch 349. The impediment to enjoyment must be in place at that time.

39 While the losses claimed by the Plaintiffs could not be compensated on the basis of a failure to be given vacant possession, some of these were to my mind relevant as part of the damages claimable for breach of warranty and will be dealt with in the section below.

Completion

40 The Plaintiffs argued that there was no completion as either there was a defect of title or that vacant possession was not delivered. In view of my findings that there was no defect of title nor a failure to deliver vacant possession, there was no doubt that completion had in fact occurred.

41 Aside from this though, the Plaintiffs' arguments that there was no completion went against the facts: on the completion date, the Defendants purported to execute and deliver the Property, while the Plaintiffs paid the balance of the purchase price. The Plaintiffs subsequently registered the transfer of title and were in occupation. What the Plaintiffs were arguing then really was that there was constructive non-completion because of the breaches that occurred. This goes to show the significant consequence of the Plaintiffs arguments that defect in title and vacant possession ought to be given an expanded meaning. The upshot will be greater uncertainty in conveyancing transactions.

42 In the absence of a special provision, completion usually involves conveyance of the estate of land and final settlement of business, such as, in the case of non-registered land, the handing over of documents of title, and the giving of vacant possession: *Emmet* at para 8.007. Final settlement of business would require that matters relating to the conveyance and transfer of title and possession should have been carried out fully. It does not to my mind require that there be no disputes between the parties – breaches resulting in award of damages may still exist, and it is possible to have grounds for rescission after completion, which does not postpone the fact of completion. It is true that completion does not occur where conveyance is executed by fraud or a nullity, as in *Lloyds TSB PLC v Markandan & Uddin* [2012] 2 All ER 884. But apart from such situations, the fact that transfer documents have been completed and the keys handed over, with vacant possession, would mean that completion has occurred.

43 Furthermore, the Plaintiffs took the position that there was no completion as a justification for damages for delay. Yet such a claim was made in the face of the fact that the Plaintiffs were in possession and control of the Property, and were not seeking to return it to the Defendants. Loosening completion to take in the Plaintiffs arguments would only perpetuate greater uncertainty: once keys are handed over, short of something that goes to the actual title or right to the property, or its possession, factual completion should not be unravelled or put in doubt.

Recoverable Damages

44 As I have found that there was breach of the warranty, the measure of damages would be the

amount that would put the Plaintiffs in the position they would have been in had the contract been properly performed by the Defendants. While it is possible to quantify this by reference to the diminution of value of the Property caused by the breach, this would have been difficult – valuation is not an exact science and much depends on the comparable data available. It was doubtful that any reasonable comparator would have existed. In any event, the parties chose to argue recovery on the basis of the cost of cure, and I proceeded accordingly.

45 Such cost of cure would have to include the cost of accommodation for the period of construction. While I found that there was no breach of the obligation to give vacant possession, and thus that the Plaintiffs were not prevented by this from taking possession of the property, this finding to my mind did not preclude finding that the cost of accommodation for the period of work required to rectify the room was recoverable on the principles established in *Hadley v Baxendale* (1854) 9 Exch 341 ("*Hadley v Baxendale*"). The possibility that the plaintiffs would not be able to continue residing on the Property while works were carried out would be within the class of events flowing natural from the breach.

46 A factual issue which needed to be determined to quantify the rectification was whether such work should extend to putting the room to the extent that it could be used as a gym. The Plaintiffs claimed that there was a representation to this effect, while the Defendants denied this. While I found that the 1st Defendant did make such a representation, it was not operative because of a contractual clause in the Option. The rectification costs thus had to be quantified on the basis that the room was to be put into a state as a normal room only. That finding, however, meant that much of the Plaintiffs' evidence on the cost of rectification was not material, and I had in the end to consider a combination of evidence from both sides.

Representation of the room as a gym

47 The Plaintiffs did not assert in their pleadings any representation of the room as a gym as an actionable basis, whether in contract or tort. On the pleadings, the use of the room as a gym was only mentioned briefly, and not invoked as a basis for damages in itself. The relevant head of claim was for breach of warranty that regulatory approval had been obtained for the room: para 13 of the Statement of Claim (Amendment No 4). The relevance of the room's use as a gym was to the rectification work. This was not particularised in any detail, but at trial, the parties were joined and prepared on the issue of whether the room was indeed represented to be used as a gym, as this was probably foreshadowed in the affidavits. For that reason, I did not hold the Plaintiffs strictly to the pleadings.

