Ho Kian Siang and Another v Ong Cheng Hoo and Others
[2000] SGHC 136

Case Number : Suit 600017/2000

Decision Date : 11 July 2000

Tribunal/Court : High Court

Coram : Lee Seiu Kin JC

Counsel Name(s) : Molly Lim SC and Belinda Ang (Peter Low Tang & Belinda Ang) for the plaintiffs; Sreenivasan and Derrick Wong (Derrick Ravi Partnership) for the first and second defendants; Anthony Lee and Lynette Chew (Bih Li & Lee) for the third defendants

Parties : Ho Kian Siang; Another — Ong Cheng Hoo

Contract – Remedies – Damages – Assessment of damages – Date of assessment -Plaintiff claiming for specific performance only and electing for damages only at trial – Whether damages to be assessed at time of election, time of breach, or other time

: In this action the first and second plaintiffs (`the plaintiffs`) seek an order for specific performance in respect of a contract for sale and purchase of 39 Walmer Drive (`the property`) entered into between the plaintiffs and the first and second defendants (`the defendants`) on 22 March 1999. The third defendants (`the bank`) were the mortgagees of the property at the material time. The defendants failed to complete on the contractual date for completion, viz 29 June 1999 and that situation remained up to the first day of trial. The primary reason for this was the inability of the defendants to secure a discharge of their mortgage. This was because the outstanding sum owed to the bank was in excess of the sale price and the defendants did not have funds to pay the difference. In addition, one of the conditions of completion was that the temporary occupation permit (`TOP`) for the property must have been issued and this had not been done on 29 June 1999. The TOP was finally obtained sometime in November 1999 and after that date it was no longer an impediment to completion.

The defendants had been in default under their mortgage to the bank since mid-1998. On 21 December 1999 the bank took out OS 1963/99 (`the OS`) in which one of the prayers was for an order for the defendants to deliver up to the bank the property and an adjoining property known as 39A Walmer Drive. The plaintiffs, having an interest in the matter, applied for and obtained an order joining them as defendants in the OS.

On the first day of trial, 29 May 2000, the plaintiffs entered into a settlement agreement with the bank in this action and the OS. In respect of the OS the plaintiffs withdrew their opposition and with the defendants` consent, I gave an order in terms of the prayers therein. As mortgagees in possession, the bank agreed to sell the property to the plaintiffs for $1.7m. The defendants agreed with the bank that they would not object to the sale of the property for this sum. With that, the plaintiffs discontinued their claim against the bank in this suit. By this settlement, the plaintiffs have effectively abandoned their claim for an order for specific performance and they asked the court to grant them damages in lieu thereof.

The issue

The defendants do not dispute that they are liable to the plaintiffs in damages. As a result of the settlement between the plaintiffs and the bank on the first day of trial, the issues before me have been reduced to just the question of the quantum of damages that the defendants are liable for. The

plaintiffs contend that damages should be assessed as at the date on which they elected for damages, ie 29 May 2000. The defendants submit that damages should be assessed as at the following dates:

(i) 29 June 1999, which is the contractual date for completion and the date the contract was breached; alternatively,

(ii) August or September 1999 when the defendants orally informed the plaintiffs that they would not be able to complete due to their inability to discharge the mortgage to the bank, ie the date when the contract was `lost`; alternatively,

(iii) December 1999 or January 2000 when the defendants informed the plaintiffs of this in writing.

Under the sale and purchase agreement of 22 March 1999, the price of the property was $1.318m. Before me the parties agreed that the market value of the property on three key dates were as follows:

(a) $1.45m on 29 June 1999;

(b) $1.50m in December 1999/January 2000;

(c) $1.65m on 29 May 2000.

If the plaintiffs` contention is upheld, then damages would be the difference between $1.65m and the purchase price of $1.318m, viz $332,000. If any of the defendants` contentions are correct, damages would range from $132,000 to $182,000.

Interim orders

Judgment was reserved at the end of the trial. However, as the defendants had admitted that they were liable to the plaintiffs in damages for at least $132,000, I made the following interim orders:

(i) that there be judgment against the defendants for $132,000;

(ii) that the defendants refund to the plaintiffs` solicitors the deposit of $13,180;

(iii) that the defendants` previous solicitors refund to the plaintiffs` solicitors the deposit of $118,620.

