Chua Chay Lee and Others v Premier Properties Pte Ltd
[2000] SGCA 34

Case Number : CA 182/1999

Decision Date : 11 July 2000

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Tan Lee Meng J; Yong Pung How CJ

Counsel Name(s) : Thio Shen Yi and Priscilla Chang (Thio Su Mien & Partners) for the appellants; Mohan Pillay and Andre Maniam (Wong Partnership) for the respondents

Parties : Chua Chay Lee — Premier Properties Pte Ltd

Contract – Breach – Repudiatory breach – Developer in agreement with apartment owners to exchange new apartments for old apartments in en bloc purchase of site – Developer delaying construction of new apartments by one year – Whether developer repudiating contract – Whether apartment owners entitled to terminate agreement

(delivering the grounds of judgment of the court): In this case, the appellants, the owners of apartments to be built by the respondents at St Martin`s Drive, Singapore, claimed the right to terminate their contract with the respondents on the ground of anticipatory breach because the respondents were not in a position to complete and hand over the said apartments to them by the deadline stipulated in the contract. The respondents, who admitted that there was a delay in the completion of the construction of the apartments, contended that the circumstances of the delay were such that the question of a repudiatory breach on their part did not arise. As such, they argued that the appellants should be satisfied with damages for the delay. In the court below, the learned judicial commissioner held that as the respondents had not repudiated the contract, the appellants were not entitled to terminate the contract. We dismissed the appellants` appeal against the decision of the learned judicial commissioner and now give the reasons for our decision.

A Background

The respondents, who are property developers, wanted to redevelop a site at St Martin`s Drive, on which stood 24 apartments. As such, they offered to acquire the apartments on the basis of an en-bloc transfer of all the 24 apartments to them. The agreement for the en-bloc transfer of the apartments to the respondents (hereinafter referred to as the `agreement`), which was dated 22 March 1996, gave the apartment owners two options. First, an apartment owner could sell his or her apartment to the respondents for $2.4m. Secondly, an apartment owner could, at no cost, exchange his or her old apartment for a new one to be built by the respondents on the redeveloped site.

The appellants, who owned apartments on the site in question, opted to exchange their old apartments for new ones. Unlike those who sold their apartments to the respondents, those who opted to exchange their old apartments for new ones received no money for their apartments. As they had to wait for some time before taking delivery of their new apartments, a number of terms in the agreement protected their rights. To begin with, the appellants each received a banker`s guarantee for $2,805,000 as security for the respondents` performance of the obligation to provide them with new apartments. Secondly, the respondents were required by cl 5.4 of the agreement to hand over the new apartments to the appellants not later than 33 months after all the old apartments had been handed over to them. Thirdly, cl 5.4 of the agreement further provided that in the event of a delay in the handing over of the new apartments to the appellants, the respondents were to pay the appellants liquidated damages at the rate of 10% per annum on the sum of $2,805,000, the amount stipulated in the banker`s guarantee.

After signing the agreement and taking over the appellants` apartments, the respondents took steps to acquire some land which was adjacent to the site on which the appellants` old apartments stood. This was permitted under the agreement but it was quite a time-consuming task. In fact, negotiations for a neighbouring lot, on which stood a sub-station which had to be decommissioned, took over a year. As a result of the acquisition of additional land, the respondents were able to increase the number of apartments to be built on the enlarged site.

In the meantime, the appellants were unhappy that there was no construction activity on the development site after the completion of piling work. The deadline for handing over the new apartments to the appellants was 28 August 1999 (hereinafter referred to as the `handing over date`). The appellants feared that the respondents could not complete their new apartments by the handing over date because the site was overgrown with vegetation in 1998 and appeared to have been abandoned. According to the third appellant, the respondents indicated in 1998 that they did not intend to build the promised apartments and after the preview of the working model of the project in January 1998, the respondents approached the appellants to accept in exchange for their new apartments on the St Martin`s site new apartments which the respondents were building in Anderson Road. She said that the respondents dropped the idea of a proposed swop of apartments even though the appellants showed a keen interest. Thereafter, the appellants were alarmed by newspaper reports on financial difficulties faced by the respondents. On 24 March 1998, the Business Times quoted the respondents` representative as saying that the respondents would sell their St Martins` land if the price was right.