48 I found on the facts that the 1st Defendant had indeed represented the room as gym. However, there was no breach of contract for that false representation. This representation was invoked to allow the Plaintiffs to claim the cost of rectification to cover the cost of making the structure suitable for use as a gym.

49 As argued by the Plaintiffs, the facts which pointed to the 1st Defendant actually making such a representation: such as the labelling of the gym key, as well as the 1st Plaintiff's testimony that the 1st Defendant told him the room was a gym built for the 1st Defendant's son. The gym keys came from the 1st Defendant. In the usual course, a single piece of evidence would normally not be sufficient to justify a finding in the face of a bare denial, but this must all depend on the evidence, and the weight that should be attached to it. Here, given that the keys came from the 1st Defendant, and unequivocally described the position in a manner contrary to his assertions, the conclusion that could be arrived on the balance of probabilities was that the room was represented to be gym. The explanation proffered by the 1st Defendant was not convincing. The 1st Defendant tried

to explain by saying that the word 'gym' was used on the label merely for convenience: it was short and could fit on the label. He analogised with what he did for another room at a different property: there the Glory Prayer Centre was referred to as "GPS". I could not see why if indeed he needed to fit the room description onto the key label he would have used 'gym' rather than an abbreviation or shortened form of the name he claimed he used for that room, namely a prayer room. Indeed he had to accept in cross-examination there was enough space anyway on the label for him to write "prayer room" if he wanted. His testimony in this regard could not be believed at all.

50 The probability of the room being described as a gym was also increased by the equipment that was placed there: there was a treadmill, an exercise bicycle, a bench press machine and some dumbbells. There was some dispute about the extent to which the equipment occupied the space in the room, and reference was additionally made to photographs of the room. I am of the view that the photographs did show that the exercise equipment took up a substantial portion of the room, but in any event, it was not necessary for the Plaintiffs to show that the whole of the room was taken up by these equipment. What mattered was that the presence of the equipment in a room which suggested that their use or presence was more than incidental, and that it supported the conclusion that the room would be more likely than not described as a gym. This conclusion did not however lead invariably to the next step which was that the Defendants so described the room as a gym to the Plaintiffs, but it would be something that would have to be weighed together with the other evidence.

51 In contrast, a number of other facts relied on by the Plaintiffs could not be accepted as showing that a representation was made that the room was a gym. These included the failure by the 1st Defendant to take issue with the design by the Plaintiffs that the room was a gym, the communications from the Defendants' maid, and a newspaper article describing the Property as including a gym. The 1st Defendant's failure to correct the Plaintiffs' reference to the gym in communications could not take the Plaintiffs very far. The failure to correct the Plaintiffs would only give rise to a misrepresentation had there been a duty on the 1st Defendant to correct the Plaintiffs' mistake. There was nothing on the facts, and nothing was raised by the Plaintiffs, that would point to the existence of such a duty. The parties dealt with each other at arm's length. Even if the communication from the maid was strictly speaking not hearsay, the weight that could be accorded to it could not be much – the statement did not come from the Defendants, and the maid's knowledge as to the proper use of the room was not adduced. As to the reference in the newspaper articles to the room as a gym, that was hearsay, and in any event little weight would be attached to such reports. The newspaper report was not part of the Plaintiffs' affidavit evidence in chief, but was introduced as a loose document. The Plaintiffs attempted to invoke s 32 of the Evidence Act, relying on the business records exception. That exception covers business records such as accounts and inventories, for which it would be expected that some care would be exercised rendering them more reliable than most other instances of out of court statements. Articles in newspapers are not of the same character: while one would assume that care would be taken by the journalists concerned, they are dependent on information coming from informants or interviewees who may not, for various reasons, have the same care in accuracy of what is conveyed. In any event for these reasons, even if the newspaper report was admissible under s 32(1)(*b*) of the Evidence Act, I would have excluded it in the interests of justice, or would have given it very little weight. Additionally, no notice to admit hearsay evidence was given under s 32(4)(*b*) read with O 38 r 4 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).

52 No attempt was made to rely on s 32(1)(*b*)(iii) of the Evidence Act, relating to information in tabulations or compilations. A one-off article in the newspapers would not to my mind be sufficient to constitute such a compilation of information, which would presumably again be compiled with some additional care as compared to general information or news stories.