The facts

In 1990 the defendants purchased a plot of land with a detached house then known as 39 Walmer Drive. They subsequently decided to re-develop it by constructing a pair of semi-detached houses on the land and sub-dividing the title. They obtained various loans from the bank and mortgaged the land as security. Unfortunately for them their business suffered in 1998. They encountered cash flow problems and in June 1998 defaulted on the payment of the loan instalments. This was rectified after the bank issued a letter of demand. However the defendants` problems did not stop there. They had some difficulty in paying their building contractor and the bank had to step in and issue a guarantee in order to ensure that the work proceeded. The defendants say that they explained their problems to

the representatives of the bank and were told to sell the houses which were still under construction. In any event at some point, the defendants decided to sell one of the houses to reduce their financial burden.

In early 1999 the plaintiffs were looking for a property. They chanced upon the property under construction and made inquiries to the foreman on the site. They were referred to the defendants and after some negotiation, principally as to price, the defendants granted the plaintiffs an option to purchase on 9 March 1999. The plaintiffs exercised this option on 22 March by payment of the usual deposit. Under the contract, completion was fixed on 29 June 1999 and one of the conditions was that the TOP would have been obtained by then.

The defendants` solicitors at the time, M/s Sim Mong Soo & Co (`SMSC`) wrote to the bank on 22 March 1999 to inform them of the sale and to request, among other things, for a redemption statement for the mortgage. On 5 April M/s Foo & Quek (`FQ`) replied on behalf of the bank and included a redemption statement that required the payment of the full amount outstanding under the mortgage, viz about $3m. As this sum was secured by the mortgage over the entire land and the two buildings, of which the defendants were selling only one half to the plaintiffs, SMSC wrote to FQ to remind them of this and to seek a reduced redemption sum in order to be able to complete the sale. In their letter to FQ dated 7 May, which was forwarded to SMSC on 10 May, the bank stated that they would agree to the sale subject to two conditions:

(i) payment of a sum of at least $1.7m, or a sum sufficient to reduce the security ratio to 80% of their valuation of the remaining unit; and

(ii) placement of a fixed deposit of about $90,000 as security for the guarantee issued in favour of the building contractor.

In her affidavit, the second defendant said that she and the first defendant subsequently instructed SMSC to inform the plaintiffs `at the earliest opportunity` that they were unable to complete. During cross-examination the second defendant elaborated that she told her solicitor, Sim Mong Soo (`Sim`), that they were facing financial problems and were unable to pay the difference between the balance payable under the sale contract and the redemption sum required by the bank. She said that she instructed Sim to tell the plaintiffs` solicitors that they could not complete the transaction. However there is no record of any document emanating at that time from SMSC, or from the defendants for that matter, in which the plaintiffs or their solicitors were advised that the defendants were unable to complete or would not complete. The first document that hinted of this only surfaced some seven months later, on 6 January 2000. I will deal with that later. Returning to May 1999, the evidence from the contemporary documents points to quite the opposite, ie that the defendants were preparing for completion. On 2 June, SMSC wrote to the plaintiffs` solicitors handling the purchase, M/s RCH Lim & Co (`RCHL`), forwarding the documents of title with a request to return one copy of the Schedule of Deeds duly signed. This letter was copied to the defendants. SMSC on 3 June wrote to the CPF Board giving notice of redemption of the CPF charge on the property and requesting the title deeds and a redemption statement as at 29 June. Again this letter was copied to the defendants. However there is no correspondence from SMSC after this until after the contractual completion date of 29 June. They failed to reply to inquiries from RCHL, FQ and the solicitors for the CPF Board, and the letters grew increasingly anxious as the completion date neared.

On 29 June, RCHL wrote to SMSC to state that the plaintiffs were ready and willing to complete the purchase on that day and pointed out the provision in the contract on interest for late completion. SMSC did not reply to this letter. RCHL wrote another letter to SMSC dated 16 July, which reads as follows:

> *We refer to our letter dated 29 June 1999 which we have not as yet heard from you thereon.*
>
> *Could you please let us know when your clients expect to get the temporary occupation permit for the above building and also the separate certificate of title for the property so that completion can take place. Your early reply would be appreciated.*

This letter suggests that the plaintiffs had instructed RCHL that the defendants would complete upon obtaining the TOP and a sub-division of the land.

On 30 July 1999, after a long silence, SMSC wrote a rather puzzling letter to RCHL. It states as follows:

> *We have sent all letters to our clients for their instructions.*
>
> *We have also reminded them of the completion date. However, we have yet to hear from them. We will let you know their reply on your letters as soon as we have heard from them.*

From the documents up to this stage, particularly this last letter, the irresistible conclusion is that as of 30 July 1999, SMSC had not received any instructions to abort the sale. I must add that just before the trial Sim wrote to the defendants` solicitors to state that he was prepared to give evidence in court. The defendants have chosen not to call him as a witness. When asked to explain why Sim had not acted in accordance with their instructions, the second defendant was not able to say anything. In the circumstances, I have no doubt that there is no truth in the second defendant`s assertion that upon learning that the bank required them to redeem the sum of $1.7m, they instructed SMSC to inform the plaintiffs that they were unable to complete.

