Cheong Lay Yong *v* Muthukumaran s/o Varthan and another (K Krishna & Partners and another, third parties)
[2010] SGHC 59

Case Number	: Suit No 783 of 2007
Decision Date	: 01 March 2010
Tribunal/Court	: High Court
Coram	: Quentin Loh JC
Counsel Name(s)	: Christopher Anand Daniel, Lim Cheng Hock Lawrence (Matthew Chiong Partnership) for the plaintiff; Ignatius Joseph (Ignatius J & Associates) for the defendants; Vinodh S Coomaraswamy SC, Terence Seah, Ivan Koh (ShookLin & Bok LLP) for first third party; Cheah Kok Lim (Sng & Company) for 2nd third party.
Parties	: Cheong Lay Yong — Muthukumaran s/o Varthan and another (K Krishna & Partners and another, third parties)

LAND – sale of land

1 March 2010

Quentin Loh JC:

1 The Plaintiff, as purchaser, claims specific performance of a contract for the sale of an apartment at 54 West Coast Crescent, #01-01, West Bay Condominium, Singapore ("the Apartment"). The 1st and 2nd Defendants, a husband and wife, as vendors, resist the claim on various grounds and in the event they fail as against the Plaintiff, they have brought in their solicitors as the 1st Third Party ("Solicitors" or "Krishna", as the context requires, Mr Krishnamoorthi being the partner handling the Defendants' matters in K Krishna & Partners) and the property agent as the 2nd Third Party ("the Agent"), claiming an indemnity from either or both of them. The Plaintiff also claims damages and interest under the contract and such further or other order as the court deems fit.

2 After oral submissions on 4 January 2010, I gave judgement, with brief grounds, in favour of the Plaintiff against the Defendants, dismissed the Defendants' claims against the 1st and 2nd Third Parties and awarded costs against the Defendants for all parties on an indemnity basis, and said that if any party wished to take this further, I would give my full reasons in a written judgement. As the parties needed time to work out the orders required, I gave leave for the parties to return the next day with an agreed draft judgement. The Defendants appealed against my decision on 3 February 2010.

3 There are some key facts, which are not really in dispute:

(a) On the evening of 29 May 2007, the Plaintiff viewed the Apartment together with the Agent and the Defendants; the Plaintiff and Defendants agreed on the price, the Plaintiff issued a cheque for $6,350 to the 2nd Defendant and the Plaintiff was given an option to purchase the Apartment ("the Option"), the wording of which was on fairly standard terms and supplied by the Agent.

(b) The next day, the Plaintiff went to view the Apartment from the outside and was disturbed by a substation or transformer near the Apartment and was afraid it would pose a health hazard to the occupants; she changed her mind and stopped payment of the cheque on 30 May 2007.

(c) The Defendants left Singapore on the morning of 31 May 2007 for a holiday to Canada and did not return until 11 June 2007, and they were uncontactable during that period.

(d) Sometime on or before 8 June 2007, the Plaintiff changed her mind and contacted the Agent; the Plaintiff went to see the Defendants' Solicitors on 8 June 2007 and handed them a second cheque for $6,350 and the original Option.

(e) The Plaintiff exercised the Option on or about 11 June 2007 by paying the remaining 4% of the purchase price, ($25,400). The last date for the exercise of the Option was 13 June 2007.

The details surrounding these five central facts, their legal effect and the state of mind of the parties are in contention.

The Defendants' Case

4 The 2nd Defendant did not give evidence. The 1st Defendant confirmed that he made all the decisions; the 2nd Defendant gave him full authority to do so and to speak on her behalf as well.

5 The Defendants wanted to sell the Apartment and had a price of $680,000 in mind. The Agent brought the Plaintiff to view the Apartment on the evening of 29 May 2007. The Defendants were also present at the viewing. As the Apartment was tenanted, the parties then went to the car park to negotiate the price. Eventually the price agreed upon was $635,000. The Agent produced the Option, the Defendants signed the Option, and in return, the Plaintiff gave them her cheque for $6,350 ("the 1st Cheque"). The blanks in the printed Option were filled in by the Agent upon being given the details by the 1st Defendant. One of the blanks filled in was the name of the Defendants' Solicitors. The Defendants told the Plaintiff and the Agent that they were leaving for a family holiday on 31 May 2007. The Defendants banked in the 1st Cheque on 30 May 2007 and left for their holiday on an early morning flight on 31 May 2007 to Vancouver.

6 The Defendants were unaware of the fact that the Plaintiff had stopped payment on the 1st Cheque on 30 May 2007. The Agent called the 1st Defendant on 11 June 2007 when they returned and the 1st Defendant informed her that they had just landed from a long flight and were suffering from jet lag. The next day, 12 June 2007, the Agent called the 1st Defendant and told him that the Plaintiff had exercised the Option by depositing the balance 4% with his Solicitors. The 1st Defendant called Krishna on the same day to inquire about the sale of another of his properties, 145 Dunlop Street, which Krishna was also handling for him. In this telephone conversation, the 1st Defendant also asked Krishna about the Plaintiff's exercise of the Option in relation to the Apartment. Krishna said he was not aware of the same and would have to check and confirm the same. Krishna called back the same day or the next day to confirm the exercise of the Option by the Plaintiff.

7 However, when the 1st Defendant went down to open his letter box on 13 June 2007, he was shocked to find a letter from the Plaintiff's bank to the Defendants, containing a "Return Cheque Advice" dated 1 June 2007 with the reason: "Payment Stopped". No one had told him about the cancellation of the 1st Cheque and he wondered how the Option could have been exercised. The 1st

Defendant called the Agent who said that under the Option the Solicitors had the right to "accept" and since Krishna had already accepted the 2nd Cheque, the 1st Defendant had to proceed and if he was not satisfied, he could sue his Solicitors. The 1st Defendant called Krishna who only then told him that the cheque issued to his firm was dated 8 June 2007 and that it had been banked into his firm's Client's Account; Krishna did not know that there was a 1st Cheque which had been dishonoured. The receipt and acceptance by Krishna of the 1% option fee and the subsequent 4% upon exercise of the Option was therefore without the Defendants' knowledge or mandate and outside the scope of his Solicitors' authority. The Defendants considered that the Option had been terminated by the Plaintiff stopping payment on the 1st Cheque and there was no valid option to be exercised thereafter.

8 The 1st Defendant then verbally informed Krishna on 13 and 15 June 2007 about his position and requested Krishna to stop the sale and withhold from proceeding any further. However Krishna not only made no attempts to stop the sale, but to the 1st Defendant's horror, Krishna proceeded to write two letters, both dated 13 June 2007, to the Plaintiff's solicitors requesting first a postponement of the completion date to 15 October 2007 and secondly, the release of the 4% deposit of the purchase price from the Solicitors' stakeholding obligation. The 1st Defendant never asked his Solicitor to make such requests. The Defendants protested against the contents of the 13 June 2007 letters in a letter to their Solicitors dated 16 June 2007.

9 The 1st Defendant was also upset by the actions of the Plaintiff. He had brought down his selling price below the market value "…to help her and she acted with such bad motive." The 1st Defendant tried to contact her but she refused to deal with him. He had to go down to her workplace at Suntec City and ask her to come down to meet him. He asked her why she had dishonoured her 1st Cheque and then made payment to his Solicitor with a 2nd Cheque. He did not discuss anything else. He subsequently sent a letter to the Plaintiff dated 1 July 2007 on the invalidity of the Option and another to the Plaintiff's solicitors, dated 10 July 2007. The 1st Defendant stated in his AEIC that: "There is no other reason for us wanting to stop the sale apart from the misrepresentations and misleading information received from the parties."

10 The 1st Defendant's AEIC then goes on to say that by a letter dated 10 August 2007, his Solicitors tried to blame him and allege that he was aware of the dishonour of the cheque even before going abroad. The 1st Defendant denies this and states that he banked in the 1st Cheque on 30 May 2007 and left for Canada on 31 May 2007 on an early morning flight and "…by which time…[he had]… no chance to know about the dishonour of the cheque." The Defendants say that they were "… tricked by all the parties intentionally and negligently to proceed with an invalid sale." The Defendants argued that they never gave their Solicitors the mandate to act in respect of the Option fee of $6,350 and that their Solicitors should have returned all the monies to the Plaintiff's solicitors and taken the 1st Defendant's instructions. The Agent knowingly assisted the Plaintiff and had acted without the mandate, consent or approval of the Defendants in helping the Plaintiff tender the 2nd Cheque, concealing the fact of the dishonour of the 1st Cheque from the Defendants and in getting the Defendants' Solicitors to accept the 2nd Cheque.

