E C Investment Holding Pte Ltd *v* Ridout Residence Pte Ltd and others and another appeal [2011] SGCA 50

Case Number : Civil Appeals Nos 177 and 184 of 2010

Decision Date : 28 September 2011

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA

Counsel Name(s) : Lee Eng Beng SC, Disa Sim and Jonathan Lee (Rajah & Tann LLP) for the appellant in Civil Appeal No 177 of 2010 and the first respondent in Civil Appeal No 184 of 2010; Tan Cheng Han SC, P Balachandran and Kenneth See (Robert Wang & Woo LLC) for the first respondent in Civil Appeal No 177 of 2010 and the appellant in Civil Appeal No 184 of 2010; Phua Siow Choon (Michael BB Ong & Co) for the second respondent in Civil Appeals Nos 177 and 184 of 2010; Kelvin Tan Teck San and Denise Ng (Drew & Napier LLC) for the third respondent in Civil Appeals Nos 177 and 184 of 2010; Alvin Yeo SC, Melvin Lum, Daniel Tan and Chan Xiao Wei (WongPartnership LLP) for the fourth respondent in Civil Appeals Nos 177 and 184 of 2010.

Parties : E C Investment Holding Pte Ltd — Ridout Residence Pte Ltd and others

Credit and Security – Money and moneylenders

Equity – Remedies – Specific performance – Damages in lieu of specific performance

Land – Sale of land – Contract

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2011] 2 SLR 232.]

28 September 2011 Judgment reserved.

Chao Hick Tin JA (delivering the judgment of the court):

Introduction

1 Before us are two appeals, Civil Appeal No 177 of 2010 ("CA 177") and Civil Appeal No 184 of 2010 ("CA 184") (collectively, "the present appeals"). CA 177 is an appeal by E C Investment Holding Pte Ltd ("ECI") against the decision of the High Court judge ("the Judge") in *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd and another (Orion Oil Ltd and another, interveners)* [2011] 2 SLR 232 ("the Judgment"), where the Judge dismissed ECI's application in Originating Summons No 1357 of 2009 ("OS 1357") for, in the main, specific performance of an agreement for the sale of 39A Ridout Road, Singapore 248438 ("the Property") to it at the price of $20m. CA 184 is an appeal by Ridout Residence Pte Ltd ("Ridout") against, essentially, the Judge's refusal, following his dismissal of ECI's claim, to award damages for consequential losses suffered by Ridout. ECI (the appellant in CA 177) is the first respondent in CA 184, while Ridout (the appellant in CA 184) is the first respondent in CA 177.

2 The other parties to the present appeals are:

(a) the second respondent in both appeals, Hong Leong Finance Limited ("HLF"), which is the registered mortgagee of the Property;

(b) the third respondent in both appeals, Orion Oil Limited ("Orion"), which had granted a $10m loan to Anwar secured by a charge registered against Ridout in respect of the remainder of the proceeds of sale of the Property after satisfaction of HLF's prior interest; and

(c) the fourth respondent in both appeals, Mr Thomas Chan Ho Lam ("Thomas Chan"), who was granted an option by Ridout to purchase the Property at the price of $37m after ECI had exercised its earlier option to purchase the Property at the price of $20m.

The material facts

The circumstances in which ECI came to be interested in the Property

3 In 2006, the Property, which has a land area of about 40,600 sq ft, was purchased by Ridout for $28m. Ridout held the Property on trust for its sole shareholder and director, one Mr Angus Anwar ("Anwar"). To effect the purchase, Anwar used $17m out of a total loan of $30m from HLF secured by a mortgage over the Property. In 2008, Anwar obtained a further loan of $10m from Orion secured by a charge registered against Ridout in respect of the balance of the proceeds of sale of the Property, *ie*, subject to the prior claim of HLF.

4 Between March and May 2009, HLF pressed Anwar for repayment to reduce the loan. In an attempt to stave off a mortgagee's sale of the Property, Anwar made partial repayment of around $2m to HLF. In May 2009, HLF sought further repayment from Anwar so as to reduce the then outstanding loan of approximately $19.6m to $18m. Anwar then tried to obtain loans from friends and personal contacts. At the time, Anwar obtained a valuation of the Property from Colliers International Consultancy & Valuation (Singapore) Pte Ltd dated 15 April 2009 ("the Colliers Report"), which gave the Property an open market value of $29m and a forced sale value of $23.2m.

5 Among the people whom Anwar contacted was one Mr Ivan Lim, who was given a copy of the Colliers Report. Ivan Lim in turn approached, *inter alia*, one Mr Lim Swee Hoe ("SH Lim"), who was a director of SHL Realty Pte Ltd and who was shown the Colliers Report. We should at this juncture note that of the people whom Ivan Lim approached, none was interested in giving a loan to Anwar, although some were open to the idea of buying over the Property. SH Lim then approached one Mr Tan Koo Chuan ("KC Tan") and one Mr Melvin Poh ("Poh"), who were the shareholders and directors of ECI. SH Lim showed KC Tan and Poh the Colliers Report. As ECI is a property developer, KC Tan and Poh were not interested in granting a loan. However, SH Lim also told KC Tan and Poh that Anwar (acting through Ridout) was prepared to sell the Property, but that the buyer must be willing to pay $2m upfront. To that, KC Tan and Poh indicated their interest.

The preparatory work for the transaction relating to the Property

6 As a result, ECI engaged Mr Lee Chow Soon ("CS Lee") of M/s Tan Lee & Partners ("TLP") and Ridout instructed Mr Low Yew Shen ("YS Low") of Ng Chong & Hue LLC ("NCH") to prepare the documentation to effect the transaction between ECI and Ridout ("the Transaction"). On 2 June 2009, YS Low sent CS Lee an e-mail headed "Sale and Purchase of Ridout Road (Subject to Contract)" [note: 1] forwarding a statement of accounts showing the outstanding amount owed by Anwar to HLF as at 31 May 2009. On 3 June 2009, CS Lee responded enclosing a draft option to purchase ("the Draft Option") as well as a draft deed of settlement ("the Draft Deed") for YS Low's comments. The Draft Option stipulated a purchase price of $20m for the Property and an option fee of $2m. As for the Draft Deed, it provided, in essence, that "within 60 days from today", [note: 2] the seller (*ie*, Ridout) had the right to cancel the option granted to the purchaser (*ie*, ECI) by refunding

the option fee of $2m plus making an additional lump sum payment of $250,000 – *ie*, by paying a total sum of $2.25m to ECI – by way of a cashier's order. On 4 June 2009, YS Low responded with the comment that "the drafts [were] subject to any further changes [his] clients [might] wish to make". [note: 3]

The meeting on 5 June 2009

7 On 5 June 2009, a meeting attended by KC Tan, Poh, Anwar, YS Low, CS Lee, one George Samuel Panthradil ("Panthradil"), the chief financial officer of another company owned by Anwar, and SH Lim was held at TLP's office. At this meeting ("the 5 June 2009 meeting"), CS Lee produced a litigation search done on Anwar on the same day (*ie*, on 5 June 2009) which showed numerous actions against the latter. CS Lee, KC Tan and Poh said that in view of the litigation search, there was a significant credit risk for ECI in going ahead with the Transaction. There was then a separate breakout meeting between KC Tan, Poh and Anwar, at which KC Tan and Poh told Anwar that they were willing to pay only $1.5m as the option fee, instead of $2m as stated in the Draft Option. Faced with those circumstances, Anwar agreed to reduce the option fee to $1.5m.

8 The outcome of the 5 June 2009 meeting was that Ridout granted an option dated 5 June 2009 to ECI to purchase the Property at the price of $20m in consideration of an option fee of $1.5m ("the First Option"). A deed of settlement between ECI and Ridout ("the Deed of Settlement") was also executed on 5 June 2009, but it was post-dated to 8 June 2009. Under the terms of the Deed of Settlement, Ridout had the right, "within 60 days from today", [note: 4] to cancel the First Option by refunding the option fee of $1.5m and paying an additional sum of $180,000 ("the $180,000 compensation fee") to "compensate [ECI]" [note: 5] – *ie*, by paying an aggregate amount of $1.68m ("the $1.68m") to ECI – by way of a cashier's order. If this right of cancellation was not exercised by Ridout within the stipulated 60-day period ("the 60-Day Period"), ECI would be entitled to exercise the First Option during the 30-day period thereafter. Following the grant of the First Option, ECI lodged a caveat against the Property on 5 June 2009. At this juncture, we would note that the sale price of $20m was $3.2m below the forced sale value placed on the Property by the Colliers Report. We should also add that although the Property was ostensibly to be sold by Ridout, which was its registered proprietor, it was effectively Anwar (Ridout's sole shareholder and director) who was the directing mind behind the sale. We will thus, in this judgment, refer to Ridout and Anwar interchangeably as the vendor of the Property.