RCHL replied on 19 August, asking whether the defendants had instructed SMSC as to when they expected the TOP to be issued and the sub-division made ` ***so that completion can take place*** `. When no reply was immediately forthcoming, they sent a reminder on 27 August. A third letter was sent on 6 September, in which RCHL complained about the lack of a reply. The letter also states that the plaintiffs had sold their home at Li Hwan Terrace to raise funds for, and in anticipation of, the purchase of the property and that they were staying in a rented apartment as a result of the delay. SMSC replied on the same day to say that they (i) had forwarded RCHL`s letter to the defendants; (ii) had advised the defendants of the legal consequences resulting from late completion; and (iii) would immediately advise RCHL as soon as they hear from the defendants. On 24 September SMSC wrote to RCHL in the following manner:

> *We refer to your letter of 6 September 1999 upon which we have taken our clients` instructions.*
>
> *Our clients say that they have spoken to your client directly subsequent to your said letter. Our clients have requested for time to pay towards the discharge of the mortgage. Negotiation for the sale of the property are in process [sic] and any time now our clients may contract to sell the property and to give notice of redemption of the mortgage. Our clients request for a two (2) weeks time [sic] or thereabout for them to find a buyer for the property so that they can use*

the sale proceeds to pay off the mortgage.

We understand from our clients that your client has so far been quite agreeable to our clients` request. Please take your client`s instructions.

As with all SMSC`s other letters, this was copied to the defendants. This suggests that up to 24 September 1999, the defendants had still not instructed SMSC that they would not be able to complete due to their problem with the bank.

Meanwhile on 3 September FQ had written to the defendants to give notice of default and to recall the loans. They had also demanded delivery of vacant possession of the property. On 13 October FQ wrote to SMSC requesting the return of the title deeds. SMSC followed this up by writing to RCHL on 18 October to request the urgent return of the title deeds. RCHL complied with this on the same day but said in their letter that the plaintiffs `would like to know why you want the return of these title deeds`. They pointed out that completion had been overdue for more than three months and asked what steps had the defendants taken to obtain TOP and sub-division. The letter ended with a threat of legal action `to enforce completion` if the delay continued.

After this the plaintiffs changed their solicitors to M/s Peter Low, Tang & Belinda Ang (`PLTBA`) who wrote to SMSC on 15 November giving notice pursuant to Condition 29 of the Law Society Conditions of Sale 1994 to complete the transaction. Counsel for both sides agree that the contract incorporated the Law Society conditions. The relevant clauses of condition 29 provide as follows:

(1) This condition shall apply in every case except where the Special Conditions provide that time is to be of the essence of the contract in respect of the date fixed for completion.

(2) If the sale shall not be completed on the date fixed for completion either party may on that date or any time thereafter (unless the contract shall first have been rescinded or become void) give to the other party notice in writing to complete the transaction in accordance with this condition but such notice shall only be effective if the party giving the same at the time the notice is sent is either ready, able and willing to complete or is not so ready, able and willing by reasons of the default or omission of the other party to the contract.

(3) Upon service of an effective notice pursuant to the preceding clause it shall be an express term of the contract that the party to whom the notice is given shall complete the transaction within twenty-one days after the day of service of the notice (excluding the day of service) and in respect of such period time shall be of the essence of the contract but without prejudice to any intermediate right of rescission by either party.

...

(5) If the Vendor does not comply with the terms of an effective notice served by the Purchaser under this condition, then the Purchaser may elect either -

(a) to enforce against the Vendor without any further or other notice under the contract such rights and remedies as may be available to the Purchaser at law

or in equity, or

(b) without prejudice to any right of the Purchaser to damages, to give notice in writing to the Vendor forthwith to repay to the Purchaser any deposit and any money paid on account of the purchase price but on compliance with that notice the Purchaser shall no longer be entitled to any right to specific performance of the contract and shall return forthwith all title deeds and documents in his possession belonging to the Vendor and at the expense of the Vendor procure the cancellation of any entry relating to the contract in any register.

There is no special condition in the contract to provide that time is of the essence in respect of the date fixed for completion. Therefore condition 29 applies to the contract between the parties.