11 On their pleadings the Defendants claim:

(a) as against the Solicitors, damages, and in effect an indemnity for the Defendants' liability to the Plaintiff, as a result of their negligence, breach of duty, lack of skill or diligence and/or

acting without any mandate from the Defendants, accepting the 1% Option fee in their firm's name when the Option provided that 1% Option was to be paid to the Defendants personally, failing to inform the Defendants when they received a 2nd Cheque dated 8 June 2007, failing to put the Plaintiff on notice that the exercise of the Option was not available or that the exercise of the Option was invalid, failing to stop the sale although the Option was null and void and stating that "it cannot be done", resulting in the Plaintiff asking for specific performance (I pause to note that the Defendants' Claim against the Solicitors (Amendment No.1) is badly pleaded; it also includes allegations against the Agent. Most noteworthy is the absence of any allegation that Krishna wrote two 2 letters dated 13 June 2007 without any instructions from the Defendants); and

(b) as against the Agent, that the Agent knowingly assisted the Plaintiff in re-tendering the 2nd Cheque on 8 June 2007, induced and misled Krishna into accepting the 2nd Cheque, acted without mandate; it cryptically alleges the "said representation amounted to a collateral warranty" in consideration of which Krishna accepted the 2nd Cheque and completed the Contract. This representation was false and the Agent knowingly assisted the Plaintiff in making the said representation fraudulently in that she knew it was false or made it recklessly, not caring whether it was true or false.

Counsel for the Defendants, Mr Joseph, confirmed, during closing submissions, that the Defendants were still maintaining these allegations.

Findings

The Witnesses

12 Having heard the witnesses and considered all the evidence, I find the 1st Defendant to be a totally unreliable witness of fact who lied about many of the material facts and blithely ignored the inconsistencies in his oral evidence, his AEIC and the documentary evidence. He also made up evidence on the stand each time he was caught out on cross-examination. He was even able to feign tears to show how reluctant he was to even criticise his own lawyer although he proceeded to sue his lawyer and the Agent and strongly resisted the Plaintiff's claim.

13 I found the Plaintiff to be an honest and straightforward person, who answered without hesitation, never failed to look counsel or the court in the eye under cross-examination, and did not waver in her evidence. She stated the facts plainly, in a matter of fact manner without any embellishment. No one could shake her in her evidence. The only minor point, which I found immaterial, was this: Krishna remembers her asking him to act for her in the purchase when they first met on 8 June 2007, but she says that she did not do so. Krishna had declined due to issues of potential conflict of interest.

14 I also found Krishna to be a witness of truth. He too answered questions without hesitation or embellishment. He readily admitted points that he should have asked questions on, like why was he being given a cheque made out in his firm's favour when on the face of the Option it was given in exchange for a cheque made out to the 2nd Defendant. But for the reasons set out below, I found this did not dent his credibility or his case. I also found Krishna's litigation partner, Mr Nedumaran, ("Nedumaran"), to be a witness of truth and I accept his evidence on a short meeting he had with Krishna and the 1st Defendant.

15 I also accept the evidence of the Agent. Whilst she had some lapses in her memory, she said

this was due, understandably, to her age and poorer memory. She offered medical evidence of this but with great chivalry none of the counsel required it. The relevant and important portions of her evidence were not shaken in cross-examination and on the whole I also accept her as a witness of truth. There was one aspect of her evidence that troubled me and I will refer to it below. However on the facts as I have found, this was not an issue.

The Facts

16 My findings of fact are as follows.

17 The Defendants' case is that they never knew the 1st Cheque was dishonoured. They banked in the cheque on 30 May 2007 and left for their holiday on an early morning flight on 31 May 2007: "…by which time [they would] have no chance to know about the dishonour of the cheque." (at [11], 1st Defendant's AEIC). This is completely untrue.

18 The Plaintiff denies the 1st Defendant's version. Her evidence is that she felt bad backing out of the purchase. On 30 May 2007, she telephoned the Agent first, to explain why she was backing out of the purchase (she feared that the substation or transformer room next to a balcony of the Apartment would pose a health hazard to the occupants) and, secondly, to get the 1st Defendant's telephone number; she then telephoned the 1st Defendant and she told him the same thing and that she was going to stop payment on the 1st Cheque. After these calls, the Plaintiff proceeded to telephone her bank to stop payment on the cheque. When that was done, she called the Agent and the 1st Defendant again and told them that she had stopped payment on the cheque. The Agent agrees with the Plaintiff's version of these facts and these telephone calls on 30 May 2007.

19 Unfortunately for the 1st Defendant, the Plaintiff managed to get the record of her mobile telephone calls on 30 May 2007 [note: 1], and they back up her evidence completely. The telephone numbers of the Agent, the Plaintiff's bank and the 1st Defendant are clearly shown on the Plaintiff's telephone call log. The sequence of calls, starting from 3.18 pm, show calls to the Agent first, then the 1st Defendant at 4.35 pm, followed by 3 calls to the Plaintiff's bank, DBS Bank, from 4.55 to 4.58 pm and then calls to the Agent and the 1st Defendant. There were 10 calls altogether starting from 3.18 pm to 6.49 pm on 30 May 2007; 3 outgoing calls from the Plaintiff to the Agent and 7 incoming calls from the Agent to the Plaintiff. The Plaintiff also made 4 telephone calls to the 1st Defendant on that day, starting at 4.35 pm and the last one at 5.18 pm. The 1st Defendant admitted the relevant entries showed his telephone number. This telephone log was *not* challenged by the 1st Defendant.

20 Faced with this on cross-examination, the 1st Defendant had to admit that the Plaintiff did call him on 30 May 2007 and made up three different stories under cross-examination. First he admitted she called him but claimed that it was to try to lower the price using excuses like "renovation issues" (*ie*, the condition of the Apartment) but that the Plaintiff had said nothing about the substation; he therefore did not believe she would stop payment on the cheque. Secondly, having been forced to admit that she had called him, he disingenuously said the Plaintiff only told him she *intended* to stop payment but did not tell him she had *actually countermanded* the cheque. Thirdly, when confronted with his previous solicitor's letter of 19 November 2007 (which was in reply to the Plaintiff's then solicitors' letter dated 15 November 2007, categorically stating that the Plaintiff had informed the 1st Defendant of her intention to stop payment on the cheque), which categorically denied any telephone

conversation having taken place on 30 May 2007, the 1st Defendant quite incredibly said he had told his solicitor that he did not speak to the Plaintiff on 31 May 2007 but had spoken to the Plaintiff on 30 May 2007 and blamed his previous solicitors for getting it wrong. [note: 2]

21 The second aspect of this first lie is also telling. Contrary to his case and his evidence that had he known the 1st cheque was dishonoured he would not have proceeded with the sale of the Apartment, the evidence and documents show he did some things that were quite the opposite.

22 I accept the evidence of the Plaintiff and find that when the Plaintiff told the 1st Defendant that she was going to stop the cheque and why she was doing so, he did not protest nor say he would call off the sale. I accept the Plaintiff's evidence that the 1st Defendant said to her: "Lady, be happy. We can talk about it when I return to Singapore" or words to that effect (see also Transcript, 2 December 2009, page 85 where the 1st Defendant eventually conceded he said: "…we will settle it when I come back from Vancouver."). I also accept the corroborative evidence of the Agent and find that when the 1st Defendant spoke to the Agent on 30 May 2007, after his conversation with the Plaintiff, he instructed the Agent to try and persuade the Plaintiff to go through with the purchase and if that was not possible, to find him another buyer for the same price. Pursuant to these instructions, the Agent kept reassuring the Plaintiff that the substation did not pose any health threat and that she should check with the power authorities and Singapore Power. Nonetheless, the Agent took back the Option from the Plaintiff as she felt it was not right to leave a signed option in the hands of the Plaintiff in such circumstances.

23 I find the following. The Agent did call the Plaintiff to persuade her to continue with the purchase as instructed by the 1st Defendant. The Plaintiff then called Singapore Power to check if there was any danger to health by staying near a substation or transformer. She was passed from one person to another and eventually got to someone able to answer her and who assured her it was safe and she accepted that assurance. Following her checks, the Plaintiff changed her mind; the Plaintiff telephoned the Agent to say she was prepared to go on with the purchase. This was sometime on or before 8 June 2007. The Agent called Krishna and told him about the sale. The Agent then picked the Plaintiff up, gave her back the Option, drove her to Krishna's office, told her to see Krishna and to give him her cheque for $6,350 and the Option, but did not go in with her to Krishna's office. The Plaintiff saw Krishna's office girl, handed her the 2nd Cheque, obtained an acknowledgement and spoke briefly to Krishna. As far as the Agent was concerned, she was fulfilling the instructions of the 1st Defendant, *viz*, to try and persuade the Plaintiff to go through with the sale. I also find that the Plaintiff did not tell Krishna about stopping the 1st Cheque because it was irrelevant to her in light of what the 1st Defendant said to her before his departure for holiday and because the Agent, acting on the 1st Defendant's instructions, kept persuading her to go through with the purchase. I find that the Plaintiff did not suppress this fact, neither did the Plaintiff act in concert with the Agent to mislead Krishna. The Plaintiff is someone who would not have realised the legal significance of this fact.