9 The parties' solicitors, by way of a fax from NCH to TLP dated 5 August 2009, agreed that the 60-Day Period for Ridout to cancel the First Option would end on 6 August 2009 (as the Judge noted at [37] of the Judgment, this fax was most likely sent due to the ambiguity as to whether the 60-Day Period, which was expressed as "60 days from today" [note: 6] in cl B(a) of the Deed of Settlement, meant 60 days from 5 June 2009 (the date on which the Deed of Settlement was actually signed) or 60 days from 8 June 2009 (the date of execution stated in the Deed of Settlement)). No cancellation was effected by Ridout during the 60-Day Period. However, on 7 August 2009, NCH, on behalf of Ridout, wrote to TLP tendering a Maybank cheque (as opposed to a cashier's order) for the $1.68m "as payment for cancellation of the [First] Option". [note: 7] On 11 August 2009 (which was the next working day following the National Day weekend), TLP wrote to NCH returning the Maybank cheque and rejecting Ridout's purported cancellation of the First Option on the grounds that (*inter alia*) the purported cancellation had been effected out of time. Equally pertinent to note is that Anwar admitted in evidence that the Maybank cheque would have been dishonoured had it been presented for payment as there were insufficient funds in the relevant bank account at that time to honour that cheque.

10 Following his failure to have the First Option cancelled, Anwar sought to persuade ECI not to exercise that option by offering to pay a higher cancellation fee. Nevertheless, on 27 August 2009, ECI exercised the First Option and lodged a second caveat against the Property stating its interest as being that of a "purchaser". [note: 8] On the evening of the same day, Anwar sent SMS messages to KC Tan and Poh alleging that the Transaction was an illegal moneylending transaction and stating that he would be lodging a police report, which he duly did on 29 August 2009. Interestingly, in his police report, Anwar did not specifically complain about illegal moneylending, but only stated that ECI was "trying to make more money out of the deal" [note: 9] as a result of the escalation in the price of the Property.

The alleged settlement in September 2009

11 Further discussions between Anwar on one part and KC Tan and Poh on the other took place. Notably, there is a dispute as to whether a settlement was in fact reached between them on 3 September 2009. The alleged settlement ("the September 2009 Settlement") was that upon Ridout paying a sum of $3.5m (which included the refund of the $1.5m option fee) to ECI, the sale of the Property to ECI would be cancelled and Ridout could sell the Property to another person. The Judge found that there was indeed such a settlement agreement (see [85] of the Judgment). Be that as it may, no payment was made by Anwar pursuant to the September 2009 Settlement. Instead, on 16 September 2009, Ridout sent a letter (signed by Anwar) to ECI headed "Sale of 39A Ridout Road Singapore 248438", [note: 10] in which Ridout asked for the release of $1m to it on that very day.

Thomas Chan's involvement with the Property

12 On 6 October 2009, Thomas Chan learnt from his property agent, Kelvin Tan, that the Property was available for sale. Kelvin Tan had been alerted to the availability of the Property by Anwar's private banker, Amy Tee. Thomas Chan, after viewing the Property on 7 October 2009, was interested in purchasing it despite being told that it was "hotly contested" (see [147] of the Judgment). Thomas Chan agreed to purchase the Property for $37m, with $1m as the option fee. In addition, he agreed to make a payment of $850,000 (the remainder of the first 5% of the purchase price of $37m) upon exercising his option. An option on these terms ("the Second Option") was granted by Ridout to Thomas Chan on 7 October 2009. Without undertaking any preliminary searches on the Property, Thomas Chan paid $1m for the Second Option on 8 October 2009. Rodyk & Davidson LLP, which was later engaged by Thomas Chan to act for him in the purchase of the Property, conducted a search and informed him (on 19 October 2009, almost two weeks after he paid the option fee) of the two caveats lodged by ECI against the Property. Following his inquiries, Kelvin Tan was told by Amy Tee that ECI and Ridout had resolved their differences and that ECI would be withdrawing its caveats. On 20 October 2009, Thomas Chan lodged a caveat against the Property. On 6 November 2009, he exercised the Second Option by paying $850,000 to Ridout and lodged a further caveat against the Property.

The settlement in November 2009

13 On 3 November 2009, in conducting a routine search on the Property, ECI discovered the caveat lodged by Thomas Chan on 20 October 2009 after he was granted the Second Option. ECI raised its objection to the Second Option and warned Ridout that it would apply to court for specific performance of the First Option. Subsequently, on 11 November 2009, a settlement between Ridout and ECI was reached as reflected in the correspondence between TLP and Ridout's new solicitors, JLC Advisors LLP ("JLC"). Under this settlement ("the November 2009 Settlement"), Ridout was to pay ECI $5m by way of a cashier's order by noon on 16 November 2009, whereupon ECI would cancel its

purchase of the Property and withdraw the two caveats which it had lodged. Should Ridout fail to make the stipulated payment, ECI would proceed with the purchase of the Property.

14 Pursuant to the November 2009 Settlement, on 13 November 2009, TLP sent JLC a draft notice of withdrawal of caveat for the latter's review. On the same day, Clifford Chance Pte Ltd, which was also acting for Thomas Chan in relation to his purchase of the Property, informed KC Tan and Poh that Ridout had granted the Second Option to Thomas Chan in respect of the Property and sought confirmation that ECI would not be proceeding with its purchase of the Property. KC Tan and Poh did not give the confirmation requested for as, at that time, they had yet to receive the $5m payment due from Ridout under the November 2009 Settlement.

The filing of OS 1357

15 On 16 November 2009, JLC wrote to TLP asking for a short postponement to 18 November 2009 for Ridout to make the $5m payment pursuant to the November 2009 Settlement. ECI refused to further negotiate the matter and filed OS 1357 (the originating action in the court below) praying for, *inter alia*, specific performance of "the agreement between the parties as evinced by [the First Option] granted by [Ridout] and exercised by [ECI] on 27 August 2009 for the sale and purchase of the [P]roperty" [note: 11] [emphasis in bold in original omitted]. For ease of reference, this agreement will hereafter be termed "the Sale Agreement". HLF was cited as the second defendant. Both Orion and Thomas Chan intervened in the proceedings, and Thomas Chan expressly asked for specific performance of the Second Option.

The Judge's decision

16 In the court below, the parties' arguments centred on what the true nature of the Transaction was and whether, if it was indeed a genuine agreement for the sale of the Property by Ridout to ECI, the latter should be granted specific performance. In addition, issues relating to illegality, fraud, duress, unconscionability and inducement of breach of contract were raised. As those issues are immaterial to the present appeals for the reason stated at [20] below, we will confine ourselves to discussing the Judge's decision on the true nature of the Transaction and the grant (or refusal) of specific performance to ECI.

The true nature of the Transaction

17 In the Judgment at [71], the Judge came to the conclusion that the Transaction, as set out in the First Option and the Deed of Settlement (collectively, "the Two Instruments"), was in truth "a loan with security, the security being the Property". The Judge's decision was based on the following considerations.