Although the position looked bleak from the appellants` point of view in 1997, 1998 and early 1999, things finally began to move after the first quarter of 1999. By April 1999, all the approvals required for the expanded housing project were obtained. The respondents envisaged that their housing project, which had been expanded with the acquisition of adjoining land, would be completed in two phases. Phase I would include the appellants` apartments. The main contract for the housing project was awarded in early May 1999 and the contractors were contractually bound to complete Phase 1 of the project within 63 weeks failing which liquidated damages at the hefty rate of $10,000 per day would be payable by them.

On 22 April 1999, the respondents invited the appellants to select their new apartments on 8 May 1999. However, the appellants, who noted that the date for the completion of the housing project was stated as `31 December 2002` in the respondents` brochure for their housing project, were minded to end their contract with the respondents. As such, the appellants` solicitors wrote to the respondents` solicitors on 11 May 1999, to terminate the agreement. The relevant portions of the letter are as follows:

> *[O]ur clients have perused the brochure and wish to express their shock and utter dismay that your clients` expected TOP date for the St Martin Residence is on 31 December 2002. This is contrary to your clients` expressed intention to honour ... all the terms of the agreement.*
>
> *As we have constantly reiterated in our previous letters, our clients had entered into the agreement solely on the basis that their home would be exchanged for another at the same premises by 28 August 1999. The unreasonable long delay ... constitutes a blatant breach of a fundamental condition of the agreement ...*
>
> *By reason of the foregoing, your clients have repudiated the agreement. In light of your clients` repudiation of the agreement, take notice that we hereby, for*

> *and on behalf of our clients, accept your clients` repudiation of the agreement, thereby terminating the same without prejudice to any of our clients` rights and remedies in law and/or equity against your clients for their breach.*

On the following day, the appellants` solicitors wrote to the bank to demand the payment of $2,762,603.84 under the performance guarantee. The sum was with respect to the price of their property as at the date of the agreement, namely, $2.4m, the sum paid to the cash vendors, as well as interest on the said sum.

On 12 May 1999, the respondents` solicitors replied that their clients considered the termination by the appellants of the agreement as wrongful and that any call on the performance bond would be invalid and unconscionable. On 18 May 1999, the respondents` solicitors wrote to the appellants` solicitors to point out that the appellants had already been verbally informed that the date for completion for their apartments was set back by only about a year. It was placed on record that the main contractor had been awarded the contract and that the main contractor was required to complete the construction work in question within 63 weeks from May 1999. Finally, the respondents` solicitors stated the respondents` position in the following unambiguous terms:

> *While our clients accept that there will be a delay in the completion of the project, our clients` position is that this cannot constitute repudiatory conduct ...*

> *Our clients` position is accordingly that your clients` termination is wrongful and our clients do not accept the same. Your clients have by their conduct acted in repudiatory breach of contract. Our clients choose to affirm the contract.*

On 21 May 1999, the appellants` solicitors responded to the respondents` solicitors` letter of 18 May 1999 and said as follows:

> *Even by your clients` admission, the earliest date of completion is August 2000, which is one year later than the original handover date. By any standard, one year is too long a waiting period for our clients. In the circumstances, your clients have committed an anticipatory breach ...*

Faced with the appellants` refusal to reconsider their position, the respondents took out an originating summons on 21 May 1999 to determine whether the appellants` demands under the performance guarantees were valid. They also applied for an interim injunction to restrain the appellants from receiving any payment under the guarantees until after the validity of their demands has been determined by the court. The appellants in turn sought a declaration from the court by way of a notice of counterclaim that the respondents` breach of contract was, inter alia, repudiatory.

Decision of the judicial commissioner

The learned judicial commissioner rightly took the view that the main issue to be determined was whether or not the plaintiffs had, in the circumstances of the case, repudiated the agreement so as to entitle the appellants to terminate it on 11 May 1999. His Honour accepted that the respondents

were not in a position to hand over the apartments to the appellants by 28 August 1999 and that the expected delay in the completion of the appellants` apartments was 12 months. His Honour said that while the respondents had breached the agreement, `in the context of the 33 months given to the [respondents] to complete the new flats, 12 months does not appear to be an unreasonable long period of delay given the 10% liquidated damages rate.` As such, his Honour held that the respondents had not repudiated the agreement and that the appellants were not entitled to terminate the agreement on 11 May 1999. As such, the appellants had to be content with damages, computed in accordance with the liquidated damages clause in the agreement. His Honour also took the view that the call on the bank guarantee was, in any case, made prematurely and was invalid for this reason.