The defendants failed to complete within the 21 day period which expired on 7 December 1999. On 21 December PLTBA wrote to FQ, the bank`s solicitors, informing them of the defendants` failure to complete and asked whether the bank would be prepared to release the mortgage over the property upon the plaintiffs paying to them the balance of the purchase price. They explained that this was in order to avoid having to make the bank a party in the legal action that the plaintiffs intended to commence against the defendants. FQ replied on 31 December 1999 and advised that the amount offered was insufficient for the redemption of the property. They also said that the plaintiffs had no basis to commence legal proceedings against the bank.

On 6 January 2000 SMSC wrote to PLTBA as follows:

We refer to our letter of 4 January 2000 upon which we have taken our clients` instructions to reply to you.

Our clients deeply regret the inconvenience caused to your clients resulting from their financial inability to complete the sale of the property. This is solely due to the fact that they are short of moneys to pay off the existing mortgage. Our clients` mortgagees have already started legal proceedings against them. We are instructed to enclose [FQ`s] letter dated 3 September 1999 for your attention.

In view of the existing mortgage of the property and our clients` incurred liability as mentioned earlier, we believe any legal proceeding by your clients will cause them to incur more expenses which will not produce any position results nor satisfaction.

Our clients, therefore, instruct us to request your clients to consider taking back their deposit, and to resolve this matter amicably.

We are also instructed by our clients to state clearly that they are truly sorry about the situation which they have put your clients into.

We have no instruction to accept service of process in this matter....

The plaintiffs took out the writ in this action also on 6 January. After they received a copy of the writ the defendants themselves wrote a letter to PLTBA. Dated 17 January, this letter states as follows:

> *We refer to your letter of 10 January 2000 and your writ of summons served on us.*
>
> *We are unable to complete the sale of the property to your clients because of our financial inability to discharge the mortgage ... It is not because of the increase in property price.*
>
> *Therefore, we do not dispute your clients` claim for specific performance. We consent to your clients` claim. We reiterate that we are agreeable to transfer the property to your clients upon your clients` payment of the contract purchase price to the mortgagee.*
>
> *We are however unable to make the mortgagee agrees [sic] to the transfer and to discharge this mortgage, as the mortgagee had indicated to us that the contract purchase price was insufficient to cover the mortgage debt secured by the mortgage of this property. We also have another property 39A Walmer Drive, Singapore, mortgaged to the same mortgagee to secure our indebtedness.*
>
> *Therefore, if the mortgagee agrees with your clients` claim to discharge the mortgage of this property upon payment of the contract purchase price, your clients will have ownership and clean title of this property transferred to them.*
>
> *We are agreeable to give your clients the signed transfer in their favour together with all the other documents which your clients claimed for.*

It should be noted that the defendants have still not stated in this letter that the plaintiffs should purchase another property to mitigate their damages. Indeed they inform the plaintiffs that they do not dispute, and consent to, the plaintiffs` claim for specific performance.

The defendants subsequently instructed their current solicitors, M/s Derrick, Ravi & Partners (`DRP`), to act for them in this action. They entered appearance on 12 February 2000 and filed the defence on 18 February. The defendants essentially admitted that they had breached the contract but pleaded facts in support of their position that the plaintiffs` only recourse is damages, which should be assessed as at about July 1999.

On 1 March 2000 SMSC, acting on the defendants` instructions, tendered to PLTBA a cheque in the sum of $118,620 which constituted the 9% deposit held by SMSC as stakeholders. PLTBA replied on 3 March stating that the plaintiffs were entitled to specific performance and therefore `the status quo shall remain` until the outcome of the action.

In their defence, the defendants pleaded that they had on many occasions orally informed the plaintiffs that they were unable to complete. These occasions are pleaded in paras 15 and 16 which are as follows:

> *15 The first and second defendants avers [sic] that they have on many*

occasions orally informed the plaintiffs that they were unable to complete. At or around 19 ... to 23 July 1999, the first defendant had a meeting with the plaintiffs and their son. The first defendant explained to them that his inability to complete the sale ... was not because they could not obtain the TOP but because they could not discharge the ... mortgage ... .

16 At or around the month of August the first and second defendants by telephone reiterated to the plaintiffs that they were unable to complete the sale ... and encouraged them to buy an alternative property. The plaintiffs demanded that the first and second defendants complete the sale ..., pay compensation by way of interest ... . The first and second defendants avers [sic] that they have without any reservations whatsoever, informed the plaintiffs that they were unable to discharge the mortgage ... and as such could not give title to the plaintiffs. In essence the sale and purchase of the property was repudiated by the first and second defendants.