18 First, although the Two Instruments were executed on the same day (*viz*, 5 June 2009), the Deed of Settlement was dated three days later (*viz*, 8 June 2009) to give the impression that it was a subsequent agreement (see [70] of the Judgment). Second, CS Lee, who drafted the Two Instruments, agreed that the Transaction was an unusual one and that he "had not done this kind of deal before" (see [70] of the Judgment). Third, the First Option contained a number of unusual features, namely: (a) the option fee of $1.5m was much higher than the usual option fee of 1% of the purchase price (which would have been $200,000, based on the purchase price of $20m offered to ECI); (b) the option period was some three months, much longer than the usual period of two to four weeks; (c) the purchase price of $20m stated in the First Option had no relation to the true value of the Property; and (d) no further payment needed to be made by ECI if it exercised the First Option (see [33] (at sub-para (a) thereof), [72] and [77] of the Judgment). Fourth, the Judge found KC Tan

and Poh to be unreliable witnesses and did not accept their evidence that ECI had only intended to buy the Property (see [74] of the Judgment). Fifth, before ECI exercised the First Option, the parties were attempting to reach a settlement so that ECI would not exercise the option at all (see [84] of the Judgment). In the Judge's view, this indicated that ECI was not genuinely interested in purchasing the Property. Sixth, the Judge took into account the parties' subsequent conduct in continuing to negotiate to seek a settlement after Ridout failed to comply with the terms of the September 2009 Settlement, and ECI's failure to take any action to complete the purchase of the Property (*eg*, by obtaining financing for the purchase, making the requisite legal requisitions, *etc*). In this regard, the Judge was conscious that the question of whether the subsequent conduct of contracting parties could be relied on to construe a contract was still a matter of some controversy (see [79] of the Judgment). He underlined that he was not relying on the parties' subsequent conduct in the present case to construe the Two Instruments, but "to see how they implemented or treated the [Two Instruments]" (see likewise [79] of the Judgment). He added that the parties' subsequent conduct was germane to the issues of waiver and estoppel, which were in turn relevant in determining whether, if the Transaction was indeed for the sale of the Property to ECI, ECI should be granted specific performance (see [79], [116] and [120] of the Judgment). Seventh, the Judge pointed out that in late September 2009, Ridout was earnestly looking for a new buyer for the Property. Despite being kept informed of this development, ECI did not object (see [88] of the Judgment).

Whether specific performance of the Sale Agreement should be granted

19 The Judge went on to hold that even if the Transaction was indeed for the sale of the Property by Ridout to ECI, following the authorities from Canada and New Zealand, this would not be an appropriate case to grant ECI specific performance of the Sale Agreement (as defined at [15] above) for the following reasons:

(a) ECI "[was] not holding the land for personal enjoyment but [for] the profit derivable therefrom" (see [108] of the Judgment).

(b) Damages would be an adequate remedy for ECI (see [109]–[110] of the Judgment).

(c) ECI had not come to court with "clean hands" (see [114] of the Judgment) in that: (i) the sale price of the Property was clearly below its true value; (ii) the witnesses for ECI were less than truthful in their evidence to the court; and (iii) the grant of specific performance would cause severe hardship to Ridout.

(d) In view of the September 2009 Settlement and the November 2009 Settlement, it was clear that ECI's intention was to get a higher amount of compensation from Ridout in return for not holding Ridout to the First Option (see [115] of the Judgment). If ECI had acceded to Ridout's request for an extension of just two days from 16 November 2009 to 18 November 2009 to make the $5m payment due under the November 2009 Settlement, the present dispute would not have arisen. ECI did not agree to the two-day extension because it noticed that property prices had risen significantly.

(e) There was estoppel by acquiescence in that ECI, by its conduct after 11 August 2009 (the day on which ECI rejected Ridout's purported cancellation of the First Option), "clearly led [Anwar] to believe that it agreed, for a higher 'compensation', to allow [Ridout] to look for another buyer and … would not proceed to complete the purchase of the Property" (see [120] of the Judgment).

The issues raised in the present appeals

20 In the court below, issues on duress, unconscionability and illegal moneylending were raised by Ridout to resist ECI's application in OS 1357, while issues on fraudulent trading and/or inducement of breach of contract were raised by Orion. The Judge ruled on all those issues. In the present appeals, none of the parties are challenging the Judge's decision on those issues. Thus, they are deemed to have accepted the Judge's decision in those respects (see O 57 r 3(2) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed)).

21 It follows that the present appeals hinge on only two core issues, namely:

(a) whether the Judge was right in regarding the Transaction, as set out in the Two Instruments, as purely a loan coupled with security ("the First Main Issue"); and

(b) if the Judge erred in his ruling on the First Main Issue (*ie*, if the Transaction was truly for the sale of the Property by Ridout to ECI), whether ECI should be denied specific performance of the Sale Agreement and be awarded only damages ("the Second Main Issue").

The First Main Issue: The true nature of the Transaction

22 *Vis-à-vis* the First Main Issue, the Judge, in coming to his conclusion that the Transaction (as structured in the form of the Two Instruments) was in truth a loan coupled with security, considered not only the terms of the said instruments, but also the oral evidence of the witnesses. In the next few sections (*viz*, at [23]–[60] below), we will set out briefly the arguments of the respective parties in support of or against (as the case may be) the Judge's finding on the First Main Issue. In this regard, we will first provide an overview of the respective parties' cases on this issue before going into the specific matters which they raised. It would be pertinent, at this juncture, to note the following features of the Transaction (as highlighted by counsel for Thomas Chan):

(a) The option fee of $1.5m paid by ECI to Ridout for the First Option was unusually large. It worked out to 7.5% of the stated purchase price of $20m, well above the market norm of 1%.

(b) To accommodate the 60-Day Period during which Ridout could cancel the First Option, the validity period of the option was lengthened to 90 days.

(c) The cancellation of the First Option was conditional upon Ridout paying ECI the $180,000 compensation fee, which was (so counsel submitted) essentially "interest" payable on the 60-day "loan" of the $1.5m option fee at the rate of 6% per month or 72% per annum.

Overview of the respective parties' cases on the First Main Issue

23 Ridout, Orion and Thomas Chan (hereafter collectively referred to as "the three respondents"), whose interests on the First Main Issue are similar and/or aligned (albeit not identically), emphasised that an appellate court should be slow to overturn a trial judge's findings, in particular, those findings of fact which hinge upon the credibility and veracity of witnesses (see *Lim Hwee Meng v Citadel Investment Pte Ltd* [1998] 3 SLR(R) 101 at [26]–[27]). Of course, they also recognised that an appellate court is in as good a position as the trial judge to evaluate and draw proper inferences from primary facts (see *Peh Eng Leng v Pek Eng Leong* [1996] 1 SLR(R) 939). They underscored, in particular, the following factual findings of the Judge:

(a) KC Tan was an unreliable witness as he feigned ignorance of many things. He gave answers that would suit his purpose and was combative on the stand (see [74] of the Judgment).

(b) Poh was also found to be an unreliable witness, especially in relation to his evidence on ECI's intentions at (*inter alia*) the 5 June 2009 meeting (see [74] and [83] of the Judgment).

(c) CS Lee was evasive and combative in putting forward the case for his client (ECI) and in explaining why he structured the Transaction in the form of the Two Instruments (see [70] of the Judgment). (It should, however, be noted that the Judge also expressly stated that CS Lee "did not cross the line" (see [70] of the Judgment) while giving evidence, and that his evasive and combative attitude was "more in the spirit of putting forward the best case for his client and defending his part in the structuring of the deal" (see [70] of the Judgment).)

(d) Two of ECI's witnesses (*ie*, CS Lee and SH Lim) were graphically described by the Judge as being "like sharks circling around bleeding prey, opportunistically [making] a claim when there was no basis to do so" (see [29] of the Judgment).

(e) Ridout's key witness, Anwar, was not dishonest, although his account of the events leading to the 5 June 2009 meeting was "contradictory and hopelessly tangled" (see [32] of the Judgment) as he was "a 'big picture' man who did not pay attention to details" (see [32] of the Judgment).

24 As the Judge found that both KC Tan and Poh lacked credibility as witnesses, the three respondents submitted that Anwar's evidence should be preferred over that of the said two persons, in particular, in ascertaining the parties' intention at the time of executing the Two Instruments during the 5 June 2009 meeting as well as at the time of the events surrounding the September 2009 Settlement.

25 In contrast, ECI's submission on the First Main Issue was, in brief, as follows. The Judge, it was argued, erred in reading too much into the Two Instruments when they clearly reflected two different but connected ideas, namely: Ridout was to sell the Property to ECI, but with the proviso that Ridout could cancel the First Option within the 60-Day Period by paying ECI the $1.68m (*viz*, the $1.5m option fee plus the $180,000 compensation fee). Admittedly, it could not be disputed, and we agree with the Judge, that Anwar was not keen to sell the Property, but was only interested in obtaining a loan. On the other hand, ECI, being a property developer, did not really want to lend money, but only wanted to buy the Property. ECI submitted that the Transaction, as structured in the form of the Two Instruments, was meant to meet the different needs and interests of itself and Anwar (acting via Ridout), and that it was no less an agreement for the sale of the Property by Ridout to ECI, subject to Ridout's right of cancellation within the 60-Day Period. The Judge's approach, ECI contended, undermined commercial certainty, bearing in mind that the Two Instruments had been negotiated and accepted by the parties with professional advice and in the presence of their respective solicitors. ECI submitted that the court should not be overly zealous to rewrite an arrangement for contracting parties. ECI also emphasised the following points:

(a) There was no evidence that the Transaction (as structured in the form of the Two Instruments), which was for the sale of the Property by Ridout to ECI subject to Ridout's right of cancellation, was a sham transaction.