The appeal

The appellants` appeal was only with respect to whether or not the learned judicial commissioner erred in holding that the appellants were not entitled to terminate the contract on 11 May 1999. The appellants contended that his Honour should not have accepted the respondents` evidence of the projected period of delay as realistic. Furthermore, they submitted that for the purpose of determining the effect of the expected delay on the rights of the parties, the question of delay should have been viewed more widely. Instead of focussing on the duration of the delay, emphasis should have been placed on whether or not the respondents` conduct justified the appellants` termination of the contract.

Whether the projected completion date was realistic

The appellants contended that there was no basis for the learned judicial commissioner to accept the claim of the respondents and the main contractor that Phase I of the housing project could be completed by August 2000. The appellants also said that if the respondents` projection of the completion date for Phase I of the housing project was material to the case, the learned judicial commissioner should have directed that the originating summons be converted into a writ action so that the appellants could lead evidence to challenge the respondents` allegations that the projections were realistic.

In our view, there is no merit whatsoever in the appellants` contentions. The appellants have themselves to blame for failing to effectively counter the respondents` evidence that the appellants` apartments are likely to be handed over to them by August 2000. It is obvious that in a case such as this, the length of the delay would be of utmost importance for the purpose of determining the rights of the aggrieved party. On this point, the learned judicial commissioner said:

> *The [appellants] say that even in relation to Phase 1, the estimates given for its completion [were] overly optimistic as it would be impossible to complete even Phase I of the development. However, the [appellants] did not produce any expert evidence on this. On the other hand, the [respondents] have produced evidence that the building contract was awarded on this basis as well as the architects` letters in this regard.*

His Honour`s conclusion cannot be faulted. The building contract awarded by the respondents to the main contractors required the first phase of the building project, which concerns the appellants` apartments, to be completed within 63 weeks. The main contractor expressed confidence that he can complete the job on time and the architects stated that although the period is a bit tight, the

construction work can, barring unforeseen circumstances, be completed on schedule. The appellants suggested that the evidence of the building contractors and architects should be viewed on the basis that they are interested parties. However, while the main contractor and the architects are involved in the building project in question, they are not affected by the outcome of the litigation between the appellants and the respondents. It should also be noted that the main contractor is liable to pay liquidated damages delay in respect of Phase I of the project at the rate of $10,000 per day or around $300,000 per month. In contrast, the amount payable in respect of delay in Phase II of the project is only $4,500 per day. The main contractor can thus be expected to put in more resources to try and complete Phase I on time. We thus see no reason to disturb the finding of the learned judicial commissioner that the expected delay in the handing over of the new apartments to the appellants is around one year.

Effect of the delay of 12 months

Whether or not the appellants are entitled to terminate the contract on the ground of a delay of one year in the handing over of the apartments to them will next be considered.

This case concerns an alleged anticipatory breach on the respondents` part. The rules for determining whether or not there has been a repudiatory breach are the same whether the breach complained of is an anticipatory breach or one which occurs after the time for performance has arrived. In **Thorpe v Fasey** [1949] Ch 649, 661, Wynn-Parry J rightly pointed out that `there is neither any good reason for a distinction nor does there exist any distinction between the nature of repudiation which is required to constitute an anticipatory breach and that which is required where the alleged breach occurs after the time for performance has arisen`. His Lordship`s approach was endorsed in **Universal Cargo Carriers Corp v Citati** [1957] 2 QB 401, 438 by Devlin J, who explained that as a party is allowed to anticipate an inevitable event and is not obliged to wait till it happens, it must follow that the breach which he anticipates is of the same character as the breach which would actually have occurred if he had waited.