24 The next lie involved the 1st Defendant's actions upon his return from holiday. Upon his return, the 1st Defendant telephoned Krishna and arranged a meeting at the 1st Defendant's office. Krishna's evidence, which I accept, was that it was the 1st Defendant who told him at that meeting that there was a first cheque on which payment was stopped whereupon Krishna advised him that he had a choice to accept the repudiation and end the contract or to affirm the contract. I find that prior to that, Krishna knew nothing of the 1st Cheque and its dishonour. The 1st Defendant thought about it,

said he had a slightly higher offer but was not sure if the other buyer was sincere, and proceeded to tell Krishna that his decision was to go ahead with the sale to the Plaintiff. The 1st Defendant then discussed with Krishna his loan with DBS Bank which was secured by the Apartment and whether he would have to pay any penalties for an early redemption of the loan. The 1st Defendant showed Krishna the DBS Offer Letter which had certain parts highlighted in yellow and Krishna read the same and confirmed that because of the 3 month notice period required for redemption and the inability to serve a notice of redemption less than 1 month after any capital repayment was made, he would have to pay a penalty if he redeemed the loan on the scheduled completion date of 3 September 2007 although the effect could be reduced by making a partial redemption first.

25 Following that meeting the 1st Defendant telephoned the Plaintiff to ask whether she was prepared to postpone the completion date so that he would not have to pay a penalty for early redemption to DBS. She told him to write to her lawyers, Messrs Matthew Chiong Partnership ("MCP"), handling the purchase for her. The 1st Defendant also asked her to release the 5% held by Krishna as stakeholder. She gave him the same answer. The 1st Defendant denied all this. Again he was caught out on his lie. When he was shown the Plaintiff's telephone call log with his number on it on 12 June 2007, he was forced to admit he made a call to the Plaintiff on that day. He could not explain why he would call her on 12 June 2007 on his version of events or on his case. Upon further cross-examination, he had to admit that although these conversations were pleaded by the Plaintiff and averred to in her AEIC, he had not answered or dealt with this either in his pleadings or in his AEIC.

26 I find that following this telephone call to the Plaintiff, the 1st Defendant instructed Krishna to write to MCP to make two requests; first, to ask the Plaintiff to postpone completion to 15 October 2007 and secondly to release the balance 4% stakeholder monies to the 1st Defendant. Krishna did so in two letters dated 13 June 2007, (see AB16 and AB17) as he was instructed to make different requests at different times on the same day. It should be noted that in AB17, Krishna wrote: "We have been instructed by our clients that they have spoken to your client as regards the balance 4%..." When referred to these letters in cross-examination, the 1st Defendant quite incredibly claimed that he never instructed Krishna to make any requests of this nature. He said Krishna wrote these letters all on his own and without instructions. I find it quite unbelievable for any lawyer, and especially one of Krishna's experience, to write to another solicitor with such specific requests of such nature without any instructions. Further, these letters were copied to the 1st Defendant. Krishna produced his fax transmission journal which showed two faxes to the 1st Defendant's fax number on 13 June 2007. There is no protest, as one would have expected from the Defendants, that these letters were written without any instructions (the 1st Defendant relies on a letter dated 16 June 2007, which I shall deal with below). He had been asked before, and was asked again, during the trial, to produce his original offer letter from DBS Bank but he chose not to do so, producing instead other letters from DBS Bank. The irresistible inference, which I draw pursuant to section 116, illustration (g) of the Evidence Act (Cap 97, 1997 Rev Ed), is that if he did, it would show the minimum notice periods and the penalty payable if the sale was completed as scheduled; as noted above, the 1st Defendant showed this original offer letter to Krishna at their meeting on 11 June 2007 to check if the penalty was payable if completion took place as scheduled. Furthermore, if Krishna did write those two 13 June 2007 letters without any instructions from the 1st Defendant (thereby severely prejudicing the Defendants' case), then the 1st Defendant should have been very annoyed with Krishna. He says he was "surprised" and "disappointed"; (the choice of this understatement was, I find, to put forward his front as a humble man without much education, and who was reluctant to criticise his lawyer). Yet, the contemporaneous evidence shows otherwise. When cross-examined, the

1st Defendant had no answer when he was asked why *he* wrote a letter to the Plaintiff dated 1 July 2007, (AB19), where in telling the Plaintiff to withdraw her purchase, he said: "Please do not trouble our solicitor any further. *We find that our solicitors are not at fault*." (emphasis added).

27 That is not all. The 1st Defendant chose to lie about these requests to the Plaintiff because, first, he forgot that his telephone call to the Plaintiff would show up on her telephone call log. Secondly, and more importantly, he thought there was no written evidence. During the Plaintiff's evidence-in-chief, I allowed her to introduce a document, "P-1", which she says she only just showed her lawyer and did not realise its significance. The 1st Defendant had written on "P-1" some words, dates and figures that were very telling: it had interest rates for the 1st ("3%"), 2nd ("3.5%") and 3rd ("4%") years "From date L of offer"; and it had notations like: "14th June 2007 to...", "14th July to … - redemption", "17th October 2007", "Sept 07...", "30th", "1st", "31st October...", "2%", "1.5%" and various sums of money against some of these notations. My finding is that the Plaintiff says, and I accept her evidence, that the 1st Defendant asked her to extend the completion date to 15 October 2007 and release the 4% from the stakeholding obligation; he telephoned her a number of times making these requests and on 18 June 2007 he telephoned her yet once more and said he was outside her office and asked her to meet him. She obliged. He wanted to explain his situation to her and needed something to write on. She had her file in relation to the purchase of the Apartment with her and she took out one sheet with photocopied cheques on one side, turned it over, and handed the blank reverse side to the 1st Defendant who then proceeded to write out some words and figures which clearly relate to his loan, early redemption and penalty issues. The 1st Defendant admitted the handwriting was his. The Plaintiff was then cross-examined by Mr Joseph as to why, if she says the 1st Defendant wrote on "P-1" on 18 June 2007, the reverse contained copies of three cheques, one of which bore the date 27 August 2007. She answered, without any hesitation, that it was a post dated cheque to her lawyers for the purchase of the Apartment, and she pointed to the running cheque numbers: No.150159 was in favour of MCP for $1,800 and dated 27 August 2007, but No.150160 was dated 11 June 2007 in favour of MCP and No.150161 was dated 11 June 2007 in favour of K Krishna & Partners for $25,400, which was the balance 4% when the Option was exercised on 11 June 2007. She had handed all these cheques to MCP at the same time and MCP made photocopies for her record.

28 When confronted with "P-1", the 1st Defendant first said it was written in front of Krishna on 12 June 2007. He repeated this emphatically, a number of times without any qualification. He also gave a long explanation and explained some of the notations on "P-1" which related to his DBS Bank loan on the Apartment, (see Transcript, 1 December 2009, pages 76 and 77). This was quite impossible because it is difficult to accept why Krishna would have photocopies of the Plaintiff's cheques to her lawyer for the purchase on the reverse and on top of all that, have it with him on 12 June 2007. Prior to that, the 1st Defendant had instructed his counsel that "P-1" pre-dated the Option; that was put to the Plaintiff in cross-examination. She denied it. The 1st Defendant's counsel had also said, in cross-examining the Plaintiff at another point in time, that the 1st Defendant had no recollection of writing on "P-1" and later Mr Joseph said his client could not remember when and for what purpose his client wrote on "P-1". It is unfortunate, but I have to say that the 1st Defendant's persistent telling of one lie after another under cross-examination, when shown the inconsistencies in his evidence and the documents, shows up very clearly when one peruses the Transcript. Unfortunately my judgement would be overly long if I quoted from these passages from the Transcript. Many of these passages are set out in the Closing Submissions of Mr Coomaraswamy SC and Mr Daniel.

29 I need only refer to one more matter, which I find to be very serious, to explain why I completely disbelieved the 1st Defendant and eventually, after persuasion and considering the Defendants' case and the way the 1st Defendant presented his evidence, awarded indemnity costs against him. I find that he manufactured evidence – he made up a letter, 1DBD3, allegedly dated 16 June 2007 which he claimed he sent to his Solicitors.