(b) Although Anwar initially wanted only a loan, he was prepared to sell the Property. The Judge erred in ignoring clear evidence that Anwar (and in turn, Ridout) regarded the Transaction as a sale of the Property to ECI, and not wholly as a secured loan.

(c) The Judge erred in ignoring critical pieces of objective documentary evidence which showed that Ridout did not treat the sale of the Property to ECI as having been cancelled or as

having been varied by settlement or acquiescence.

Specific matters raised by the parties

The proper approach in characterising a transaction

26 We turn now to the specific matters which the parties raised in respect of the Judge's ruling that the Transaction was in truth a secured loan, beginning with their submissions on the proper approach to take in characterising a transaction.

27 ECI submitted that in characterising a transaction, where there was no evidence either that the real agreement reached between the parties was wholly different from the agreement recorded in the documents before the court or that there was an independent contract existing outside of the documents before the court, the usual approach employed by the court was to "look at the documents themselves to ascertain the nature and substance of the transaction" (see *Thai Chee Ken and others (Liquidators of Pan-Electric Industries Ltd) v Banque Paribas* [1993] 1 SLR(R) 871 ("*Thai Chee Ken*") at [9]). ECI further submitted that if the allegation was that the transaction in question was a sham, the threshold needed to discharge the (civil) burden of proof was high, *ie*, the party alleging that it ought not be bound by the terms of the documents setting out the transaction (the "transaction documents") must show (on a balance of probabilities) that "all the parties [to the transaction] … ha[d] a common intention that the acts [done] or documents [executed were] not to create the legal rights and obligations which they [gave] the appearance of creating" (see the English Court of Appeal case of *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 at 802, which was quoted with approval by our High Court in *TKM (Singapore) Pte Ltd v Export Credit Insurance Corp of Singapore Ltd* [1992] 2 SLR(R) 858 at [48]). ECI pointed out that in the present case, there was no evidence of any collective intention on the part of itself and Ridout to deceive. Significantly, the Judge did not call the Transaction a sham. ECI argued that the Judge's finding that the Transaction was nothing but a secured loan was contrary to the weight of evidence which showed that the Transaction was for the sale of the Property by Ridout to ECI, subject only to the reservation that Ridout could cancel the First Option by paying the $1.68m within the 60-Day Period.

28 Ridout, on the other hand, argued that the case of *Thai Chee Ken* should be distinguished on its facts. In *Thai Chee Ken*, there was no suggestion by the parties that the sale and purchase agreements in question were a sham or a disguise. There was also no evidence that the real agreement reached between the parties was different from that recorded in the documents. As such, the court only looked at the documents themselves to ascertain the nature and substance of the transaction. In stark contrast, Ridout's position in the present matter had always been that contrary to the labels used in the Two Instruments, the Transaction was a loan by ECI to Anwar secured by the Property.

29 On his part, Thomas Chan argued that the question of whether the Transaction was a sham did not arise as what the court was being asked to determine was the true nature of the Transaction. On this, the Judge had made the specific finding that the Transaction was a (disguised) loan with security. Thomas Chan highlighted that in the Australian case of *Gurfinkel and another v Bentley Proprietary Limited* (1966) 116 CLR 98 (also referred to in *Thai Chee Ken* at [11]), the High Court of Australia stated (at 114) that "if it [could] be shewn by parol evidence that both parties to a document adopted the form they did as a disguise, then their true intent and not the form [would] prevail". This, Thomas Chan submitted, was precisely the position here: there was ample evidence in the instant case, from both the contemporaneous documents and the witnesses' testimony, that the real agreement reached between the parties was wholly different from the (ostensible) agreement reflected by the labels attached to the Two Instruments. Hence, according to Thomas Chan, there

was no basis for the application of *Thai Chee Ken* to the present case.

30 We recognise that the court is not prohibited from evaluating evidence *other than* the transaction documents (*ie*, the Two Instruments in the present case) to determine the true nature of a transaction. In other words, the crux of the First Main Issue lies not in construing the wording or terms used in the Two Instruments *per se*, but in determining whether the real agreement between the parties was that expressed in those instruments. If the parties had adopted the arrangement set out in the Two Instruments as a disguise for what was truly a loan, then their true intent, and not the form of the Two Instruments, will prevail, as stated in *Thai Chee Ken*.

31 In this regard, the case of *City Hardware Pte Ltd v Kenrich Electronics Pte Ltd* [2005] 1 SLR(R) 733 ("*City Hardware*") is pertinent. In that case, the court outlined the approach which should be taken in analysing whether a transaction was a disguised moneylending transaction or a genuine commercial transaction of a different nature, as follows:

> 24 ... What constitutes lending must of course remain a question of fact in every case. *Careful consideration has to be given to the form and substance of the transaction as well as the parties' position and relationship in the context of the entire factual matrix*. It is axiomatic that if there has been no lending there can be no moneylending.
>
> 25 It ought to be stressed, however, that *the court ought not to be overzealous in analysing or deconstructing a transaction in order to infer and/or conclude that the object of the transaction was to lend money*. …
>
> [emphasis added]

32 In the present case, it is true that the form and structure of the documentation for the Transaction, with the cancellation feature in the Deed of Settlement, was ECI's creation. It was probably the case that because KC Tan and Poh knew that Anwar/Ridout was reluctant to sell the Property, they came up with the idea of effecting the Transaction by way of two separate instruments (*viz*, the First Option and the Deed of Settlement) under which Ridout would give ECI an option (via the First Option) to purchase the Property at the price of $20m while reserving for itself (via the Deed of Settlement) the right to cancel the option within the 60-Day Period. As we see it, there was no reason for CS Lee to structure the Transaction in this manner other than to meet the concerns of both his client (ECI) and those of Anwar/Ridout.

33 In this regard, CS Lee stated in his evidence that he had merely prepared the Two Instruments to reflect what ECI wanted: [note: 12]

> Q. So right from the very outset, your first set of instructions, your clients [*ie*, ECI, acting via KC Tan and Poh] came to you and said, "We want to take an option over a property and at the same time we want to give the vendor the option to cancel this option."
>
> A. Yes.
>
> Q. And they also told you within 60 days?
>
> A. Yes.
>
> Q. They also told you, "Therefore, our option must be capable of being exercised on a date after the proposed cancellation date."

A. Yes.

…

Q. So the deal originated completely from them?

A. Yes.

…

Q. Right. So your input was really very mechanical: you received their instructions, you were told what the structure was, so all that you needed to do was to make sure that the documents reflected what they wanted?

A. Yes.

34 It cannot be denied that the fact that the Deed of Settlement was post-dated to a date after the date stated on the First Option (the First Option being dated 5 June 2009 and the Deed of Settlement, 8 June 2009 (see [8] above)) would give the misleading impression that the agreement set out in the Deed of Settlement was reached subsequent to the agreement set out in the First Option. CS Lee admitted as much. He also admitted that based on his more than 25 years of experience as a conveyancing lawyer, the Transaction was "an unusual transaction". [note: 13] This shows that the Transaction was not the normal or usual straightforward agreement for the sale and purchase of property.

35 On the evidence of KC Tan and Poh, it is clear that ECI wanted to purchase the Property at the most attractive price, even though Anwar was not keen to sell. Due to Anwar's financial situation, KC Tan and Poh saw this as an opportunity to get a good deal. This is evident from what Poh said in court: [note: 14]

Q. ... My question was this: would you agree with me that the genesis of the [T]ransaction, the starting point, or the motivation, I suppose, if you like, for the [T]ransaction, was because … Anwar needed to raise money?

A. Yes.

Q. You would also agree with me that at the starting point of the [T]ransaction … Anwar was seeking to borrow money from you and/or [KC Tan]; would that be correct?

A. That was raised through [SH Lim], the agent, that he was looking to borrow money, yes.

…

[Q.]So because of that, your understanding, as well as [KC Tan]'s understanding was that … Anwar had an urgent need to raise money?