In her affidavit, the second defendant said that the first plaintiff telephoned her on three occasions in July and on four or five occasions in August. The main purpose of these calls was to ask her when they could complete the sale. She said that each time she emphasised that this was beyond their control. She also told the first plaintiff to purchase another property instead of waiting. In her affidavit, the second defendant said that the first plaintiff went to her office sometime in the middle of August to scold her and insist that they complete the transaction. However she reiterated her position that they could not complete due to the bank`s refusal to discharge the mortgage. Under cross-examination, the second defendant said that the first plaintiff went to the defendants` office at Ang Mo Kio twice during this period. She said that during the first visit, the first plaintiff met with the first defendant and she did not participate. During the second visit, the first plaintiff met with her. The second defendant said that during this second visit, she told him that they could not complete because the bank had refused to discharge the mortgage.

In relation to the second defendant`s account of the meetings and telephone calls, I note that the August meeting between first plaintiff and her was not pleaded. The only meeting pleaded was one between the second defendant and the first plaintiff sometime between 19 and 23 July. Although no objection to this was taken by the plaintiffs, it nevertheless is an indicator of the veracity of her evidence. I must take it that this August meeting was not included in the instructions to her solicitors at the time the defence was drafted. I should add also that I would characterise the second defendant`s demeanour on the witness box as wanting. She was evasive in her answers to counsel`s questions in cross-examination. Her husband, the first defendant, was a little more forthright in his answers. But his version contradicts hers in some crucial parts. The first defendant said that sometime in July he spoke to the first plaintiff about three times on the telephone and invited him to a meeting in August or September. Over the telephone the first plaintiff asked when he could obtain the TOP and complete the transaction. He replied that he had problems with the TOP but was in the process of getting it. He also said that he had some problems with the bank. At the meeting in August or September he told the first plaintiff that he was having financial problems. He recalled telling the first plaintiff that he owed the bank about $3m. He said that the bank had pressured him to make payments on the mortgage and asked him to sell one of the houses to reduce the loan amount. But after he had sold the property to the plaintiffs the bank wanted him to top up on the price before they would discharge the mortgage. The first defendant also told the first plaintiff that if he were able to sell the other house at a good price then he could resolve his problem with the bank. At this stage his evidence became uncertain. He then said that this outcome was not likely and he told the first

plaintiff that he should look for an alternative property. On the other hand he admitted that sometime in September 1999 he spoke to the bank`s representative and told them that he would sell the other house to raise money to repay them.

In contrast, the plaintiffs` version of events is consistent with the contemporaneous documents, in particular the letters from SMSC which gave no indication that the defendants had informed the plaintiffs at the outset that they were unable to complete and to look for an alternative property. Therefore I accept the plaintiffs` version that they were not told this as the defendants claim, and find accordingly.

The law

I now turn to examine the law in relation to damages in lieu of specific performance. In **Johnson v Agnew** [1980] AC 367, 392-393; [1979] 1 All ER 883, 889-890, Lord Wilberforce, delivering the sole opinion of the House of Lords, set out five established propositions of law:

> *First, in a contract for the sale of land, after time has been made, or has become, of the essence of the contract, if the purchaser fails to complete, the vendor can either treat the purchaser as having repudiated the contract, accept the repudiation, and proceed to claim damages for breach of the contract, both parties being discharged from further performance of the contract; or he may seek from the court an order for specific performance with damages for any loss arising from delay in performance. (Similar remedies are of course available to purchasers against vendors.) This is simply the ordinary law of contract applied to contracts capable of specific performance. Secondly, the vendor may proceed by action for the above remedies (viz specific performance or damages) in the alternative. At the trial he will however have to elect which remedy to pursue. Thirdly, if the vendor treats the purchaser as having repudiated the contract and accepts the repudiation, he cannot thereafter seek specific performance. This follows from the fact that, the purchaser having repudiated the contract and his repudiation having been accepted, both parties are discharged from further performance. ...*
>
> *Fourthly, if an order for specific performance is sought and is made, the contract remains in effect and is not merged in the judgment for specific performance. ...*
>
> *Fifthly, if the order for specific performance is not complied with by the purchaser, the vendor may either apply to the court for enforcement of the order, or may apply to the court to dissolve the order and ask the court to put an end to the contract.*

From these propositions it can be seen that, in respect of contracts capable of specific performance, the law does not require the innocent party at the time of breach, to accept the repudiation and treat the contract as discharged. He is permitted to pursue his remedy of seeking an order for specific performance, whether exclusively or as an alternative to damages. However if he proceeds in the alternative, at the trial he would be required to elect which remedy to pursue, ie whether specific performance or damages. The question before me is as follows: if the innocent party elects for damages only at the trial, what would be the appropriate date for the assessment of such damages.