30 The evidence and contemporaneous documents following from the 1st Defendant's return from his holiday in relation to the sale of the Apartment are all consistent with his knowing the 1st Cheque had been dishonoured and being prepared to carry on with the sale of the Apartment to the Plaintiff. There is AB13, a letter dated 11 June 2007 from Krishna, acting for the Defendants in the sale of 145, Dunlop Street, to another solicitor, changing the completion payments; this included a Cashier's Order for $421,889.64 payable to the Defendants, to be used for capital repayment to DBS Bank, and AB15, the DBS capital repayment notice form signed by the Defendants dated 12 June 2007 for $480,000. More importantly, there are the two letters of 13 June 2007 from Krishna to MCP already referred to (it should also be noted that 1st Defendant never subsequently withdrew these letters, even when he changed solicitors). The Defendants only changed their minds about the sale of the Apartment to the Plaintiff when the Plaintiff did not accede to their requests to postpone completion and to release the 4% stakeholder deposit held by Krishna pending completion. Right until 1 July 2007 (*ie* after Krishna wrote the two letters of 13 June 2007), the Defendants had taken the position that their Solicitors were not at fault. The Defendants blamed the Plaintiff as the party who surreptitiously, without the Defendants' and their Solicitors' knowledge, and with the connivance of the Agent, gave another cheque for the 1% Option fee and exercised the Option early. Krishna's firm also wrote to the Defendants on 4 July 2007 to confirm their instructions not to serve the notice of redemption on DBS Bank in relation to the loan on the Apartment, (see AB21). This was because by then, the Defendants decided not to proceed with the sale. To explain away these contemporaneous documents and evidence, the 1st Defendant manufactured 1DBD3, purportedly dated 16 June 2007, to record his alleged objection to the two 13 June 2007 letters which were allegedly written without instructions:

> ... As regards to the sale of 54, West Coast Crescent, #01-01, You have disappointed us, and telling us that we cannot stop the sale and have to proceed with it.
>
> We will not acknowledged [*sic*] your recent letters dated 13th June 2007 as it has confirmed the 1% cheque given under our name has being [*sic*] returned reason being stopped payment.

I accept the evidence of Krishna that he never saw this letter until this litigation. He did not receive this or any such letter. If the Defendants were truly annoyed with Krishna for writing such letters without any instructions or authority, I would have expected more explicit language rather than the vague: "we will not acknowledged your recent letters dated 13 June 2007". The 1st Defendant was quite capable of expressing himself in clearer language to record his objections. This 'letter' was only brought up in reply to a request of further and better particulars around 23 April 2008 (the action was commenced on 14 December 2007) and was never referred to in any of the Defendants' second set of solicitors, Messrs Kalamohan & Co's, letters which contained many of the material allegations against Krishna. Messrs Kalamohan & Co wrote these letters from 15 August to 18 December 2007. Krishna noted that he always dealt with the 1st Defendant by telephone and facsimile and the 1st Defendant's letters to him were always by facsimile and AR registered post. This purported letter was only 'by post' and it is no coincidence that Krishna did not receive any such letter. Finally when cross-examined why Messrs Kalamohan & Co did not refer to this purported letter in their correspondence, the 1st Defendant's disingenuous lies can be clearly seen from the transcript; (see Transcript,

2 December 2009, pages 33 to 41). When he was pressed on this letter by Mr Daniel, the 1st Defendant became very emotional: see Transcript, 2 December 2009, page 23, line 9 to page 24, line 27. Unfortunately I believe these were crocodile tears shed to evade answering questions about something he knew was fabricated by him, interspersed with reasons like he was never one to write such letters to his lawyers and moreover only over money. I find the 1st Defendant to be a very intelligent and shrewd businessman who is very clear in his mind as to what he wants to do or does not want to do. He is also meticulous and does his calculations on his property investments with care. He puts forward the semblance of someone who is very simple, not very educated or well versed in matters of commerce but every now and then he will use words to acknowledge commercial and banking practices with correct pronunciation and accuracy. His portfolio of property transactions, dealt with below, is good evidence of this acumen. He gives evidence quite comfortably in English but when he is caught out, he pretends he needs an interpreter, but only to "help" him understand difficult words. I suspect it is more to give him more time to think. He often refused to answer questions, even simple ones, by giving irrelevant answers and more than one counsel had to keep repeating the question. Sometimes I had to intervene, by repeating the question, before he answered the same.

31 The following evidence was not challenged and therefore accepted by the Defendants: Krishna had acted for the Defendants in numerous property transactions. Krishna states in his AEIC that he has known the 1st Defendant from about 1993 and over the years he acted for the 1st Defendant in something like 28 transactions - 17 purchases of property, 3 sales of property and 8 financing transactions like mortgages or re-financing: see [2.2] of his AEIC. Krishna and the 1st Defendant were well known to each other for about 14 years at the time of the sale of the Apartment. In his unchallenged evidence, Krishna deposed in his AEIC that in early May 2007, the 1st Defendant informed him that he wanted to sell the Apartment. The 1st Defendant was eager to do so even if he incurred a slight loss because he had been looking to sell the property since April 2007 but was unable to find a buyer. It is important to note that this is why the 1st Defendant was confident enough to put Krishna's firm as his solicitors in the Option on the night of 29 May 2007 and then go off on holiday without telling Krishna that he had done so.

32 Towards the end of May 2007, the 1st Defendant told Krishna that he was going to Canada for a family vacation. Hence, when the Agent contacted Krishna on 8 June 2007 and told him about the sale and when the Plaintiff came to his office with the signed Option, even though the option monies were being paid to his firm, he saw nothing amiss and acted in good faith to secure the sale for the 1st Defendant. He says he had no reason, and I accept his evidence, to be suspicious why the cheque was made out in his firm's name. He also says candidly that, *on hindsight*, perhaps he should have asked why the cheque was in his firm's name despite the first paragraph of the Option stating otherwise. However, in the context of the long business relationship existing between the Defendants and Krishna, and what the 1st Defendant had told Krishna before the Defendants went on holiday, I find there was no negligence or breach of duty or breach of mandate on the part of Krishna. This is especially so because when the 1st Defendant told him of the dishonoured cheque, Krishna promptly advised the 1st Defendant of his rights but the 1st Defendant then instructed him to nonetheless proceed with the sale. I find that that is exactly what would have happened if Krishna had informed the 1st Defendant that the cheque was in his firm's name on 8 June 2007, Krishna would have found out that it was a second cheque, he would have rendered his advice and the 1st Defendant would have instructed him to continue with the sale as he did later on 11 June 2007.

33 I also accept the following important piece of corroborative evidence. Sometime in July 2007, the 1st Defendant came to Krishna's office to discuss another property transaction. The 1st Defendant also raised the sale of the Apartment and asked if the letters of 13 June 2007 could be detrimental to his case if he wanted to withdraw from the sale. Krishna thought it would but called in his litigation partner, Nedumaran, for confirmation; Nedumaran on being told the facts and shown the two 13 June 2007 letters also opined that it would because it clearly evinced an intention to proceed with the sale after knowledge of the dishonoured cheque. Nedumaran was called as a witness by the Plaintiff and I also accept his evidence. I need not deal with any objections of solicitor client privilege as none was raised but if it were I would expect that *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 would have been a good answer.

34 There is one aspect of the Agent's evidence that I do not accept. The Agent said that when she called Krishna on or about 8 June 2007 to inform him about the sale of Defendants' Apartment and fix an appointment for the Plaintiff to call at his office, she informed Krishna that there was a 1st Cheque that had been dishonoured. Krishna denies this. I accept Krishna's version, he is too experienced a conveyancer and lawyer to have ignored such a crucial fact. I think she was mistaken. Accepting that her memory was not as good as before, it was perhaps her way of subconsciously protecting herself against criticism. At the relevant time, she was only completing the sale process as instructed by the 1st Defendant and not being legally trained, she may not have realised the significance of a dishonoured cheque. However nothing turns on this in view of my findings of fact.

35 There is another aspect of the evidence against the Defendants. After they changed their minds in early July 2007, they wrote to the Plaintiff and her solicitors setting out their position, but surprisingly not to the Agent. Later, after requests by Krishna to the Defendants to instruct another firm of lawyers to act for them and to inform them that they were discharging themselves from further acting for them, the Defendants appointed Kalamohan & Co to act for them. There were letters written by Kalamohan & Co to the 1st Defendant and MCP, setting out the Defendants' position from 15 August 2007 to December 2007. On 13 December 2007, MCP wrote to Kalamohan & Co asking if they had instructions to accept service and Kalamohan & Co replied on 18 December 2007 stating that they had. Again, during this period there were no letters of accusation against the Agent. It was only 28 days after MCP said they were commencing proceedings that the 1st Defendant wrote his first letter, dated 10 January 2008, accusing the Agent of assisting the Plaintiff, concealing the fact of the dishonour of the 1st Cheque from Krishna and dishonesty in acting as an agent. If the Defendants truly felt that the Plaintiff and the dishonest Agent had acted in concert to mislead Krishna and put the Defendants in this legal tangle, one would have expected the Agent to have received a letter or letters from Kalamohan & Co setting out allegations of the Agent's wrongdoing in the transaction. But there were none until almost a month after MCP said they had instructions to commence proceedings. When this was pointed out to the 1st Defendant, all he could lamely say was that he never instructed Kalamohan & Co to do so, (see Transcript, 3 December 2009, pages 35-36).