A. Yes.

36 Following from the above, Ridout submitted that KC Tan and Poh entered into the Transaction because they realised that this was the only way for ECI to have a chance of purchasing the Property. They wanted to ultimately acquire the Property at a knock-down price: given Anwar's

financial circumstances, they thought that Anwar would not be able to pay the $1.68m within the 60-Day Period and, thus, ECI would be able to purchase the Property in accordance with the terms of the First Option. Although this appears to support the contention that the Transaction was a loan secured by the Property, we see difficulties with this line of argument, as we will explain at [65]–[74] below.

The parties' pre- and post-contractual conduct

37 We now turn to the arguments raised by the respective parties in relation to their pre- and post-contractual conduct.

(1) Pre-contractual conduct

38 *Vis-à-vis* the parties' pre-contractual conduct, ECI emphasised that right from the very beginning when Ivan Lim and SH Lim approached KC Tan and Poh, KC Tan and Poh had already indicated that ECI was only interested in buying the Property and not in lending money to Anwar. Furthermore, before they met, Anwar was a complete stranger to KC Tan and Poh. The fact that ECI was only interested in buying the Property, coupled with Anwar's reluctance to sell it, led to the hatching of the idea of a 60-day grace period (*viz*, the 60-Day Period) within which Ridout could cancel the First Option. ECI submitted that it did not really matter *who* was the first to suggest the idea of a grace period during which Ridout could cancel the First Option: in view of the diametrically opposed interests of ECI and Ridout, one need not be a genius to be able to come up with that idea. In this regard, ECI also highlighted the following points:

(a) If ECI had wanted to grant a secured loan to Anwar, it could easily have structured the Transaction as a straightforward loan coupled with security, given that (as found by the Judge at [139] of the Judgment) this would not have been prohibited by the Moneylenders Act 2008 (Act 31 of 2008) ("the Moneylenders Act").

(b) It was significant that the first e-mail from YS Low to CS Lee apropos the Property (*ie*, the e-mail of 2 June 2009 from YS Low to CS Lee mentioned at [6] above) was entitled "*Sale and Purchase* of Ridout Road (Subject to Contract)" [note: 15] [emphasis added], and stated explicitly that the information furnished therein was for ECI "to consider whether or not to purchase the [P]roperty". [note: 16]

(c) The draft agreements and the accompanying correspondence circulated between the parties prior to the 5 June 2009 meeting reflected precisely the intention of the parties, *viz*, that the Transaction was for the sale of the Property by Ridout to ECI, with a cancellation clause inserted solely to meet Ridout's concerns.

(d) The Transaction was an arm's length commercial transaction negotiated between two independent parties, both of whom had the benefit of legal advice.

39 ECI also submitted that the Judge placed undue weight on his findings of fact that at the 5 June 2009 meeting: (a) ECI was only concerned with Anwar's ability to make the requisite payment needed to cancel the First Option, as opposed to the purchase price of the Property (see [72] of the Judgment); and (b) ECI used the litigation search done on Anwar to push the option fee down from $2m to $1.5m (see [73] of the Judgment). ECI said that those were wholly neutral, if not irrelevant, factors as CS Lee had good reason to conduct the litigation search on Anwar since Anwar was the sole shareholder and director of Ridout, and since there was a trust deed in the land register indicating that the Property was held on trust for him. The relevance of the litigation search was that

it would ascertain whether Anwar had been made a bankrupt and, as a result, lost his status as Ridout's director, and/or whether beneficial ownership of the Property had vested in the Official Assignee.

40 ECI also argued that there was nothing *legally improper* about its pressuring Anwar to lower the purchase price of the Property and the option fee. This, it was submitted, showed that ECI's true intention was indeed to purchase the Property. It was only natural for ECI, as a property developer, to seek for itself the best possible deal. In support of this proposition, ECI cited the following statement by this court in *Beckkett Pte Ltd v Deutsche Bank AG and another and another appeal* [2009] 3 SLR(R) 452 ("*Beckkett v Deutsche Bank*") at [114]:

> … *No prospective purchaser would act or be expected to act in … a commercially imprudent (or morally considerate) manner in the conduct of his own commercial affairs*. If the mortgagee wants to sell a mortgaged property cheaply or below the market price, it is not up to the prospective purchaser to turn down a good offer. On the contrary, commercial reality expects the latter to drive a hard bargain to force the price down. ... [emphasis added]

ECI added that the agreed purchase price of $20m was neither commercially absurd nor unreasonable when compared to the two forced sale valuations adduced at the trial, *ie*, $23.2m according to the Colliers Report dated 15 April 2009, [note: 17] and $21.6m as at 5 June 2009 according to a report by Savills (Singapore) Pte Ltd, the valuer engaged by ECI ("the Savills Report"). [note: 18]

41 In contrast, the three respondents (individually and collectively) referred to the following aspects of the parties' pre-contractual conduct to support the Judge's finding that the true nature of the Transaction was that of a secured loan:

(a) At the 5 June 2009 meeting, there was no real negotiation on the purchase price for the Property. Instead, the focus of the meeting was on Anwar's ability to pay the $1.68m if Ridout were to cancel the First Option.

(b) At the separate breakout meeting between Anwar, KC Tan and Poh held in the course of the 5 June 2009 meeting, KC Tan and Poh made it clear to Anwar that they were only prepared to pay $1.5m as the option fee, and not $2m as stated in the Draft Option. This reduction of the option fee from $2m to $1.5m was presumably to lower ECI's financial risk as a result of the litigation search done on Anwar, and was wholly consistent with Anwar's evidence that everyone present at the 5 June 2009 meeting understood that the option fee was, in reality, meant to be a loan to help him with short-term financing. The three respondents submitted that this reduction in the option fee would only make sense if the option fee was in truth a loan because if the sale of the Property envisaged in the First Option was genuine, the option fee paid would have been part payment of the purchase price and there would not have been any real need for ECI to press down the option fee. If Ridout could not repay the option fee plus the specified amount of compensation needed in order to cancel the First Option, it would have been a welcome opportunity for ECI to purchase the Property at the attractive price of only $20m.

(c) During cross-examination, KC Tan and Poh confirmed that they knew Ridout could give good title of the Property to ECI despite Anwar's personal financial difficulties and the various legal proceedings against him. Poh's evidence on this point was as follows: [note: 19]

> Q. ... [I]n the ten years that you've been involved in the property business … have you come across any transaction where an option has been derailed because of a litigation

suit?

A. Not that I'm aware of.

As for KC Tan, his evidence on this point was as follows: [note: 20]

Q. ... [W]hen you buy a property from a company, your contract is with the company and the personal circumstances of the shareholders or directors are not important.

A. Yes, generally that is so.

Based on the above evidence, the three respondents submitted that the litigation search on Anwar would only make sense if the option fee was in truth a loan. It was also pointed out that CS Lee had himself confirmed during cross-examination that the existence of the trust deed under which Ridout held the Property on trust for Anwar and the various law suits against Anwar would not affect the sale of the Property: [note: 21]

Q. ... To what extent would a trust arrangement affect the validity of any option given by [Ridout] to [ECI]?

A. It will not affect the validity because they [*viz*, Anwar and Ridout] are two different entities …

Q. … [Y]ou will confirm for us that the existence of the trust and the litigation suits against … Anwar, to the best of your professional expertise, would not affect the sale of the [P]roperty from [Ridout] to [ECI]?

A. Yes.

The three respondents further submitted that, interestingly, Poh admitted that ECI had been concerned about Anwar's ability to pay the $1.68m if the First Option were cancelled, and that ECI had "[taken] the opportunity of [the] searches [on Anwar] to press down the price". [note: 22] This was despite the fact that CS Lee had testified that ECI could purchase the Property from Ridout without being affected by the financial difficulties of and the law suits against Anwar.

(d) CS Lee said that he "had [the Moneylenders Act] in mind when [he was] drafting [the] documents", [note: 23] but concluded that it had no application to the Transaction. The three respondents submitted that it was precisely because the Transaction was a loan or contained features that came close to offending the prohibitions under the Moneylenders Act that CS Lee considered the implications thereof, and sought to disguise the true nature of the Transaction by splitting up the instruments documenting it into two separate instruments (*viz*, the First Option and the Deed of Settlement) as well as by inserting misleading wording into and post-dating the Deed of Settlement.

(e) ECI's attempt to explain away the significance of the litigation search done on Anwar – *viz*, that it was necessary to ascertain whether Anwar (the beneficiary under the trust held by Ridout on the Property) had been made a bankrupt, thereby vesting beneficial ownership of the Property in the Official Assignee – was an afterthought as this was not brought out in evidence. In fact, the litigation search reflected ECI's concern about the risk of lending money to Anwar.