Ms Lim, Senior Counsel for the plaintiffs, submitted that the appropriate date would be the first day of

trial, when the plaintiffs abandoned their claim for specific performance and asked for damages in lieu thereof. She cited **Meng Leong Development Pte Ltd v Jip Hong Trading Co Pte Ltd** SLR 27 [1985] 1 MLJ 7 . In that case the vendor had entered into a binding contract to sell a house to the purchaser. During the period for completion, the vendor claimed that the purchaser had failed to produce certain documents that it was obliged to procure under the contract. The vendor subsequently refunded the 10% deposit to the purchaser and sold the property to a third party. The purchaser sued for specific performance. The High Court found that the vendor`s repudiation of the contract was not justified but refused specific performance on the ground that the property had already been sold to a third party. Instead the purchaser was awarded damages assessed as at the date of the trial. The vendor appealed. The matter took a certain turn at the Court of Appeal which does not concern us here. Suffice it to say that in the eventual appeal to the Privy Council, one of the questions for the decision of the Board was the question of quantum of damages in lieu of specific performance. Lord Templeman, delivering the majority opinion of the Board, rejected the contention of counsel for the vendor that it could be argued that damages should be assessed at an earlier date. He said (at p 15):

> *On behalf of the vendor, Mr Godfrey argued that the damages awarded by AP Rajah J were excessive and should be reduced. The vendor`s appeal to the Court of Appeal for such a reduction had not been heard on its merits. He asked that the issue as to the quantum of damages should be referred back to the Court of Appeal or should be made the subject of an inquiry. He said that the written judgment of AP Rajah J did not explain the basis on which the damages were calculated. Examination of the record, however, makes the matter quite plain. The learned judge rightly decided that damages should be assessed as at the date of trial. Mr Godfrey said that it was arguable that damages should have been assessed at an earlier date when the vendor repudiated the contract. But that repudiation was not accepted; the purchaser issued a writ for specific performance. There is nothing in this point.*

The Privy Council held that in the circumstances of the case, in which the defendants` repudiation was not accepted and the plaintiff had sued for specific performance, the trial judge`s finding that the plaintiff`s entitlement to damages awarded in lieu of specific performance was to be assessed from the date of the trial was correct.

The subject of specific performance is dealt with in 44(1) ***Halsbury`s Laws of England*** (4th Ed, Reissue), where it states that the principle that damages should be assessed as at the date of breach does not normally apply. Paragraph 960, headed `The measure of damages`, states as follows:

> *Where damages are awarded in lieu of specific performance, the principle that damages should be assessed as at the date of the breach of contract (which is the usual rule in relation to commercial contracts) does not normally apply. The selection of the appropriate date is a matter for the court`s discretion, but the date usually chosen is the date at which the remedy of specific performance ceases to be available. Thus damages have been ordered to be assessed as at the date on which it ceased to be within the vendor`s power to convey the property, as at the date on which the purchaser elected to abandon his claim to specific performance, and as at the date of judgement. If the purchaser has been guilty of delay in pursuing his claim, assessment may be directed at an earlier date.*

I would have held that the decision in the ***Meng Leong Development*** case combined with the commentary in ***Halsbury`s*** sufficiently disposes of the matter if not for the able submissions of counsel for the defendants, Mr Sreenivasan. It is therefore incumbent upon me to deal with them.

Mr Sreenivasan`s first submission is that damages should be assessed as of the date of breach which in the present case is the contractual date of completion, viz 29 June 1999. He cited several authorities in support of this proposition, to which I will turn later. But it seems to me that apart from authority, if this be the law, then the right given to the innocent party to seek specific performance would be worthless. If the innocent party were required to mitigate his damages from the time of breach he would in effect be confined to seeking his remedy in damages. I shall illustrate this with the following example. X enters into a contract to purchase a property from Y. On the date of contract, X had taken the view that the property will rise in value. Y fails to complete on the contractual completion date. X decides to sue for specific performance. In a situation where damages, if awarded in lieu of specific performance, are assessed at the time of breach then X, having taken the view that the market is on the rise, would have to go into the market and purchase an equivalent property. But should X succeed in obtaining an order for specific performance and Y then completes the transaction, X would be saddled with 2 properties. This is all very well if the market has moved up. But if it moved down instead, it would have doubled his losses in a situation where he had bargained for only half the exposure. The other reason why the right would be futile is a practical one. X would have paid to Y a deposit of about 10% of the purchase price. If X seeks an order for specific performance, he is not entitled to ask for the refund of this deposit. Without that money he is not likely to be able to purchase another property to mitigate his damages.