53 The Plaintiffs additionally relied on as evidence testimony by the 1st Plaintiff as to what the Defendants told the Plaintiffs directly. The 1st Defendant tried to argue against making use of this testimony, primarily as this was not in the 1st Plaintiff's affidavit. It is true that the failure to include testimony in the affidavit may give rise to concerns about the weight that could be given, but where such testimony has been given, the court would need to weigh the explanation given for not mentioning that fact in the affidavit, as well as the cogency of the evidence itself. Here, the Plaintiff's explanation was not sufficient; what he could say only was that he may have omitted mentioning this because there were numerous statements made. Given the importance of the description of the room I could not accept this as sufficient explanation for omission from the affidavit. As this was so, the evidence would be so unreliable because of the danger of tailoring of evidence that it should not be taken into account.

The effect of the representation that the room was a gym

54 While the evidence showed that there was a representation made by the Defendants that the room was a gym, cl 14 of the Option was an entire agreement clause that prevented the representation from operating. That clause read, in the first portion:

> The terms and conditions contained in the Option supersede any previous representation, warranty, information, agreement or undertaking, whether such be written or oral, given by the Vendor or its agents and the terms and conditions contained in the Option shall be the full and complete contract between the Vendor and Purchaser.…

It was clear then that the intention and the bargain between the parties was that the Option would contain the whole of the contract. If there was no mention of a particular representation or term in the contract, it did not bind the parties. This was underlined then by the second part of the clause:

> Without prejudice to the generality of the foregoing, no representation, promise, inducement or statement of intention has been made by the Vendor or its agents which is not embodied in the option and neither the Vendor nor its agents shall be bound by or liable for any alleged misrepresentation, promise, inducement or statement of intention not so set forth in the Option.

Parties must be held to their bargain, which in case of this nature would presumably have been with full legal advice. In the face of the above clause, had the Plaintiffs wanted to invoke or rely on the representation that the room was a gym they should have incorporated a term to that effect into the contract.

55 The Plaintiffs took brief issue with cl 14 not having been pleaded by the Defendants; as I have noted above the whole issue of the representation of the room was only relevant to the extent of rectification, and the pleadings on both sides were very brief on quantification. Clause 14 was in fact pleaded by the Plaintiffs, though its relevance to their case was not that strong. Given this, it was not surprising that the Plaintiffs did not really push the pleadings point, and in any event, I would have found that such as it was, it was part of the issue of the extent of rectification necessary, and neither party was taken by surprise.

56 The Plaintiffs tried to argue around cl 14 by invoking an "as is, where is" clause in the Option. It was hard to see where this could take the Plaintiffs: such clauses could not operate to the extent of giving the Plaintiffs a basis to treat the room as a gym. Short of a sign on the door or in the room that it was a gym, such a clause would only give the Plaintiffs a right to have the room in the condition that it was in at the point of sale, and nothing more. If anything, reliance on such a clause could be taken against the Plaintiff, as the condition, and state of the room and its structure would

have to be taken at the point of sale as well.

57 The Plaintiffs also seem to have tried to circumvent the operation of the entire agreement clause by referring to cases such as *J Evans & Son (Portsmouth) Ltd v Andrew Merzario Ltd* [1976] WLR 1078, (a decision of Lord Denning dealing with exemption clauses) which are best interpreted as dealing with oral collateral contracts. There was no proven oral collateral contract in the present case. Furthermore, I would be wary of readily introducing such collateral contracts into conveyancing transactions, especially in the face of an entire agreement clause, between parties who should have been able to deal with each other at arms' length.

Evidence on rectification

58 There was some issue about the evidence given in respect of the rectification work. The Plaintiffs took issue with the credibility and credit of DW2 and DW3, who testified as to the construction work and costs. However, the Plaintiffs' witnesses' evidence was on the basis that the room was to be rectified and made into a gym. As I have found that the only operable obligation was to render the room compliant with regulations, much of the Plaintiffs' witnesses' evidence on the costs of repairs were irrelevant to my decision. I was thus left primarily with the Defendants' witnesses' evidence on this. In the end, I found that the best evidence on the facts in respect of rectification of the room into a room compliant with regulations was what the Defendants portrayed as the best possible case for the Plaintiffs. This used information from the Defendants' contractor witness, DW 2, who was put forward as giving expert opinion on the cost to be incurred. The Plaintiffs objected to his evidence, contending that he was not a qualified expert. I found to the contrary that he was a qualified expert in respect of the costs of work and took his evidence into account.