(2) Post-contractual conduct

(2) Post-contractual conduct

42 Turning now to the arguments of the parties based on their post-contractual conduct, ECI pointed to the following to show that Ridout had regarded the Transaction as a sale of the Property to ECI, subject only to the right of cancellation within the 60-Day Period:

(a) All the correspondence issued on behalf of Ridout apropos the Transaction referred to that transaction as a sale of the Property to ECI (*eg*, the letter from NCH (Ridout's then solicitors) to TLP (ECI's solicitors) dated 8 June 2009 made reference to "the Option Agreement" [note: 24] and "stakeholders"). [note: 25]

(b) Ridout did not object to the lodgement of a caveat by ECI on 5 June 2009 indicating that it (ECI) had an interest in the Property as a "purchaser". [note: 26]

(c) When asked by Orion about the First Option granted to ECI, NCH, in its letter of reply dated 6 July 2009, represented the Transaction as being for the "Sale and Purchase" [note: 27] [underlining in original omitted] of the Property to ECI.

(d) Anwar's police report lodged on 29 August 2009 made no allegation of illegal moneylending and acknowledged that ECI had the right to buy the Property.

(e) Even after raising the allegation that the Transaction was an illegal moneylending transaction, Anwar himself wrote a letter dated 16 September 2009 using Ridout's letterhead (*ie*, the letter mentioned at [11] above), wherein he stated that there was a valid agreement between the parties for "the … sale of the [P]roperty" [note: 28] and requested for an early release of $1m of the purchase price of the Property.

(f) The alleged "loan" from ECI (in the form of the $1.5m option fee paid by ECI) was not recorded in Anwar's statement of liability when he filed an affidavit on 23 December 2009 pursuant to his application under s 45 of the Bankruptcy Act (Cap 20, 2009 Rev Ed).

(g) Neither Ridout nor its then solicitors (NCH) protested against the various references to the Transaction as a purchase of the Property by ECI in TLP's letters to NCH dated (*inter alia*) 27 August 2009 and 30 October 2009. [note: 29] NCH's response to those letters was merely that it was taking instructions from Ridout.

43 ECI submitted that none of the above circumstances were considered by the Judge. Instead, the Judged inferred that ECI did not genuinely intend to purchase the Property based on what were really insignificant events, such as ECI's failure to obtain financing for the purchase of the Property, its late payment of the stamp fee on the First Option and its late making of legal requisitions, when there were clearly plausible and credible explanations for those events.

44 With regard to its delay in paying the stamp fee on the First Option and making legal requisitions, ECI explained that the delay was the result of Anwar's persistent attempts to persuade it to forego its rights under the First Option in consideration of the payment of a settlement sum, which was initially agreed at $3.5m (under the September 2009 Settlement) and later increased to $5m (under the November 2009 Settlement). It was submitted that it made sense for ECI to refrain from incurring further expenses towards the completion of the purchase of the Property while there appeared to be prospects of being able to reach an amicable settlement with Ridout *vis-à-vis* the latter's purported cancellation of the First Option. After Ridout failed to pay the settlement sum of

$5m due under the November 2009 Settlement by the stipulated deadline of noon on 16 November 2009, ECI decided to cease all further discussions with Ridout/Anwar and proceeded to seek the completion of the purchase of the Property. To that end, legal requisitions were sent on 16, 17 and 20 November 2009 [note: 30] and the stamp fee on the First Option was paid on 24 November 2009. [note: 31]

45 Ridout, on the other hand, countered ECI's explanation for the late payment of the stamp fee on the First Option and the late making of legal requisitions by highlighting the various inconsistencies in ECI's ever-shifting (so Ridout submitted) position on these matters:

(a) The evidence of KC Tan and Poh in their joint affidavit filed on 15 January 2010 was that ECI had always intended to complete the purchase of the Property despite Anwar's various attempts to reach a settlement by which ECI's intended purchase of the Property would be cancelled. Notably, at para 32 of their joint affidavit, they stated that in early September 2009, Anwar contacted them again to try to convince ECI to enter into such a settlement, but "[they] were adamant about the purchase as by [that] time, the property prices for [Good Class Bungalows] had risen significantly". [note: 32]

(b) However, Poh eventually conceded under cross-examination that on 3 September 2009, "there was an agreement to settle at [$]3.5 million in principle". [note: 33] Poh made this concession only when he was confronted with evidence produced by Anwar (in the form of SMS messages) that there was such a settlement.

(c) In short, it was only at the trial that KC Tan and Poh admitted to the existence of the September 2009 Settlement, and endeavoured to explain away their inaction in making legal requisitions on the ground that the parties were then still attempting to reach an amicable settlement.

46 With regard to its delay in obtaining financing to effect the purchase of the Property, ECI clarified that its ability to finance the Transaction was never an issue as that was not disputed by any party in any of the pleadings or affidavits filed in OS 1357, nor in the list of issues presented to the Judge for adjudication. In this regard, we note that there was a letter of offer dated 9 September 2009 from HLF offering ECI a loan of $18m for the purchase of the Property. Ultimately, ECI did not accept the offer. It was confirmed by HLF's counsel that HLF's offer lapsed as ECI did not take steps to fulfil the condition precedent of the proposed loan, *ie*, to increase the paid-up capital of ECI, which then stood at only $2,000, to $100,000. ECI pointed out that both KC Tan and Poh had given evidence that ECI had sufficient funds from other sources to complete the purchase (*eg*, by drawing down on other lines of credit or utilising cash reserves from a related company). [note: 34] ECI therefore submitted that the Judge erred (at [81] of the Judgment) in finding that it ought to have adduced more proof of its ability to finance the Transaction and that the time to produce such evidence had long passed.

47 On its part, Ridout, with regard to ECI's submissions on Anwar's police report dated 29 August 2009 (see sub-para (d) of [42] above), pointed out that although Anwar had not referred to the Transaction as a loan *per se* in the police report, he had stated that he had been loaned money at "an interest fee of 6% [per month]". [note: 35] Further, two days before lodging the police report, he had sent a SMS message to Poh stating: [note: 36]

… I will have to file a report of money lending. The [T]ransaction was based on borrowing

SIN $1.5mil for two months yielding SIN $1.68mil. Thank you. …

In any event, Anwar had complained in his police report that ECI was "trying to make more money out of the deal". [note: 37] This, Ridout submitted, was consistent with its case that all that ECI was entitled to under the Two Instruments was a high interest rate for lending Anwar the option fee of $1.5m.

Inconsistencies in the evidence of Ridout's witnesses

48 We now turn to the respective parties' submissions on the evidence of Ridout's witnesses.

49 ECI submitted that the evidence proffered by Ridout's witnesses as to the true nature of the Transaction, both on affidavit and at the trial, was confusing. Where Anwar's evidence was concerned, ECI highlighted the following matters:

(a) At the trial, Anwar's position was that throughout the course of the negotiations between the parties, all that he had in mind was that the Transaction was an *unsecured loan*, with the Property playing no role whatsoever. [note: 38]

(b) However, in Ridout's pleaded case for OS 1357, it was stated that "the true intent of the parties was to provide *security* to [ECI] for the loan of $1.5 million from [ECI] to [Ridout]" [note: 39] [emphasis added].

(c) In his affidavit of evidence-in-chief ("AEIC") filed on 25 June 2010, Anwar deposed that he was surprised when YS Low informed him on or about 2 June 2009 that the documentation for the Transaction consisted of "an option to purchase the [P]roperty followed by a so[-]called Deed of Settlement". [note: 40] As he was "extremely uncomfortable to give an option for a loan", [note: 41] he "requested a meeting so that [he] could satisfy [himself] that the [T]ransaction was a loan". [note: 42]

(d) Under cross-examination, Anwar sought to retract the version of events set out in his AEIC as inaccurate. On the stand, he said that he first learnt about the structure of the Transaction in a conversation with Panthradil during the car journey on the way to the 5 June 2009 meeting. [note: 43]

(e) Anwar sought to shift the responsibility for all communications with YS Low apropos the Transaction to Panthradil. [note: 44] This, however, was contradicted by Panthradil's evidence on the stand. Panthradil testified that he had no substantive discussions with YS Low about the Transaction, apart from the mechanics for paying the option fee. [note: 45]

50 ECI submitted that the aforesaid inconsistencies in Anwar's case were fabricated to mask the fact that Anwar knew that the Transaction involved the sale of the Property by Ridout to ECI. ECI pointed out that the Judge had found Anwar to be an experienced business entrepreneur who had had the benefit of advice from both his lawyer and Panthradil (the chief financial officer of another company owned by Anwar) before he signed the Two Instruments (see [56] and [58] of the Judgment). Yet, inexplicably (in ECI's submission), the Judge, at [56] of the Judgment, found that the Transaction was in fact a disguised loan coupled with security:

Under cross examination Panthradil said that he received the [D]raft [O]ption and [the] [D]raft

> [D]eed … on or after 3 June 2009 and upon reading them, said to [Anwar]: "Hey, Pak, this looks like you're selling the [P]roperty". Panthradil said [Anwar]'s response was: "No, I will clear it before that. Its [*sic*] just the structure to enable the borrowing" … I accept Panthradil's evidence over [Anwar]'s version. Panthradil said when he saw the cancellation and the factoring in of the interest[,] he saw the documents as a secured loan structure. Panthradil said they were desperate for funds because no one was going to lend [Anwar] $2m "clean". I therefore find that [Anwar] intended to use the Property as security for the loan.