It is common ground that for the purpose of the agreement, time is not of the essence. As for when a delay in such a case may result in the defaulting party being regarded as having repudiated the contract, the following words of Devlin J in **Universal Cargo Carriers Corp v Citati** [1957] 2 QB 401, 426 are instructive:

> *Where time is not of the essence of the contract - in other words, when delay is only a breach of warranty - how long must the delay last before the aggrieved party is entitled to throw up the contract? The theoretical answer is not in doubt. The aggrieved party is relieved from his obligations when the delay becomes so long as to go to the root of the contract and amount to a repudiation of it.*

As for when a delay may be regarded as having gone to the root of the contract, his Lordship said that it has been settled by a long line of authorities that the yardstick by which such a delay is to be measured is not that of a reasonable period of time. Instead, delay in performance of contractual obligations which goes to the root of the contract may be characterised as delay which frustrates the contract.

While it may be convenient to determine the effect of delayed performance of contractual obligations by asking whether it goes to the root of the contract, delay which constitutes repudiatory conduct

has been elucidated in other ways. In **Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd** [1962] 2 QB 26, 66, Diplock LJ took the view that in cases of delayed performance of contractual obligations, the following question is relevant:

> *[D]oes the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?*

In **Photo Production Ltd v Securicor Transport Ltd** [1980] AC 827, 849 and in **Afovos Shipping Co SA v R Pagnan & F Lli** [1983] 1 All ER 449, 454-455; [1983] 1 WLR 195, 203, Lord Diplock took the opportunity to reiterate that the effect of a failure by one party to perform his primary obligation depends on whether it has the effect of depriving the other party of substantially the whole benefit he was intended to have under the contract.

Yet another elucidation of the type of breach required to entitle the aggrieved party to terminate the contract may be found in **The Nanfri; Federal Commerce & Navigation Co Ltd v Molena Alpha Inc & Ors** [1979] AC 757, 783, where Lord Fraser said:

> *The test of repudiation has been formulated in various ways by different judges. I shall adopt the formulation by Buckley LJ in **Decro-Wall International SA v Practitioners in Marketing Ltd** [1971] 1 WLR 361, 380c as follows:*
>
> *`Will the consequences of the breach be such that it would be unfair to the injured party to hold him to the contract and leave him to his remedy in damages as and when a breach or breaches may occur? If this would be so, then a repudiation has taken place.`*

Although there are different ways of expressing the test for repudiation, they are not inconsistent with one another. In **The Nanfri; Federal Commerce & Navigation Co Ltd v Molena Alpha Inc & Ors** [1979] AC 757, 779, Lord Wilberforce aptly observed, after referring to a number of these formulations, that the various formulations by the authorities as to when a breach amounts to a repudiation `represent, in other words, applications to different contracts of the common principle that, to amount to repudiation a breach must go to the root of the contract.`

In this case, the learned judicial commissioner applied the right test for the purpose of determining whether or not the respondents had repudiated the contract. Relying on **Universal Cargo Carriers Corp v Citati** [1957] 2 QB 401, his Honour examined all the circumstances surrounding the agreement before he concluded that the respondents had not repudiated the agreement by delaying the completion of the appellants` apartments by 12 months. It is worth remembering that in **Universal Cargo Carriers Corp v Citati** [1957] 2 QB 401, 435, Devlin J reiterated that while the application of the doctrine of frustration is a matter of law, the assessment of a period of delay sufficient to constitute frustration is a question of fact. It is trite law that the finding of fact of the trial judge is not to be lightly interfered with.

The learned judicial commissioner furnished a number of reasons for finding that the respondents had not repudiated the agreement. The appellants have tried to attack some of his reasons. One need not agree with each and every reason given by the learned judicial commissioner. What is important is that if one were to ask whether or not the respondents` delay of around 12 months for the handing

over of the appellants` new apartments is an anticipatory breach which goes to the root of the contract or is a frustrating delay or will lead to performance by the respondents of their contractual obligations in a manner which is substantially inconsistent with the bargain between them and the appellants, there is no reason whatsoever to disturb the finding of the learned judicial commissioner.

There is no doubt that the respondents had been rather tardy in performing their contractual obligations. The appellants have certainly good reason to be unhappy with the delay. However, whatever grouses the appellants may have had in the past, things had finally begun to move along by 11 May 1999, the day they purported to terminate the agreement. Whether or not the project site was then lush with overgrown vegetation and whatever the newspapers may have reported about the financial standing of the respondents, the main contractor for the housing project had been appointed by the respondents. More importantly, the main contractors were, as has been mentioned, obliged to complete Phase 1 of the project, which includes the appellants` new apartments, by 21 July 2000, failing which they would have to pay liquidated damages of $10,000 per day, a rather stiff sum. The appellants had been invited on 22 April 1999 to select their housing units on 8 May 1999. Whatever the respondents` brochure may have said about the completion date for the project, the appellants had been informed that there would be a delay of around one year in the handing over of the new apartments to them.