36 It is clear to me, having heard and considered the evidence, that the 1st Defendant knew that the 1st Cheque had been dishonoured on 30 May 2007, the 1st Defendant did not repudiate the Option but instead told the Plaintiff that they would discuss it further when he returned from holiday, the 1st Defendant instructed the Agent nonetheless to try and persuade the Plaintiff to go through with the sale, the Agent did so, the Plaintiff changed her mind and pursuant to her instructions, the Agent brought the Plaintiff to Krishna, the Defendants, with full knowledge of the facts, and having been advised of their rights upon their return from holiday, decided to go ahead with the sale of the Apartment nonetheless and the 1st Defendant instructed Krishna to proceed with the sale and ask for

an extension of the completion date and release of the 4% of the purchase price from the stakeholding obligation. The Defendants only changed their minds when the Plaintiff did not accede to their requests. I also find that there are two reasons why the Defendants changed their minds. The first is because the Plaintiff refused to postpone completion and to agree to early release of the 4% Option fee. Secondly, because the prices of properties, including the Apartment, had risen. There were Freudian slips by the 1st Defendant under cross-examination. Counsel was not asking about property prices at all, but was asking the 1st Defendant about the contents of Kalamohan & Co's letters when the 1st Defendant gratuitously said:

> Q Kalamohan got involved in August
>
> A Yes Sir, I already said because of my relation with him, I --- I have, er, hesitated to --- because if he -- - Krishna could have tell me, he never even say a word "Sorry" to me, I say "I've done this thing to you." **If got the word, its not the matter of the money $50,000 or $100,000, I know the property; at that point of time, it went up to $800,000 because within the period when I left the property market, it went up to 800, it's just a matter of say "Kumar, I've done --- sorry, I've done this, sorry"**.
>
> [emphasis added]

Again when being cross-examined on his partial repayment of the capital sum and the 13 June 2007 letter, the 1st Defendant again gratuitously said:

> A Er, there's a---er, no basis, Sir. This capital repayment is --- is just we are, er, lowering down the --- our financial burden, it has nothing to do with the completion. Er, because I have sold the property, 145 Dunlop St. In fact, the property was completed on the 15th of June. **I could have stopped --- if I see the property market have gone up , on the 11th when I arrived in Singapore**, **I can easily --- I don't want to complete. I can tell --- I say, "I don't want to complete" , if I want to because the property have gone up may be 600,000, half a million**. **I could have just say, "I don't want to complete " and start doing specific form, I didn't do that. I completed the sale on the 15th of June, Sir**. But that has nothing to do with --- with this property, 54 West Coast Crescent, Sir. The redemption is because I'm getting the money, I want to lower my financial commitments so that's why I wanted. In fact Krishna --- Mr Krishna, the 1st third party, asked me to fax to him the letter. And that --- with that letter, I don't want to say more on this part, Sir. I think I'll just stop on this, the --- this one, with the letter I --- I --- he is the one that --- in fact the redemption is done by myself. It is --- I no need to get a lawyer to do it, to do this redemption. I can do it myself. I --- it's my own money, I can put it in the bank and I instruct the bank to --- to tell this --- also for the --- the --- the other letters, Sir, I already instructed the bank today. I just this morning call for the original copy. I will get it by next week, I can forward it to you, Sir.
>
> [emphasis added]

The underlined words above also show the 1st Defendant's cavalier attitude to his contractual undertakings with regard to the sale of his properties. It is clear that money is very important to the 1st Defendant, (see also the 1st Defendant's AEIC, [9(ii)] where he states that the Defendants sold the Apartment far below the market value of $680,000).

The Law

37 The Defendants rely heavily on the proposition that the Plaintiff's 1st Cheque was given specifically *in consideration for the grant* of the Option and when the Plaintiff countermanded payment on the 1st Cheque, the Option failed altogether for want of consideration and the Defendants were no longer contractually bound by the Option. The Option in this case stated, in paragraph 1:

> ***In consideration of*** the sum of ***dollars*** six thousand three hundred and fifty ***paid by you to me this day*** by way of ***option money*** , ***we*** , Kumar Muthukumaran s/o Varthan and Indira d/o Srinivasa Naidu, the undersigned ***hereby grant to the Purchaser this option*** , which shall be valid until 4.00 pm on 13/6/07 (herein called "the expiry date") to purchase the property at the price of dollars six hundred and thirty five thousand only.
>
> [emphasis added]

The Defendants cite *Mohamed Ali s/o Abdul Razak v Tan Ah Bee* [2009] SGHC 279 at [23] as authority for this proposition:

> The Plaintiff's Option cheque was delivered to Phyllis Ng on 4 June 2009 in exchange for the delivery to him of the signed Option. It is quite settled current practice in relation to options to purchase land in Singapore that the tender of a cheque in exchange for the grant of an option is good tender for the payment of the option money, whilst the exercise of an option is customarily effected by payment to the nominated solicitors. See *Wong Fook Heng v Amixco Asia Pte Ltd* [1992] 2 SLR 342 per Lai Kew Chai J … **Equally, a tender of a cheque which is subsequently dishonoured, would no longer contractually bind the grantor to the Option**. … See *Min Hong Auto Supply Pte Ltd v Loh Chun Seng* [1993] 3 SLR 498.
>
> [emphasis added]

The Defendants rely on the statement of law emphasized above. However, their reliance on this statement is misplaced. That statement has to be read in context. In the first place, the facts there were quite different. The purchaser gave his cheque to the agent, but unknown to the purchaser, the vendor, in addition to setting a date, had also set a time limit, *ie*, 4 pm, within which the agent could accept the option fee in exchange for the option. The vendor did not wish to go through with the sale because the option fee, paid by way of cheque, was handed to the agent there at 6.45 pm. The vendor therefore returned the cheque to the purchaser. The question was whether a vendor could do so and therefore render his option invalid and defeat a claim for specific performance. The issues were therefore different, see Pillai JC's judgment at [7]. Secondly, the option in *Mohamed Ali*'s case had a specific paragraph which provided that if the "option money" (defined as the money paid in exchange for the option in the first paragraph), is not honoured on first presentment, the vendor was entitled to treat the contract as having been repudiated and the vendor was thereupon entitled to rescind the contract or affirm the contract. There is no such clause in this Option. Similarly, *Wong Fook Heng v Amixco Asia Pte Ltd* [1992] 2 SLR 342, is of no assistance to the Defendants. That case stands as authority for the well known proposition that the vendor was entitled to sue on a cheque paid for the option fee even though the purchaser had repudiated the underlying option contract and countermanded payment of the option cheque. This proposition is unremarkable because a cheque is a bill of exchange and remains a separate and distinct cause of action from the underlying contract. The issue of whether dishonour of a cheque given to obtain an option automatically discharges the option was not an issue in this case. Mr Joseph is, with respect, wrong when he relies on these

authorities and submits that when the Plaintiff countermanded payment on her 1st Cheque, she had by her action repudiated the contract, and no further act was necessary from the Defendants because once she did that, the Option failed to survive and all the terms therein do not survive. There was, according to his submission, an *automatic* discharge of the Option as a contract once the Plaintiff countermanded payment.

38 There is no principle of law that the tender of a cheque in exchange for an option for the sale of property, subsequently dishonoured, would automatically discharge the option contract and no longer bind the grantor of the option, unless of course the payment of the option fee is expressly made a condition precedent for the coming into existence of the option or a condition subsequent which expressly provides that failure to pay automatically discharges the option. This Option contains no condition precedent or condition subsequent of this nature. On the contrary, *Mohamed Ali* and *Wong Fook Heng* stand for the proposition that payment by cheque for the option is good payment for the option money. This must mean that with the tender of the cheque and handing over of the signed option, the contract came into being.

39 In the past there have been some differences of opinion on the nature of an option in relation to the sale and purchase of real property: is there one contract or two contracts, is the option an irrevocable offer to sell for the duration of the option period, is the sale and purchase contract a conditional contract, the condition being the exercise of the option in accordance with its tenor? Is this one contract with two stages, a unilateral contract at the first stage and a synallagmatic contract at the second stage which comes into being upon exercise of the option? Hoffman J (as he then was) in *Spiro v Glencrown Properties Ltd* [1991] 1 Ch 537 at 543 stated that from the purchaser's view, it is an irrevocable offer whereas from the vendor's view it is a conditional contract, but said:

> …the underlying principles are clear enough. The granting of an option imposes no obligation upon the purchaser and an obligation upon the vendor which is contingent upon the exercise of the option. When the option is exercised, vendor and purchaser come under obligations to perform as if they had concluded the ordinary contract of sale. And the analogy of an irrevocable offer is, as I have said, a useful way of describing the position of the purchaser between the grant and exercise of the option … But the irrevocable metaphor has much less explanatory power in relation to the position of the vendor. The effect of the 'offer' which the vendor has made is, from his point of view, so different from that of an offer in its primary sense that the metaphor is of little assistance.

In *Alrich Development Pte Ltd v Rafiq Jumabhoy* [1995] 2 SLR 401, the Court of Appeal accepted this passage and its description of an option to purchase land as a contract for the sale of land contingent upon the exercise of the option; and also said that an option is an unilateral contract along the lines of *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256. The learned authors in Tan Sook Yee's *Principles of Land Law* (LexisNexis, 3rd Ed, 2009) conclude at page 383: "Thus the option is really *sui generis*..." quoting again from Hoffman J at page 544:

> An option is not strictly speaking either an offer or a conditional contract. It does not have all the incidents of the standard form of either of these concepts. To that extent it is a relationship sui generis. But there are ways in which it resembles each of them. Each analogy is in the proper correct a valid way of characterising the situation created by the option.