Mr Sreenivasan cited the following passage from ***Johnson v Agnew*** to support his first submission (at [1980] AC 367, 400-401; [1979] 1 All ER 883, 896):

> *... On the balance of these authorities and also on principle, I find in the Act no warrant for the court awarding damages differently from common law damages, but the question is left open on what date such damages, however awarded, ought to be assessed.*
>
> *The general principle for the assessment of damages is compensatory, ie that the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed. Where the contract is one of sale, this principle normally leads to assessment of damages as at the date of the breach, a principle recognised and embodied in s 51 of the Sale of Goods Act 1893. But this is not an absolute rule; if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances.*
>
> *In cases where a breach of a contract for sale has occurred, and the innocent party reasonably continues to try to have the contract completed, it would to me appear more logical and just rather than tie him to the date of the original breach, to assess damages as at the date when (otherwise than by his default) the contract is lost. Support for this approach is to be found in the cases. In* ***Ogle v Earl Vane*** *the date was fixed by reference to the time when the innocent party, acting reasonably, went into the market; in* ***Hickman v Haynes*** *at a reasonable time after the last request of the defendants (the buyers) to withhold delivery. In* ***Radford v De Froberville****, where the defendant had covenanted to build a wall, damages were held measurable as at the date of the hearing rather than at the date of the defendant`s breach, unless the plaintiff ought reasonably to have mitigated the breach at an earlier date.*

In the present case if it is accepted, as I would accept, that the vendors acted reasonably in pursuing the remedy of specific performance, the date on which that remedy became aborted (not by the vendors` fault) should logically be fixed as the date on which damages should be assessed. Choice of this date would be in accordance both with common law principle, as indicated in the authorities I have mentioned, and with the wording of the Act `in substitution for ... specific performance`. The date which emerges from this is 3 April 1975, the first date on which mortgagees contracted to sell a portion of the property. I would vary the order of the Court of Appeal by substituting this date for that fixed by them, viz 26 November 1974. The same date (3 April 1975) should be used for the purpose of limiting the respondents` right to interest on damages.

Mr Sreenivasan argued that the statement in the first paragraph cited, ie that the assessment is normally assessed as at the date of breach, is applicable in this case. With respect, I do not agree. Lord Wilberforce stated that the overriding principle is that damages should place the innocent party in the position as if the contract were performed. The statement that assessment is normally assessed at the date of breach is followed by following the sentence: ` ***But this is not an absolute rule; if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances*** `. The circumstances I have set out above fully justify departing from the norm.

Mr Sreenivasan argued that if damages were assessed at the date of election, then the innocent party was in a position to determine the best moment to make the election. This could increase the quantum of damages to the party in breach through no fault of his and it would be unfair to him. For my part I do not see how the innocent party would have any degree of control in maximising his damages. The moment he elects for damages, it becomes irrevocable and from that moment on he must step into the market if he wishes to benefit from any subsequent rise in prices.

Mr Sreenivasan`s second submission is that the date for assessment in the present case ought not to be the date of trial but the date when the contract was `lost`. He submitted that this occurred when the second defendant told the first plaintiff in July or August 1999 that they were unable to complete the contract. Alternatively, this was when the first defendant told the first plaintiff in September or October 1999 that they were unable to complete. Alternatively, in January 2000 when SMSC wrote to PLTBA (on 6 January) and the defendants wrote to PLTBA (on 17 January) saying that they were unable to complete.

Mr Sreenivasan sought to rely on the case of ***Johnson v Agnew*** . The facts of that case are rather unusual. The vendor contracted to sell a house and some grazing land to the purchaser. The purchaser failed to complete on the date fixed for completion. The vendor then served a notice making time of the essence of the contract and fixed a new date for completion. The purchaser again failed to complete and the vendor commenced the action, claiming specific performance or damages in lieu thereof. The vendor applied for summary judgment and obtained an order for specific performance of the contract against the purchaser. Before this order was drawn up the mortgagees of the house obtained an order for possession. Subsequent to the drawing up of the order for specific performance, the mortgagees for the grazing land also obtained an order for possession. Several months later the mortgagees of the grazing land entered into a contract to sell it and shortly after that, the mortgagees for the house also entered into a contract of sale. Both contracts were completed shortly afterwards. The House of Lords held that the fact that there was an order for specific performance did not preclude the vendor from applying to the court to discharge the order and terminate the contract if it became impossible to enforce it. On such an application the court could award damages for breach of contract at common law. On the question of quantum of damages, Lord Wilberforce held

that the appropriate date for assessment of damages should be the date that the mortgagees for the grazing land entered into a contract to sell it, on which date the order for specific performance became impossible of performance.