The inclusion of a liquidated damages clause in the agreement shows that the parties had contemplated a possible delay in the completion of the appellants` apartments and had provided for the consequences of delay in the agreement. In this case, the amount payable per annum by the respondents to the appellants for the delayed handing over of the apartments, namely $280,500, is not to be scoffed at. The learned judicial commissioner understandably paid much attention to the liquidated damages clause.

The appellants attempted to downplay the importance of the liquidated damages clause in a number of ineffective ways. To begin with, they contended that notwithstanding the presence of the liquidated damages clause, one must take into account the fact that the respondents` primary obligation was to hand over the completed apartments to them by 28 August 1999. They submitted that as the respondents failed to comply with this primary obligation, they were entitled to terminate the agreement. However, the primary obligation of the respondents under the agreement must be determined in the light of all its provisions. If the appellants are entitled to terminate the agreement as soon as it becomes obvious that the 28 August 1999 deadline cannot be met, the liquidated damages clause would be superfluous.

In any case, the appellants have not been consistent in their approach towards the 28 August 1999 deadline. In the written submissions to the learned judicial commissioner, their counsel conceded that a delay of a ***few months*** or of a reasonable time may be acceptable. Paragraph 46 of the submissions is as follows:

> *It cannot be said that the agreement allows for such abnormal delay. Whilst it is generally reasonable to give allowances for a few months of delay, the present delay ...*
>
> *The plaintiffs were to deliver a new home to the defendants by latest August 1999 or* ***within a reasonable time*** *thereafter in exchange for the [appellants] surrendering their old homes to the [respondents] in 1996. [Emphasis added.]*

Needless to say, the appellants` counsel`s submission cannot be countenanced. The test of a

reasonable time for the purpose of determining the length of delay which goes to the root of the contract has been rejected in favour of frustrating delay in a long line of authorities.

The first appellant conceded in paragraph 47 of her affidavit that a delay of a month or two might have been acceptable. She said:

> *Although cl 5.4 of the agreement provides for a liquidated damages clause in the event of delay, it was never within our contemplation nor was it our intention that the delay which it was intended to provide for, would be more than a one or two month delay ... It was our understanding and it still is that the liquidated damages clause was only to cover a short delay of at the maximum, a couple of months ...*

If it had been intended that cl 5.4 of the agreement was to apply only if there is a short delay of not more than two months, the clause should have been drafted in very different terms. As such, the question of limiting the application of cl 5.4 to a short delay does not arise.

The appellants also suggested that the liquidated damages clause was only applicable with respect to delays caused by events such as inclement weather, which are outside the control of the respondents. If this is the case, nothing would have been easier than for it to have been stated in the clause. In any case, it did not escape our attention that on 28 April 1997, the third appellant`s law firm, which acted on behalf of the respondents for a long time, outlined to the respondents their liabilities under the agreement in the following terms:

> *You have requested for our written opinion on your liabilities under the sale agreement ...*
>
> *In relation to the exchange vendors, you are obliged to ... deliver the completed units not later than 33 months from 29 November 1996 that is to say, by 30 August 1999, failing which you shall be liable to pay liquidated damages of 10% per annum on $2,805,000 or $768.493 per day.*

It is worth noting that although the third appellant`s law firm referred to the effect of the liquidated damages clause, there is a deafening silence with respect to a time limit for its application or to its application only in the event of unavoidable delay caused by, inter alia, bad weather.

The appellants have also pointed out that the respondents are not entitled to any extension of time for delay because the only ground for any extension of time provided for under cl 5.4 of the agreement is if the appellants themselves had delayed in delivering vacant possession of the old apartments to the respondents. This submission must be rejected. The question of an extension of time for the respondents under cl 5.4 of the agreement does not arise in this case. If the delay fell within the ambit of the extension provision in cl 5.4, the respondents would not be in breach and need not pay liquidated damages to the appellants.