Evidence of the Defendant's Contractor witness, DW2

59 I found that the Defendants' Contractor, DW2, had sufficient expertise to give his opinion on the cost required for works determined by the Defendants' engineer expert, DW3. The Plaintiffs took issue with the affidavit of DW2. As noted by the Defendants in their submissions, the matter was canvassed during the proceedings, and I ruled that it would be permitted to stand as expert evidence under s 47 Evidence Act. The Plaintiffs' primary contention was that this witness did not have the required expertise as he was not a quantity surveyor or building surveyor.

60 I did not read s 47 of the Evidence Act to require that an expert witness have specific qualifications. It may be easier for his evidence to be accepted and given due weight if he were shown to possess specific qualifications on the subject matter he is testifying on. Section 47(2) of the Evidence Act defines an expert as "a person with such scientific, technical or other specialised knowledge based on training, study or experience." Section 47(2) does not limit expertise to specific categories of professionals or otherwise. As long as it can be shown that a particular person has, by dint of experience or otherwise, specialised knowledge, he may be considered an expert under s 47. There is also no requirement now that the opinion to be given must be on an area not known to the court – it is sufficient that the court is able to derive assistance on a point of specialised knowledge. Of course, the precise scope of this will vary from case to case, but I could not find anything here that would justify the exclusion of DW2's evidence. However, in the end, I did not accept the whole of his evidence as there were costs which were not included by him or the Defendants' engineering witness, DW3.

61 The rectification work to be done was only to the extent that the room would be put into a state that would be in accordance with the regulations, and not to the extent that it would be a gym. Much of the Plaintiffs' efforts in court were to support their expert witnesses' testimony as what

was required in terms of rectification works to make the room a gym.

62 As it was then, the evidence of the Plaintiffs' witnesses were not sufficient on their own given my finding that the representation that the room was a gym was not operative. While, the Plaintiffs also argued that DW2 did not provide complete costing, I had in the circumstances of the case to consider what was available to me from the parties, and make the best possible assessment given my findings of fact.

Rectification costs.

63 The evidence I accepted on the costs of rectification were, as the Defendants had also done, partly taken from the Defendants' evidence and partly from the Schedule deposed by PW1. The rectification costs should be the amount that would be incurred to put the room into such a state that it would have been approved for use as a room. I accept that the room as originally constructed had to be rectified. The question was what parameter was to be used.

64 The Plaintiffs evidence on the work required was geared to show the costs that would be needed to construct the room so that it could be used as a gym, and that this was what they incurred. The Plaintiffs contended that the structure was required to withstand a load of 5 kN per square metre. I had some concerns on the use of such a load requirement for a home gym, which I will address below. The rectification work by their case stood at $297,516.54, though in fact the actual final invoices was estimated to total $301,972.92. This is tabulated at Schedule 1, exhibit ACP-11 of the 1st Plaintiff's affidavit. Construction costs alone for strengthening of the existing structure was tabulated at $220,000.

65 However, the Plaintiffs were only entitled to rectify the room to the extent that it was usable and could be approved as a room, rather than as a gym. The Plaintiffs' evidence, no doubt because work was done on that basis, was only in respect of the requirements of a gym. In the event then, I was left only with the evidence of DW2 and DW3. DW3 in his report concluded that the room could be strengthened by the addition of an I-beam. The Plaintiffs took issue with DW3's evidence and expertise, arguing that he was mistaken as to a number of points, such as being mistaken as to the number of pillars shown on diagrams; whether pillars in the structure were built on slabs; and whether there was any steel frame trellis in the structure or diagrams. As noted by the Defendants, there was nothing in the evidence even from the Plaintiffs' expert that the trellis should be taken into account in the load calculations. As for any error in identifying the number of pillars, I did not find that this would affect the conclusion that the room could be sufficiently strengthened by the addition of an I-beam. It was not shown that the calculations leading to that recommendation were so far off that DW3's evidence should on that score be rejected. In any event, even if I rejected the Defendants' evidence entirely on the strengthening works required, it would not follow that I should accept the Plaintiffs' claim in its entirely given that it was on a wholly different premise, *ie* that the room was to be used as a gym. In the circumstances, the Defendants' evidence was the best available to the Court.