I do not see how the finding in relation to damages in ***Johnson v Agnew*** supports Mr Sreenivasan`s position in the present case. ***Johnson v Agnew*** did not concern a case where there was an election at the trial. It was a case where the plaintiff had lost the right to specific performance due to the default of the defendant. The House of Lords held that the appropriate date for assessment of damages in those circumstances would be the date in which the right to specific performance was lost. Indeed it would seem to me that this decision supports the plaintiffs in the present case as their right to specific performance was lost when they entered into the settlement agreement with the bank on the first day of the trial.

Mr Sreenivasan cited two other authorities, namely, **Indian Overseas Bank v Cheng Lai Geok** [1992] 2 SLR 38 and **Tay Joo Sing v Ku Yu Sang** [1994] 3 SLR 719 . In the ***Indian Overseas Bank*** case, the vendors were the mortgagees of four properties and had put them up for sale by public auction. The purchaser put in a successful bid for them at a total sum of $2.6m. Upon signing the agreement on 2 July 1981 the purchaser handed the vendors a cheque for $650,000. Completion was fixed for 2 August 1981. However on 3 July 1981 the purchaser countermanded payment of the cheque and informed the vendors that he had decided not to proceed with the purchase. On 8 October 1981 the vendors took out the action at the High Court seeking specific performance or damages in lieu thereof. Almost ten years later, in April 1991 the vendors sold the properties by tender for $2.33m. They then amended their statement of claim in the action to seek only damages for breach of contract. The trial judge held that the vendors had not acted reasonably in pursuing the remedy of specific performance and as a consequence of this damages ought to be assessed as at the date of breach, which was the date for completion, ie 2 August 1981. The Court of Appeal upheld this ruling and observed that the purchaser`s counsel had not sought to challenge it. But the Court of Appeal also said that it was not an inflexible rule and that in appropriate circumstances damages could be assessed as at the date when the contract was lost rather than the date of breach. It can be seen that the facts in this case are quite different from the present case as the court there had found that the vendors had not acted reasonably in waiting for ten years before selling the properties. In the present case it can hardly be said that the plaintiffs were acting without due despatch. They had held their hands as long as the defendants had asked them for an opportunity to resolve their problems with the bank. Moreover the TOP was not obtained yet and it was only given in November 1999. As soon as they were informed by the defendants` solicitors in January 2000 that completion was not possible, they commenced this action.

In ***Tay Joo Sing v Ku Yu Sang*** the Court of Appeal refused a prayer for specific performance because the purchaser was guilty of laches in bringing the action some 25 months after the alleged breach. The court also found that the purchaser should have, but failed to, mitigate his loss and therefore there was no reason why damages should not be assessed as at the date of breach. The court held that assessment at any later date would cause injustice on the vendor. The court, in making this decision was clearly affected by the unreasonable delay of the purchaser in seeking legal recourse which had prejudiced the vendor. In the present case it was not clear to the plaintiffs that the defendants would not proceed with the contract until January 2000. After that they had proceeded with this action with all reasonable despatch.

In the premises, I do not agree with Mr Sreenivasan`s submissions. I can find no reason to depart from the norm in the present case. Although the plaintiffs did not ask for the alternative remedy of damages, in reaching the settlement with the bank at the first day of trial, they had lost the right to specific performance. I do not see any material difference between the situation where a party

pursues his remedies in the alternative and where a party only asks for specific performance. Indeed in the latter case the innocent party appears to be more determined to acquire the property and is likely to consider that any award in damages would be inadequate. There is no reason to treat him any differently from the more prudent plaintiff in the former case who had pleaded his case in the alternative. Therefore I would hold that this court may award them damages in lieu of specific performance and that under the circumstances of this case, the appropriate date at which damages are to be assessed is at the first day of trial, viz 29 May 2000. As the parties have agreed that the value of the property on that date was $1.65m, it follows that the damages would be $332,000 and I hold accordingly.

An interim order for payment of $132,000 has been made against the defendants. I therefore give judgment for the balance of $200,000 against the defendants and in favour of the plaintiffs. I will hear the parties on the question of costs and other consequential orders.

Outcome:

Order accordingly.