51 ECI argued that a careful examination of Panthradil's evidence showed that his evidence was in fact consistent with and supported its case, *viz*, that Anwar was well aware that Ridout had to sell the Property to ECI if Ridout did not cancel the First Option within the 60-Day Period. Further, Anwar's reference to the structure of the Transaction demonstrated that he knew that the Two Instruments did not simply provide for the grant of a loan to him, but also something more.

52 In countering ECI's argument on the alleged inconsistencies in Anwar's evidence, Ridout submitted that the court was entitled to accept Panthradil's evidence that the 5 June 2009 meeting was "more to lend … money and [KC Tan and Poh] were more concerned of … Anwar's ability to repay the money". [note: 46] Although Panthradil was only an employee of Anwar, there was, Ridout submitted, no suggestion that he was not truthful in his testimony. In respect of ECI's criticism that the Judge erred in treating Panthradil's evidence as indicative of Anwar's intention, Ridout submitted that ECI had mischaracterised the Judge's finding, which, simply put, was that Panthradil's evidence was corroborative of Anwar's evidence that he did not want to sell the Property all along and had made this known to his employee (*viz*, Panthradil).

Whether the Transaction lacked the key features of a loan

53 We move now to the parties' submissions on whether the Transaction lacked the key features of a loan.

54 ECI submitted that the Transaction lacked many of the key indicia and features of a loan. It cited the case of *City Hardware*, where the High Court accepted (at [23]) the following definition of "loan" set out in Clifford L Pannam, *The Law of Money Lenders in Australia and New Zealand* (The Law Book Company Limited, 1965) at p 6:

> A loan of money may be defined, in general terms, as a simple contract whereby one person ("the lender") pays or agrees to pay a sum of money in consideration of a promise by another person ("the borrower") to repay the money upon demand or at a fixed date. The promise of repayment may or may not be coupled with a promise to pay interest on the money so paid. *The essence of the transaction is the promise of repayment*. … [emphasis added]

55 ECI submitted that the case of *In re George Inglefield, Limited* [1933] Ch 1, which discussed (at 27–28) the difference between a sale and a mortgage or charge as follows, was also instructive:

> *In a transaction of sale the vendor is not entitled to get back the subject-matter of the sale by returning to the purchaser the money that has passed between them*. In the case of a mortgage or charge, the mortgagor is entitled, until he has been foreclosed, to get back the subject-matter of the mortgage or charge by returning to the mortgagee the money that has passed between them. The second essential difference is that if the mortgagee realizes the subject-matter of the mortgage for a sum more than sufficient to repay him, with interest and the costs, the money that has passed between him and the mortgagor[,] he has to account to the mortgagor for the surplus. *If the purchaser sells the subject-matter of the purchase, and*

realizes a profit, of course he has not got to account to the vendor for the profit. Thirdly, if the mortgagee realizes the mortgage property for a sum that is insufficient to repay him the money that he has paid to the mortgagor, together with interest and costs, then the mortgagee is entitled to recover from the mortgagor the balance of the money, either because there is a covenant by the mortgagor to repay the money advanced by the mortgagee, or because of the existence of the simple contract debt which is created by the mere fact of the advance having been made. *If the purchaser were to resell the purchased property at a price which was insufficient to recoup him the money that he paid to the vendor, of course he would not be entitled to recover the balance from the vendor*. [emphasis added]

56 In this regard, ECI highlighted that the following key features of a loan were missing from the Transaction:

(a) There was no provision for the payment of interest after the 60-Day Period if Ridout failed to cancel the First Option within that period.

(b) Likewise, there was no provision for the enforcement of payment of the "outstanding sum" (*ie*, the $1.68m) should Ridout fail to cancel the First Option within the 60-Day Period.

(c) The amount of compensation which Ridout had to pay for cancelling the First Option was $180,000 in respect of an option fee of $1.5m. This worked out to an "interest rate" of 12% per annum (or 6% per month). This figure should be contrasted with the original provisions set out in the Draft Option and the Draft Deed, which stipulated a cancellation fee of $250,000 in respect of an option fee of $2m (see [6] above). That arrangement would have yielded a higher "interest rate" of 12.5% per annum (or 6.25% per month). If ECI had intended the Transaction to be a loan, it would not have sought to reduce the option fee to $1.5m and thereby earn a lower "interest rate" as that would not make commercial sense.

ECI submitted that had it truly intended to grant a loan to Anwar, it would have taken a valid security over the Property and would have made appropriate provisions in the contractual documents to address the matters mentioned at sub-paras (a)–(c) above, instead of doing what it did, *ie*, structuring the Transaction in the form of the Two Instruments.

57 In rebuttal to ECI's point about the lack of provision for interest to be paid after the 60-Day Period if Ridout did not cancel the First Option, Ridout stated that the Transaction was meant to be a short-term loan to Anwar and, therefore, there was no provision for interest accruing after the 60-Day Period. In the event of default (*ie*, in the event that Ridout did not cancel the First Option and therefore did not pay ECI the $1.68m), there could be an implied term that ECI could sell the Property at its market price and recoup the amount lent to Anwar. Ridout further submitted that the lack of provision for interest after the 60-Day Period was, in any event, irrelevant, given KC Tan and Poh's motive for structuring the Transaction as a sale of the Property with a view to taking unfair advantage of the situation if Anwar was unable to pay the $1.68m within the 60-Day Period.

58 As for the reduction of the "interest rate" for the "loan" of the option fee from 6.25% to 6% per month, Ridout argued that this followed from the lower sum of $1.5m (as opposed to the sum of $2m stated in the Draft Option) which ECI was comfortable to lend to Anwar. In any event, Ridout submitted, the difference was *de minimis*.

59 Similarly, counsel for Thomas Chan contended that all the hallmarks of a loan were present in the Transaction (as the Judge found at [30], [31] and [71] of the Judgment). It was submitted that the absence of a term providing for continued interest after the 60-Day Period was not fatal to

Thomas Chan's case as a "windfall" to ECI was still provided for in the form of ECI being able to purchase the Property at the knock-down price of $20m, which would easily exceed the interest accruing after the 60-Day Period (had there been provision for such interest to be paid) and which bore no relation to the loss that ECI would suffer if Anwar failed to pay the $1.68m within the 60-Day Period.

60 Counsel for Thomas Chan also highlighted that there was no evidence of any real negotiation or agreement on the purchase price of the Property either before or at the 5 June 2009 meeting. The purchase price of $20m was really the outstanding mortgage amount due from Anwar to HLF. This emerged from KC Tan's evidence during cross-examination, as follows: [note: 47]

> Q. I would also like for you to confirm that in fact the sum of 20 million was arrived at by you, or proposed by you and … Poh after you had seen how much was owed to [HLF] under the mortgage that [HLF] had on the [P]roperty.
>
> A. Yes, I suppose that was the case, yes.

Thus, even at the 5 June 2009 meeting itself, there was no evidence of any negotiation on the purchase price of the Property. It would appear, Thomas Chan's counsel submitted, that Anwar did not resist ECI's efforts to set the purchase price at $20m in the First Option because he did not contemplate a sale of the Property and felt sure that he could repay the loan amount (*viz*, the $1.5m option fee) plus interest (*viz*, the $180,000 compensation fee) within the 60-Day Period. Notably, ECI's evidence confirmed its knowledge of Anwar's nonchalant attitude towards the purchase price of the Property stated in the First Option.