66 Thus, the best evidence on rectification was to install an I-beam. Removing the room entirely was not, to my mind, an option. These costs therefore included preliminaries, site inspection and preparation, the cost of installing an I-beam, consultancy services, structure engineers' fees, quantity surveyors' fees, structural surveyors' fees, resident technical officers' fees, cost of materials, government fees, utility charges and property tax. The amount on this basis was $219,916, calculated as follows, taking as the Defendants had done some figures from the 1st Plaintiff's affidavit as the best evidence:

Items	Costs
Preliminaries	$21,400
Site preparation	$5,350
Installing an I-beam	$94,160
Architect's consultancy services	$21,400
Structural Engineers	$8,000
Quantity surveyors	$2,675
Structural Surveyors	$8,000
Resident Technical Office	$1,200
Strengthening works	$48,995.30
Regulatory fees	$700
Utilities for 1 month	$574.92
Property tax for 19 weeks	$7460.78
Total	**$219,916.00**

67 I was satisfied that the need for rectification work made it reasonable for the Plaintiffs to seek alternative accommodation, and that such incurred costs would not be too remote to be recoverable. The loss of accommodation to my mind would be costs that would arise naturally in the usual course of things from the breach of the warranty. I accept that the Plaintiffs were entitled to accommodation costs for the period of rectification. I found that it would be reasonably foreseeable that the Plaintiffs could not stay on the Property while work was being carried out. As to the period that could be claimed, I found this to be 19 weeks on the evidence before me from the Defendant witnesses' evidence as to the rectification required. This represented the period of time the Plaintiffs would have not been able to use the Property so that appropriate works could be done. In comparison, the Plaintiffs themselves had claimed 26 weeks because of the gym related work they say they incurred.

68 The Defendants argued that the evidence showed that the Plaintiffs were going to have to obtain alternative accommodation anyway. The Defendants contended that first, the Plaintiffs intended to carry out renovations anyway and were intending to stay off Property in the duration; and secondly, that there was nothing to support the Plaintiffs' claim in court that they would have terminated that lease early, because there was no termination clause in the lease. I did not accept the Defendants' arguments that there was no loss suffered in this respect. I preferred the evidence from the Plaintiffs that the original intention was for minor renovations only, the installation of a lift, which would not have required them to stay elsewhere, and that despite not providing specifically for early termination in their lease, they were intending to terminate the other lease as soon as they could. It may be that the Plaintiffs would or would not have encountered difficulties following the termination of that lease, but that is an entirely different matter and there was no evidence before me about possible costs to be incurred in such termination. The fact that the Plaintiffs may not have had a ready facility to terminate would not necessarily show that they would have stuck to that lease right to the end. On the evidence before me, I accepted that the Plaintiffs' original intention was to terminate the lease when they were able to move in. As they were unable to move in because of the

rectification work, they should be entitled to costs for the period when they had to be off the property.

69 That would give an additional sum of four months and three weeks' rental at $10,000 per month amounting to a total of $47,500 for the entire duration. The total sum awarded as damages including the cost of rectification was thus $267,416.

Other Issues

70 There were quite a number of issues raised which were not material given my findings, but which I will address briefly in view of the submissions made.

Evidence as to cost of rectification as a gym

71 While I concluded that the damages for rectification should not include the cost of rectification to make the room suitable for a gym, I should note that there was difference in evidence as to what that would have entailed. There was conflicting evidence as to the load requirement needed. The Plaintiffs' witness, PW2 testified that the load standard should be 5 kN per square metre, basing his position on Category C4 of the BS 6399-1: 1996, *Code of practice for dead and imposed loads* (British Standards Institute, September 1996) ("BS 6399-1"). Category C4 was chosen as it covered "areas with possible physical activities". This led the Plaintiffs; witness, PW2, to state in his report (at para 7):

> It was meant to be a Gym room. In accordance with the Building Code it has to have a design live load of 5 KN per sq metre…

The standard that the Plaintiffs' expert thought relevant, one would have thought, was meant for a gym catering to groups of people, perhaps run on a commercial or club basis, rather than a gym used by a typical Singapore family in its home. In contrast, the Defendants' expert, DW3, was of the view that 1.5 kN per square metre was sufficient, applying the requirement for usage within a single family dwelling unit, with a uniformly distributed load, *ie* category A in BS 6399-1. Neither side's expert witness had had experience in the construction of such a room on another property in Singapore and what the required standard might be.

72 While PW2 maintained his position when questioned, it does seem that Category C4 is not concerned with gyms in residential properties. The other part of Category C4, as pointed out by the Defendants, referred to drill halls and drill rooms as well as dance halls and studios and stages. The whole category covered by Category C4 seems to be addressed to situations where there would be mass physical activity: dances, gyms, performances, drills. I was very doubtful that the same standards should necessarily apply to a gym in a house with standard equipment and used only by family members.