The sensible way of interpreting the agreement is that the target date for handing over the new apartments is 28 August 1999 but if there is any delay which does not go to the root of the contract, the appellants must be compensated with damages at the rate of 10 per cent per annum on the agreed sum in the banker`s guarantee. As for the appellants` concern that the respondents are not entitled to buy time for themselves for the purpose of delaying the project, we agree that the

respondents are not entitled to assume that they can continue to delay the project indefinitely merely because they are prepared to pay liquidated damages. In **Universal Cargo Carriers** [1957] 2 QB 401, 430, Devlin J issued a timely reminder that `a party to a contract may not purchase indefinite delay by paying damages`. A time will come when the delay is so great that the defaulting party is guilty of repudiatory conduct. That point of time had not arrived when the appellants terminated the contract on 11 May 1999. As such, the learned judicial commissioner`s findings should not be disturbed.

Deliberate breach by the respondents

The appellants also argued that the learned judicial commissioner failed to give enough attention to the respondents` conduct. Their counsel submitted as follows:

> *The learned judicial commissioner should have construed the question of delay more widely, instead of limiting himself to construing it as a measurement of time. In this regard, his Honour should not have confined himself to* ***Universal Cargo Carriers*** *as the only yardstick for this case. He should have considered the alternative yardstick established in [* ***Laurinda Pty Ltd & Ors v Capalaba Park Shopping Centre Pty Ltd****] ...*
>
> *Since the issue was whether the respondents` anticipatory breach was repudiatory, the learned judicial commissioner, after establishing the proper yardstick for repudiatory breach, should have considered whether the conduct of the respondents justified the appellants` termination on 11 May 1999.*

The conduct of the respondents did not escape the attention of the learned judicial commissioner when he looked into all the circumstances of the case. In any case, when considering the conduct of a defaulting party, the following words of Lord Wilberforce in **Suisse Atlantique SociÃ©tÃ© d`Armement Maritime SA v NV Rotterdamsche Kolen Centrale** [1967] 1 AC 361, 435, are worth noting:

> *The `deliberate` character of a breach cannot, in my opinion, of itself give to a breach of contract a `fundamental` character, in either sense of that word. Some deliberate breaches there may be of a minor character which can appropriately be sanctioned by damages: some may be, on construction, within an exceptions clause ... This is not to say that `deliberateness` may not be a relevant factor: depending on what the party in breach `deliberately` intended to do, it may be possible to say that the parties never contemplated that such a breach would be excused or limited: and a deliberate breach may give rise to a right for the innocent party to refuse further performance because it indicates the other party`s attitude towards future performance. All these arguments fit without difficulty into the general principle: to create a special rule for deliberate acts is unnecessary and may lead astray.*

As for **Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd** [1989] 166 CLR 623, the Australian case relied upon by the respondents, we do not think that it laid down another yardstick regarding the effect of delay on the aggrieved party`s rights. The facts in that case, shorn of details, are as follows. Under an agreement for the lease of part of a shopping centre, the lessor agreed to procure the registration of a formal lease or to deliver a registrable lease to the lessee. The shopping centre opened on 1 December 1985 and the lessee commenced business on 3 December 1985. On 3

January 1986, the lessee paid the fees required for the stamping and registration of the lease. As no copy of the lease was delivered, the lessee again asked for a copy of the lease on 14 March 1986. The lessor`s solicitors replied that the lease had been executed and would be provided `as soon as we are able to`. On 21 August 1986, the lessee`s solicitors wrote to the lessor`s solicitors that `in view of the unexplained and lengthy delay, it appears reasonable that our clients require your client to complete registration within fourteen days from the date hereof`, and that if this was not done, their clients would reserve their rights in respect of the default. The lease was not registered within the stipulated time. On 5 September 1986, the lessee`s solicitor wrote to say that their client was no longer bound by the lease. The lessee then sought a declaration that the lease had been validly determined. It was held that the lessor`s failure to deliver a registrable lease to the lessee was a repudiation of the agreement and that the lessee was entitled to treat it as terminated.