40 In this case we need to analyse the option stage. What happens to an option, which is stated to be and is in fact given, in exchange for a monetary consideration paid by way of a cheque, and that cheque is subsequently countermanded by the option grantee? The Court of Appeal in *Alrich*

Development said, at page 417:

> In our opinion, the option here is a contract, and the revocation of the option by [the Grantor of the option] was a unilateral repudiation of that contract. **Such a repudiation, unless it is accepted is of no effect and is a thing 'writ in water'**. In *Heyman & Anor v Darwins Ltd* [1942] AC 356 at p 361 Viscount Simon LC said succinctly:
>
> > …But repudiation by one party standing alone does not terminate the contract. It takes two to end it, by repudiation, on the one side, and acceptance of the repudiation, on the other.
>
> In this case, the repudiation by [the Vendor] was not accepted and therefore the option survived, exercisable in accordance with its terms. It was exercised by [the nominee of the purchaser] and thus there arose a contract which [the nominee of the purchaser are now claiming.
>
> [emphasis added]

For the purposes of this case therefore, the option is a contract, the consideration is the option fee paid by cheque, and in exchange, the vendor promises to keep open the offer to sell the property on agreed terms, for a certain period. During that period the vendor cannot revoke the offer, nor can he offer the property to anyone else. Unless there are express conditions precedent or conditions subsequent, the countermanding of the cheque which is given in exchange for the option, amounts to a repudiation of that contract by the purchaser. The vendor is put to election, within a reasonable time, whether to accept the repudiation, terminate the contract and sue for damages or to affirm the contract and sue for damages. If the vendor does nothing the contract remains afoot, *a fortiori* if having done nothing, the purchaser meanwhile makes good the option money by tendering it to the vendor or the vendor's authorised agent, be it the property agent or more likely, his solicitor, who accepts it.

41 Mr Daniel and Mr Coomaraswamy SC referred me to quite a number of authorities to back up their propositions; these include *Lim Hwee Meng v Citadel Investment Pte Ltd* [1998] 3 SLR 601 at [35] – [37]; *Joseph Mathew & Anor v Singh Chiranjeev & Anor* [2009] SGCA 51 and [2009] 2 SLR 73 especially at [21] and [22]; *Min Hong Auto Supply Ltd v Loh Chun Seng & Anor* [1993] 3 SLR 498; and *Foo Kee Boo v Ho Lee Investments (Pte) Ltd* [1988] SLR 620. I do not think it is necessary to refer to all of them because even though they provide support for the proposition that stopping payment on a cheque which was given in consideration for a contract only amounts to a repudiation of the contract, not an automatic discharge of the contract, the authorities I have cited above are sufficient for the purposes of this judgement. Also, since options for the purchase of land are contracts *sui generis*, limited guidance can be gleaned from those cases dealing with, for example, contracts requiring a deposit before full performance.

Conclusions

42 The Defendants therefore fail at a number of levels, any one of which is fatal to their defence. First, when the Plaintiff repudiated the option stage of the contract by countermanding payment of the cheque with the intention of backing out of the purchase of the Apartment, which repudiation was communicated to the Defendants, the Defendants were put to election, to accept the repudiation and terminate the contract or to affirm the contract, having in either case, the right to damages. The 1st Defendant clearly elected to keep the option stage of the contract alive by what he said to the Plaintiff as well as his instructions to the Agent before he went on holiday. Secondly, even if we put this to one side, when he returned from his holiday, with full knowledge of the facts,

he instructed Krishna to proceed with the sale, he even affirmed the contract by asking for a variation of terms, *viz*, postponing the completion and seeking a release of the option exercise monies from the stakeholder obligation, both through his lawyers to the Plaintiff's lawyers as well as personally to the Plaintiff.

43 The Defendants submitted that Krishna was negligent and acted without mandate in accepting the 2nd Cheque on 8 June 2007 whereas the Option, dated 29 May 2007, expressly provided that the option monies were paid to the 2nd Defendant. This submission does not arise in view of my findings of fact. In the event I am wrong, there are at least three answers to this. First, the Option itself provides that the vendor's solicitors are appointed "…as the vendor's agent for the collection of the purchase price or any part thereof and all money payable under this option." Secondly, even after the 1st Defendant knew of the tender of the 2nd Cheque and the exercise of the Option on 11 June 2007, the 1st Defendant affirmed the contract by instructing Krishna to proceed and to ask for a variation of terms. This would amount to waiver with full knowledge of the facts and circumstances. Thirdly, this would also amount to ratification of Krishna's acts in accepting the 2nd Cheque and the exercise of the Option.

44 As for the Agent, she acted within the scope of her authority and the instructions given to her by the Defendants. The Defendants have not even begun to discharge the heavy burden of proof in their allegations of false representations, knowing assistance to the Plaintiff to make representations fraudulently or making it carelessly not caring whether they were true or false. She did not induce or mislead Krishna in view of my findings of fact, especially the 1st Defendant's instructions on 30 May 2007 to try and persuade the Plaintiff to go through with the purchase. If I am wrong, and she was under a duty to inform Krishna that there was a 1st Cheque that was dishonoured, then I find that the Defendants waived this oversight in proceeding with the sale nonetheless and by doing so, ratified any acts done by the Agent.

45 For the reasons set out above, I gave judgement for the Plaintiff. I granted her the order for specific performance of the contract for the sale of the Apartment, with the usual order that if the Defendants fail to execute the necessary documents, the Registrar is empowered to do so on the Defendants' behalf to effect a transfer of the Apartment to the Plaintiff. The Plaintiff has also asked for loss and damage, damages either in lieu of or in addition to specific performance, interest under the Law Society Conditions of Sale 1999, costs and such further or other relief as the court deems fit.

46 I awarded the Plaintiff interest under Condition 8.2 of the Law Society Conditions of Sale as the sale was not completed as contracted and the delay in completion is due solely to the default of the Defendants as vendors. Under Condition 8.2, interest is payable as liquidated damages for delay. Condition 8.2 provides as follows:

> 8 Late Completion Interest
>
> …
>
> 8.2 Interest Payable by Vendor
>
> 8.2.1 If –
>
> (a) the sale is not completed on or before the date fixed for completion; and

(b) the delay in completion is due solely to the default of the Vendor,

he must pay interest (as liquidated damages) commencing on the day following the date fixed for completion up to and including the day of actual completion. Interest will be calculated on the purchase price at 10% per annum.

Condition 8 interest has been applied to similar fact situations where specific performance is being claimed as well as Condition 8.2 interest: see *eg*, *Fernhill City Investments Pte Ltd v Lee Keng Huat* [1997] SGHC 327, *Alivestone Investment Pte Ltd v Splendore Investments Pte Ltd* [1996] 1 SLR(R) 678.

47 The Plaintiff also asked for an account for the rent, if any, and claimed that sum pursuant to Condition 6.2 of the Law Society Conditions of Sale. I initially had some reservation as payment of interest as liquidated damages for delay and being accountable for rent, if there was any, seemed like double damages. However, I awarded the Plaintiff the net rent, if any, after taking into account all the outgoings from the date when completion should have taken place and an account thereof from the Defendants to the Plaintiff. I should point out that I have not had the benefit of counsel's arguments on this point and on hindsight, I should have asked counsel to address me. Mr. Joseph did not object when Mr Daniel made a claim for this item, nor did he demur when all counsel appeared before me the following evening, with the agreed draft judgement. But I do not criticise or blame Mr Joseph as I should have asked for further argument on my reservation before making such an award. I am only glad that if I am wrong, the Court of Appeal will be able to put that right.

48 I now set out my reasons why, I instinctively felt it was fair and just that the Defendants should also account for the net rental, if any.

49 Mr Daniel based his claim on Condition 6.2 of the Law Society Conditions of Sale 1999, but I have my doubts on how Condition 6 is to work in the circumstances of this case. I find Condition 6 quite confusing. Condition 6 provides as follows:

6 Outgoings, Rents and Profits until Completion

6.1 The Vendor must discharge the outgoings down to and including the date fixed for completion.

6.2 Subject to Condition 6.3, after the date fixed for completion the Purchaser –

(a) must discharge all outgoings; and

(b) will be entitled to all the rents and profits or possession.

6.3 The Purchaser is not to be let into actual possession or receipt of rents and profits until the date of actual completion of the purchase.

6.4 Where necessary, the outgoings, rents and profits are to be apportioned between the parties.

It will be noticed straightaway that Clause 6.1 strangely does not provide who is entitled to the rents and profits up to completion. One would have expected the rents and outgoings to go hand-in-hand and for it to be belong to the vendor up to and including the completion date. Condition 6.2 on the other hand provides, as one would expect, that after the date fixed for completion, the purchaser

must discharge all outgoings *and* will be entitled to all rents and profits (and possession). However, Condition 6.2 is made subject to Condition 6.3 which draws a distinction between contractual completion and *actual* completion; it provides that the purchaser is not to be let into *actual* possession or the receipt of rents and profits until the date of *actual* completion.