73 Apparently there was no available commentary or guidance note on BS 6399-1, and how it may be applied to a home gym. Be that as it may, I could not say on the evidence before me that it should be accepted on the balance of probabilities that the higher requirements put forth by the Plaintiffs should apply. Had a decision been necessary on this point, I would have preferred calling for further evidence.

Plaintiffs' assertions of adverse inference against the Defendants.

74 The Plaintiffs argued that adverse inferences should be drawn under illustration (*g*) of s 116 of

the Evidence Act against the Defendants for failing to call relevant witnesses including the interior designer, structural engineer and the architect as to the purpose of the room. Given my findings above, particularly that there was no operative representation that the room was to be used as a gym, this particular issue was not a live one.

75 In any event, whether an adverse inference should be drawn will depend on various factors, including the relevance and materiality of the evidence to be given by that witness and whom the evidential or legal burden in respect of the specific issue in question rests on. Taking one of the cases cited by the Plaintiff, *Teng Ah Kow and another v Ho Sek Chiu and others* [1993] 3 SLR(R) 43, the Court of Appeal found an adverse inference operated against the defendants in a case of personal injuries arising out of a fire caused by a gas leakage. There, the defendants failed to call their employee, who had been the one responsible for connecting the gas cylinders in question. That case, as well as the other cases cited such as *Sin Lian Heng Construction Pte Ltd v Singapore Telecommunications Ltd and another suit* [2010] 4 SLR 821, was clearly one in which the evidence of the absent witness was relevant and material. In contrast, in the present case, I could not find that the evidence of the witnesses not called would have had a significant impact – the evidence already before the court would generally have been material and sufficient. The 1st Defendant was one of the owners of the Property and would have been the one giving instructions on work on the Property or its structures, thus he would have had personal knowledge of these matters.

Affidavit shortcomings

76 The Plaintiffs took issue with the absence of an attestation clause in DW2's affidavit, citing Malaysian cases. These cases proceeded on the basis that there had to be strict compliance. The Plaintiffs did not cite any local cases, and I am not aware of any case that is binding on me in this regard. While non-compliance is to be deprecated and avoided, the effect of non-compliance requires the court to weigh the objective of achieving justice between the parties against the need to ensure that court directions are observed. In the present case, I could not conclude that the non-compliance was so contumelious that the court should penalise the non-complying party directly, or the affidavit so unreliable that it should be rejected to ensure justice.

77 The Plaintiff also argued that the report was hearsay. All reports are hearsay as they are made out of court. What I believe the Plaintiffs were essentially contending was that the report was not DW2's opinion as it was prepared by others. I accepted however that the report was prepared under his direction, and he was aware of the contents, and exercised his expertise as a director of the business, in giving his opinion in the affidavit.

Defence of estoppel

78 The Plaintiffs also took issue with estoppel by representation raised by the Defendants in respect of the fact of completion. In view of my finding that there was completion in law, this point was moot. The Defendants also did not press the point in their submissions.

Credibility of 1st Defendant and other witnesses

79 The Plaintiffs argued at length on the credibility of a number of the Defendants' witnesses. While there were weaknesses in some aspects of the evidence of these witnesses, these were not such as to render either their credit or credibility wholly suspect, and that the whole of any of these witnesses' evidence should be rejected entirely.

80 An additional attack mounted on DW2 was in terms of the point of the options identified by

DW2. The Plaintiffs argued that what DW2 did in the end was just an academic exercise – preparing the report for persons who were not the owners of the Property. I did not find these arguments to be sound. The quotations were prepared to show the court what the Defendants' version of the costing was.

Market rental

81 As an alternative to accommodation cost, the Plaintiffs put forward a claim for the loss of opportunity to rent out the property for the period that they were unable to use the property. As I had granted at least part of the accommodation cost claim, this was not included in my determination. I was doubtful that this claim could stand on *Hadley v Baxendale* principles – there was nothing in the evidence that showed that this was in the contemplation of parties, or would flow in the natural course of events, as the Plaintiffs seemed to have indicated to the Defendants that they were purchasing it as a home.

Conclusion

82 Having found for the Plaintiffs on the primary claim for damages but not on all their major points, I awarded costs of $65,000, totalling $80,000 after other cost orders were added, inclusive of disbursements. There was some discussion about whether offers to settle were operative, but in the end nothing came out of these.