The appellants relied on the following passage from Mason CJ`s judgment at p 634:

> *There is a difference between evincing an intention to carry out a contract only if and when it suits the party to do so and evincing an intention to carry out a contract as and when it suits the party to do so. In the first case, the party intends not to carry out the contract at all in the event it does not suit him. In the second case, the party intends to carry out the contract but only to carry out as and when it suits him. It is much easier to say of the first than of the second case that the party has evinced an intention no longer to be bound by the contract or to fulfil it only in a manner substantially inconsistent with his obligations and not in any other way. But the outcome in the second case will depend on its particular circumstances, including the terms of the contract. In some situations, the intention to carry out the contract as and when it suits the party may be taken to such lengths that it amounts to an intention to fulfil the contract only in a manner substantially inconsistent with the party`s obligations and not in any other way.*

The appellants placed great emphasis on the last sentence of the above passage from Mason CJ`s judgment. However, they failed to note that Mason CJ referred to the carrying out of contractual obligations `in a manner substantially inconsistent with the party`s obligations and not in any other way`. In similar vein, Brennan J said at p 643 that delay `will amount to repudiation if the defaulting party evinces an intention no longer to be bound by the contract ... or shows that he intends to fulfil the contract only in a manner substantially inconsistent with his obligations, and not in any other way`. These statements are an echo of the following words of Lord Wright in **Ross T Smyth & Co Ltd v TD Bailey Son & Co** [1940] 3 All ER 60, 72:

> *I do not say that it is necessary to show that the party alleged to have repudiated should have an actual intention not to fulfil the contract. He may intend in fact to fulfil it, but may be determined to do so* ***only in a manner substantially inconsistent with his obligations and not in any other way****. [Emphasis added.]*

Lord Wright added that it must always be a question in such cases whether a refusal by word or conduct goes to the root of the contract so as to constitute a total repudiation. His approach was approved in **The Nanfri** [1979] AC 757, 778-779 by Lord Wilberforce, who linked it with Diplock LJ`s approach in the ***Hongkong Fir*** case (supra) in the following succinct terms:

> *I do not say that it is necessary to show that the party alleged to have repudiated should have an actual intention not to fulfil the contract. He may*

> *intend in fact to fulfil it, but may be determined to do so only in a manner substantially inconsistent with his obligations and not in any other way. (* ***Ross T Smyth & Co Ltd v TD Bailey, Son & Co*** *..., per Lord Wright) such as to deprive `the charterers of substantially the whole benefit which it was the intention of the parties ... that the charterers should obtain from the further performance of their own contractual undertakings`. (* ***Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*** *per Diplock LJ.)*

It is therefore clear that in ***Laurinda*** `s case, the court applied principles which did not depart from those established in the English cases referred to above. Indeed, Mason CJ emphasized that mere delay on the part of the lessor to register the lease does not, without more, justify a refusal by the lessee to comply with the contractual terms. He said at p 633 that something more, such as conduct amounting to a clear repudiation by the lessor of his obligations would be required to justify the termination of the contract by the lessee. He noted that as late as September 1986, the month the lease was terminated, the lessor had not even taken steps to obtain their mortgagee`s consent to the lease of the shop to the lessee. Neither had they taken any step to complete the lease in accordance with the agreement or to make arrangements for stamping the lease. Even on these facts, Mason CJ found the matter `finely balanced` although he concluded that inference of repudiation on the part of the lessor was sustainable. In contrast, in the case before us, the respondent had finally taken concrete steps towards fulfilling his contractual obligations when the appellants purported to terminate the contract on 11 May 1999. It might have been different if no main contractor had been appointed by that date or if the time given to the main contractor to complete the construction of the appellants` apartments was such that the delay in handing over the new apartments to the appellants could be regarded as a frustrating delay. In short, whether one applied English cases or ***Laurinda`s*** case to the facts in this case, the only reasonable conclusion is that the appellants were not entitled to terminate the contract when they purported to do so on 11 May 1999. They have not shown how a delay of 12 months, in the context of a 33-month period of construction, coupled with the payment of $280,500 in liquidated damages to each of them, can be a frustrating delay which goes to the root of the agreement.

Affirmation

The respondents also contended that the appellants are in no position to terminate the contract as they have affirmed the contract. As we have held that the respondents did not repudiate the agreement, there is no need for us to consider whether the appellants have affirmed the agreement.

Conclusion

It must always be borne in mind that the repudiation of a contract is a serious matter and is not to be lightly found or inferred. For the reasons stated above, the appellants` appeal was dismissed with costs.

Outcome:

Appeal dismissed.