50 Nonetheless, does Condition 6.3 indicate that if there is delayed completion, the purchaser is not entitled to possession nor the rent or profits generated by the property until actual completion? If so, then like the converse of Condition 6.1, Condition 6.3 does not provide who is responsible for the outgoings during the period after contract completion and actual completion. Perhaps that is why Condition 6.4 states that "where necessary", the outgoings, rent and profits are to be apportioned between the parties. Whilst Condition 6.4 may or may not have its origins due to the old Common Law rule that rents cannot be apportioned in respect of time, the phrase "where necessary" remains the current yardstick to apportion rent and profits. That does not help much in construing Conditions 6.2 and 6.3. The plain reading is that, leaving aside the outgoings, Condition 6.3 envisages that the purchaser is not entitled to possession, the rents or profits before *actual* possession under these Conditions. However, when it comes to payment of Condition 8.2.1 interest by way of liquidated damages for delay in completion, Condition 8.2.2 provides:

> 8.2.2 If the Vendor has delivered vacant possession of the property before the date of actual completion, then the interest payable to the Purchaser will be reduced by a sum equivalent to a rent calculated on the annual value of the property fixed under the Property Tax Act (Cap 254)

By implication, and contrary to Condition 6.3, early possession can be given to the purchaser. Condition 8.2.2 can be looked upon either as reduction of liquidated damages in cases where vacant possession has been given before the date of actual completion, thereby protecting it from attack as a penalty or perhaps as indicating that one cannot obtain the rent and profits in addition to the liquidated damages of 10% per annum on the purchase price for the period of delay. In either case it has no application to the facts at hand because on a plain reading Condition 8.2.2 deals with a situation where there is late completion but early physical possession is given to the purchaser who is an owner occupier.

51 It is interesting to look at the precursors of Condition 6. Condition 6 of the 1981 Law Society Conditions of Sale read as follows:

> 6 The outgoings will be discharged by the Vendor down to but excluding the date fixed for completion, as from which day all outgoings shall be discharged by and the rents and profits or possession shall belong to the Purchaser, (such outgoings, rents and profits, if necessary, being apportioned) but the Purchaser shall nevertheless not be let into actual possession or receipt of rents and profits until completion of the purchase, and the Purchaser shall on completion pay to the Vendor a due proportion of the current rents less the like proportion of the current outgoings.

This version of Condition 6 makes it reasonably clear that for the rents and profits and outgoings, a line is drawn on the day before contract completion - prior and including the day before completion - up to that day they are the responsibility and for the benefit of the vendor; from the date of completion, they are the responsibility and for the benefit of the purchaser, with an apportionment of outgoings, rents and profits accordingly. That makes sense. It then goes on to provide that the purchaser is not entitled to actual possession, the rents or profits until completion of the purchase. The last portion of Condition 6 deals with the situation where rents and outgoings are paid at intervals which do not neatly coincide with the completion date. Arguably this is already covered by the provision in parenthesis.

52 In 1994 the Law Society Singapore's Conditions of Sale were amended and Condition 6 provided as follows:

> 6 The outgoings will be discharged by the Vendor down to and including the date fixed for completion, after which day all outgoings shall be discharged by and the rents and profits or possession shall belong to the Purchaser, (such outgoings, rents and profits, if necessary, being apportioned) but the Purchaser shall nevertheless not be let into actual possession or receipt of rents and profits until the date of actual completion of the purchase.
>
> The change was that for rents, profits and outgoings, the line was now drawn on the date fixed for completion and not the day before. The last portion of the old 1981 Condition 6 was deleted, as noted above, probably because the words in parenthesis would have catered for the eventuality that the rents and outgoings did not coincide with the completion date.

53 In *Law Relating to Specific Contracts in Singapore*, (Michael Hwang SC editor-in-chief) (Sweet & Maxwell Asia, 2008), Kelvin F K Low in his chapter on the Sale of Land, citing English authorities, states generally:

> 12.10.16 General. Where completion is delayed, adjustments must be made to the rights of the parties in respect of the period between the date fixed for completion and that of actual completion. In principle, a purchaser enjoys the income and suffers the outgoings of the property and the vendor is entitled to interest on the price as if completion had taken place on the contractual date.
>
> 12.10.17 Apportionment. The vendor must account to the purchaser for all rents and other profits out of the property accrued due since the date fixed for completion in the contract. Where the vendor is the occupier, he must pay a fair occupation rent for the period between the contractual date for completion and the actual date for completion, unless the delay is due to the purchaser's default. On the other hand, the purchaser must repay by the latter in respect of the same period. The [Law Society] Conditions of Sale 1999 does not depart from these rules.
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> 12.10.18 Interest for late completion. Since it is not right that a purchaser should have the income of the property from the contractual date of completion and yet be relieved from paying interest on the purchase money, a vendor becomes entitled to interest on the balance of the purchase money outstanding until it has been paid to the purchaser. The modern approach to the rate of interest, unless contractually specified, is to take into account the constantly fluctuating interest rates. Where the delay is due to the wilful default of the vendor and the interest exceeds the income of the property, then the purchaser and the vendor may keep the interest and income respectively.

The above principles have much to commend it. The current 1999 Condition 6 splits the one clause into 4 sub-clauses and in so doing created, with respect, ambiguities and difficulties pointed out above. It is difficult to apply this Condition where, as here, the date for actual completion has not yet occurred. Conveyancing practitioners will say that in situations where completion has not actually taken place, Condition 6 is of no application. I agree with that approach and prefer to base my decision on other grounds.

54 The first ground rests on whether Condition 8, which provides for liquidated damages for delay in completing, is the only remedy. There is no express provision that says so in the Law Society Conditions of Sale 1999. There are many instances where liquidated damages for delay cater for just that, delay, and the innocent party is entitled to pursue other heads of damages apart from delay

damages. For example, in a voyage charterparty, where charterers are obliged to load a full and complete cargo at a stipulated daily rate of loading, demurrage which is calculated on a daily basis, is payable for every day of detention of the ship beyond the time stipulated for loading or discharging at that rate. If the rate of loading is not met and the vessel is delayed, and as a result crosses into winter where because of legislation the vessel can only carry a reduced load, this loss of freight can also be claimed in addition to the demurrage: see *Aktieselskabet Reidar v Arcos Ltd* [1927] 1 KB 352. Similarly, in a building contract where unsuitable equipment is used by the contractor which leads to major structural defects resulting in the suspension of work and extensive remedial work being required before it could be completed, the owners are not limited to the liquidated damages stipulated for delay; they were entitled to claim financing charges as well: see *Chanthall Investments Ltd v F G Minter Ltd* 1976,SC 73. If these defective works also caused the owners to have to pay damages to other contractors involved in the project whose works were affected by these defects, these are claims not related to delays but defective works and recoverable. Also if a building contract on the RIBA/JCT 1977 Form provided for 5 completion dates for 5 distinct areas but the contract provided for one completion date and liquidated damages are based on that one date for completion and possession, it *prima facie* does not preclude unliquidated damages for delays to the earlier phases and completion dates: see *E Turner & Sons Ltd v Mathind Ltd* (1989) 5 Const LJ 273.

55 So the question is whether rental is something apart from liquidated damages for delay. Is this an alternative remedy or is it a cumulative remedy?

56 If the property was rented out during the period of delay then the position is in my view different because once a contract for the sale of real property, which can be enforced by specific performance, has been entered into, in the period before completion, the vendor becomes a qualified trustee of the property for the purchaser who has equitable ownership of the land through the doctrine of conversion; see *British & Malayan Trustees Ltd v Sindo Realty Pte Ltd* [1999] 1 SLR(R) 61 at [66], *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman* [1994] 1 SLR(R) 233 and *Chen Kon Ling-Tony v Quay Properties Pte Ltd* [2004] 2 SLR 181 endorsing *Lysaght v Edwards* (1876) 2 Ch D 499. It is a qualified trust because it does not have all the usual incidents of a bare trustee, *eg*, the trustee has his own interest in receiving the purchase price which he is entitled to protect and he has a lien on the property until he has been paid his purchase money. But there is no doubt that the property itself is held as by a trustee. Thus if before completion the vendor wrongfully sells the property to another person, he was accountable to the first purchaser for the purchase money as a trust and was entitled to pursue tracing of the purchase money rather than pursue his remedy in damages: see *Lake v Bayliss & Anor* [1974] 1 WLR 1073. On this basis, the Defendants are accountable for the rent to the Plaintiff as trustees of the Apartment pending completion.

57 In *Personal Representatives of Tang Man Sit v Capacious Investments Ltd* [1996] 1 AC 514, a Privy Council decision on appeal from Hong Kong, it was said, at 521 that the law frequently affords an injured person more than one remedy for the wrong he has suffered. Sometimes the two remedies are alternative and inconsistent. The classic example is an account of the profits made by the defendant in breach of his fiduciary obligations or damages for the loss suffered by the plaintiff by reason of the same breach. The former is measured by the wrongdoer's gain and the latter is the measure of the injured party's loss; (this passage was cited with approval in *Main-Line Corporate Holdings Ltd v United Overseas Bank Ltd* [2010] 1 SLR 189 at [26]). In that case, Tang, a landowner entered into a joint venture with Kung, through his company, the plaintiff, in 1978 for the construction of 22 houses on Tang's land. The plaintiff provided the money. The houses were completed in September 1981. By a deed dated 20 March 1982, Tang agreed to assign 16 of the houses to the plaintiff. But no deed of assignment was executed. Kung then died and there were some complications with his estate. The houses were originally empty but from 1985, Tang let out some and progressively all of the 16 houses as homes to the elderly without the plaintiff's knowledge

or consent. On an application for summary judgement, a judge granted the plaintiff a declaration that at least from the date of the deed, it was the equitable owner of the 16 houses and, (Tang having died two days before the writ was issued), ordered Tang's personal representatives to assign the 16 houses to the plaintiff free from encumbrances, with vacant possession and to furnish an account of all secret profits in Tang's use and letting of the 16 houses and to pay the plaintiff the profits and to pay damages for breach of trust to be assessed. The Privy Council held that the plaintiff was entitled to either an account of the profits in respect of the money received by Tang from letting out the 16 houses or damages for loss of use and occupation, as these were alternative remedies. The plaintiff was also entitled to claim damages for the decrease in the value of the houses as they had deteriorated badly through over-occupation. In addition, since Tang's estate was unable to assign the houses free from encumbrances, damages were also payable therefor. This Privy Council decision thus shows that other heads of damage may be cumulative remedies and if so, both heads can be claimed.

58 The Plaintiff here is recovering Condition 8.2 interest as liquidated damages for delays in completion. That interest also covers other damages, *eg*, for rises in the price of property. If the property is not rented out, the Plaintiff is only entitled to the interest under Condition 8.2. However, if the property happens to be rented out, then the Defendants as trustees of the Apartment should be made accountable for the profit, if any. If not, any profit kept by the Defendants goes towards reducing their interest damages under Condition 8.2. It is not difficult to envisage a situation where a vendor deliberately breaches his obligation to complete because not only has the value of the property has suddenly increased but also because the rental obtainable has spiked. In 2007, before the September 2008 financial meltdown, office rentals were reaching dizzy heights of over $20 per square foot per month when only 6 to 12 months earlier they were at $6 per square foot per month. In such a market, would it be fair or just to allow the vendor to make a profit over his 10% per annum liquidated damages? If any party is to make a gain out of the rental, then it should be the innocent party, *ie*, the Plaintiff. This is based on some very basic notions of what is just and fair in our legal system. In *Jia Min Building Construction Pte Ltd v Ann Lee Pte Ltd* [2004] 3 SLR(R) 288, V K Rajah JC, as he then was, said at [60]: "This principle applies to all facets of the common law and has its origins in Roman Law – "*Nullus commodum capere potest de injuria sua propria*". In *Jowitt's Dictionary of English Law* (John Burke ed) (Sweet & Maxwell, 2nd Ed, 1977) at p 1266, this maxim is explained thus: "(No one can gain an advantage by his own wrong.) The maxim goes much further than to say merely that no man shall profit by his own fraud: he is not allowed to profit by his own mistake" We are also referred to two other maxims in the Dictionary (at pp 1230 and 1263 respectively):

> *Nemo ex suo delicto meliorem suam conditionem facere potest* … (No one can improve his position by his own wrongdoing.) English law also acts on this principle; and so where the existence of a cause of action is, by the fraud of the person who creates it, concealed from the person who could take advantage of it, then the Limitation Act, 1939, will begin to run only as from the date when the fraud is or could reasonably have been discovered.
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> *Nul prendra advantage de son tort demesne* (No man shall profit by wrong that he does.

These old underlying or foundational principles in our law still guide us today when exceptional circumstances arise. I need only cite two examples. For example, it allows a court to give, exceptionally, exemplary or punitive damages, for defamation where two persons deliberately cause a company, owned and controlled by them, not to make full and frank disclosure to scheme creditors so as to obtain their un-informed consent to the scheme, and who deliberately flouted their statutory duty and assurance given to the court to explain the accounts by telling deliberate half-truths to mislead scheme creditors and the court in approving the scheme and to hide their culpability by blaming others for the disappearance of the company's funds when the two of them were in fact

responsible for the same: see *Lim Eng Hock Peter v Lin Jian Wei and Anor* [2009] SGCA 48. Secondly, a court is no longer limited to compensatory damages for breach of contract based on expectation or reliance interest, it can, in appropriate and exceptional cases, award restitutionary damages: see *Attorney-General v Blake* [2001] 1 AC 268, *Experience Hendrix LLC v PPX Enterprise Inc* [2003] 1 All ER (Comm) 830, *Esso Petroleum Co Ltd v Niad Ltd* [2001] All ER (D) 324, *O'Brien Homes Ltd v Lane* [2004] EWHC 303.

59 This is an exceptional case with not only no merit but also with all the demerits on one side. I must not be taken to be laying down any general rule that in all circumstances, purchasers will be entitled to claim an account for rental in addition to their Law Society Conditions of Sale liquidated damages under Condition 8.2. In many cases there will be legitimate and respectable argument, *eg*, on whether title is in order or whether requisitions were satisfactory or whether the property is affected by any public authority reserves. The Defendants' breach here belongs to the category of deliberate and cynical wrongdoing; they deliberately refused to go through with the sale because of monetary considerations and without any legitimate reason. It involved proprietary rights and trust. They brought three parties to court, cast unwarranted aspersions on these parties and they lied on numerous aspects of their defence as well as manufactured evidence. I see no reason why any court should allow them to keep the rental income from their conduct in deliberately breaching their clear contractual obligations in such a cavalier manner. If only interest was payable for this kind of breach, then the Defendants will be able to keep the rental and profits to lower their damages. As noted above, in an exceptional market, they will make a profit. That does not seem just or fair in the circumstances of this particular case.

60 Not having had the benefit of counsels' submissions on any of the above, I say no more, but leave the final decision in better hands. I hope that counsel will, in addition to full submissions on these and other points before the Court of Appeal, have ready agreed information like whether the Apartment was in fact rented out, the outgoings and rental, the interest earned on the balance purchase price and other relevant details that may assist the Court of Appeal.

The Order for Indemnity Costs

61 I was initially not minded to order indemnity costs. However, having heard counsels' submissions and after retiring for a while to reflect on the reasons put forward, I agreed. The principles on which a court would order indemnity costs are settled. There must be compelling reasons and this includes exceptional circumstances or a special case to do so. The Supreme Court Practice 2009, at [59/27/5], states that factors which justify indemnity costs include litigation which is conducted by the party paying in a dishonest, acrimonious or otherwise improper manner and the absence of merit.

62 In my judgement, all these criteria have been satisfied. The Defendants chose to maintain their pleaded case against the Plaintiff, the Solicitors and the Agent when material parts of their case had no evidence to support the same. The Defendants have also blatantly maintained they had no knowledge of the 1st Cheque being dishonoured, that they were tricked by the Plaintiff, surreptitiously handing the unsuspecting Krishna, a 2nd Cheque with the knowing assistance and fraudulent misrepresentation of the Agent, and that Krishna had acted without mandate, wrote two letters without instructions whatsoever and then refused to obey their instructions not to proceed with the sale. All these are, unfortunately, blatant untruths. The 1st Defendant has been caught out lying time and again on very material allegations of his case. The 1st Defendant refused to produce the original DBS Bank letter, which he had discussed with Krishna in his office on 11 June 2007, and then fabricated the 16 June 2007 letter. He not only blamed Krishna for mistakes, but also Mr Kalamohan and gave this, (*ie*, Mr Kalamohan's mistakes), as one of his reasons for discharging Mr Kalamohan and

changing lawyers to Mr Joseph. There were Freudian slips in 1st Defendant's evidence during cross-examination which showed the true reason for the Defendants' actions – money.

63 The Defendants have no respect for the law or the legal process and think they can concoct multiple lies in their pleadings, their AEIC and in the oral evidence, hide documents and fabricate evidence to suit their ends. As I have noted above, the 1st Defendant is not an ignorant person, on the contrary, he is a shrewd and intelligent businessman, although he puts up a front of being very humble and not very well versed in commercial matters. He made a mockery of his affirmation to tell the truth. For these reasons, I awarded indemnity costs to the Plaintiff, the Solicitors and the Agent against the Defendants.

[note: 1] AEIC of Cheong Lay Yong filed on 18 December 2008, "CLY-2".

[note: 2] Transcript, 1 December 2009, pages 94 – 97.