Our decision on the true nature of the Transaction

61 It is not in dispute that the proper approach in determining the true nature of a transaction is to look at the substance, as opposed to the form, thereof (see [30]–[31] above). In so far as the documentation for the Transaction is concerned, it is clear that the First Option contained a "normal" option in favour of ECI, albeit with some unusual features, as mentioned at [18] and [22] above (*eg*, the quantum of the option fee (*ie*, $1.5m), which was much higher than the market norm of 1% of the purchase price, and the validity period of the First Option (*ie*, 90 days)). The Deed of Settlement accorded to Ridout the right, within the 60-Day Period, to cancel the First Option by paying ECI the $1.68m. There can be no doubt as to what the Two Instruments mean on their face.

62 Like the Judge, we also accept that Anwar, the sole shareholder and director of Ridout, who is also its directing mind, did not want to sell the Property. All he wanted was to get a temporary loan to tide him over so that HLF would not exercise its right of sale as the mortgagee of the Property. Despite soundings made on his behalf, no one was interested in lending him money, bearing in mind that there was then a mortgage over the Property in favour of HLF and a charge for $10m in favour of Orion over the remaining proceeds of sale of the Property. In view of those prior encumbrances, and bearing in mind what was believed to be the market value of the Property, there was really no value left in the Property which Anwar could use to obtain a loan. It was against that backdrop that ECI came into the picture. As mentioned at [5] and [25] above, ECI, being a property developer, was likewise not interested in extending any loan to Anwar, but it was willing to consider buying the Property.

63 At this point, we would observe, as did the Judge, that Anwar is unquestionably a seasoned businessman and entrepreneur. He cannot claim to be a novice in business, although he was financially very stretched at the material time due to the effects of the global financial meltdown of

2008. Similarly, ECI's directors, KC Tan and Poh, are also men of business. Thus, neither Anwar (and in turn, Ridout) nor KC Tan and Poh (and in turn, ECI) can claim to be at a disadvantage in the business sense, although, as just mentioned, Anwar (and in turn, Ridout) was financially very stretched at the material time. As observed by this court in *Beckkett v Deutsche Bank* at [114] (reproduced at [40] above), it is legally permissible for a man of business to squeeze the best deal for himself, taking advantage of the economic weaknesses of the other party.

64 It seems to us that having regard to what were clearly different objectives on the part of the parties concerned (*viz*, Anwar wanting to borrow money and ECI wanting to buy the Property at the best possible price), the arrangement that was eventually worked out by the parties' solicitors, as reflected in the Two Instruments, satisfied, to an extent and certainly not completely, the needs of both parties. As the Judge noted at [58] of the Judgment, Anwar was confident that he would be able to raise, within the 60-Day Period, the $1.68m which Ridout had to pay to have the First Option cancelled. As for ECI, it clearly wanted to buy the Property at the best possible price. It obviously recognised that the Transaction (as set out in the Two Instruments), although not its preferred choice, was, in the circumstances, the next best thing, in the sense that should Anwar be unable to raise the $1.68m which Ridout needed to pay to have the First Option cancelled, ECI would have the chance to purchase the Property at the extremely attractive price of $20m.

65 In a case of this nature, as between the oral evidence of the parties and the objective contemporaneous documentary evidence, greater emphasis should be placed on the latter (see *Ng Chee Chuan v Ng Ai Tee (administratrix of the estate of Yap Yoon Moi, deceased)* [2009] 2 SLR(R) 918 at [17]). At the material time, both parties were legally represented, and the Two Instruments were considered and approved by the respective solicitors as representing what their clients were prepared to accept, in contrast to what they would have preferred. It would be fair to assume that the legal effect of the Two Instruments would have been explained to the parties by their respective solicitors. It might well be true that Anwar never intended to sell the Property, and certainly not at the price of $20m, which was lower than even the forced sale value of $23.2m indicated in the Colliers Report (although that was dated 15 April 2009, some seven weeks before the First Option was granted to ECI). Be that as it may, Anwar cannot deny that while he might not have wanted to sell the Property (which, as mentioned at [62] above, we accept) – and he was even confident (as the Judge noted at [58] of the Judgment) that he would not have to sell the Property as he felt sure he could raise, within the 60-Day Period, the $1.68m needed for Ridout to cancel the First Option – if he should fail to raise the $1.68m, ECI would be able to exercise the First Option and buy over the Property. This, we find, was precisely what happened. It should be highlighted that the conversation which transpired between Panthradil and Anwar (reproduced in the quotation at [50] above) and Anwar's (misplaced) confidence in being able to "clear it" [note: 48] (*ie*, raise the $1.68m which Ridout had to pay to cancel the First Option) clearly show that Anwar was *fully aware* of the fact that the Transaction was, in fact, an agreement for the sale of the Property by Ridout to ECI. The arrangement set out in the Two Instruments gave Anwar some hope of keeping the Property, but it does not lie in his mouth to now claim that he did not fully appreciate the consequential effects of his failure to raise the $1.68m which Ridout had to pay to have the First Option cancelled. As it turned out, Anwar's confidence was ill-founded. However, that is hardly a proper basis or ground to hold that the Two Instruments do not mean what they say. There is nothing in the Two Instruments which is unclear or ambiguous.

66 We turn next to the three respondents' argument that at the 5 June 2009 meeting, there was no real negotiation on the purchase price stated in the First Option. To say the least, the state of the property market at that point in time was uncertain. The Colliers Report, which was dated 15 April 2009, placed a forced value of $23.2m on the Property, while the Savills Report placed a forced sale value of $21.6m on it (as at 5 June 2009). To put the matter most favourably to Anwar, the only

reason we could think of as to why he agreed to state the purchase price as $20m in the First Option was because he was confident – extremely confident – that he would not have to sell the Property and, thus, the purchase price stated in the First Option was, in his view at that time, no more than an academic figure.

67 We would highlight that there is another implication which arises from the three respondents' assertion that the Two Instruments were a disguise for what was in truth a secured loan with a high interest rate. As mentioned earlier (at [6] and [65] above), the Two Instruments were drawn up and considered by solicitors. If the three respondents' claim were true, it would mean that both ECI's solicitors and Ridout's solicitors were involved in creating the disguised loan. It is not necessary for us, at this point, to offer any views on the impropriety or want of probity of such conduct on the part of the solicitors concerned if the claim is indeed true. More significantly, we note that at the trial, Ridout's counsel did not put it to either YS Low or CS Lee that they were instructed to draw up the Two Instruments to disguise what was really a secured loan with a high interest rate.

68 This brings us to a related issue raised by the three respondents, *viz*, the fact that CS Lee had considered the applicability and/or the implications of the Moneylenders Act *vis-à-vis* the Transaction. This was harped on by the three respondents to reinforce their claim that the Transaction was a moneylending transaction *simpliciter*. In our opinion, there is a leap in logic in this argument. It is hard for us to see how the mere fact that CS Lee was thorough in his consideration of all the *potential* implications of the Transaction supports the view that the Transaction was a disguised moneylending transaction (or, for that matter, the converse view that the Transaction was what it purported to be, *viz*, an agreement for the sale of the Property by Ridout to ECI). The three respondents' argument on this point is a *non sequitur*.

69 We now turn to the three respondents' arguments on ECI's tardiness in taking steps to complete the purchase of the Property after exercising the First Option on 27 August 2009. It was emphasised that ECI did nothing on the conveyancing front for a long period after it exercised the First Option. Furthermore, in spite of the fact that the purported date for the completion of the purchase of the Property was 19 November 2009, ECI only made the necessary legal requisitions on 16, 17 and *even* 20 November 2009. [note: 49] The First Option was only stamped on 24 November 2009, [note: 50] five days after the purported completion date. No financing arrangement was made to enable ECI to complete the purchase (in this regard, as mentioned at [46] above, although HLF offered ECI a loan of $18m on 9 September 2009 to complete the purchase, that offer was allowed to lapse). At [44] and [46] above, we have already set out the explanations of ECI on these matters. In our view, these matters are more germane to the Second Main Issue (which we will consider at [75] *et seq* below), *viz*, the issue of whether, if the Transaction was indeed for the sale of the Property by Ridout to ECI, the latter should be granted specific performance of the Sale Agreement (as defined at [15] above).

70 We also note Ridout's contention that ECI's delay in taking steps to complete the purchase of the Property was due to the desire of KC Tan and Poh to extract the maximum monetary compensation from Ridout in return for withdrawing the two caveats lodged by ECI against the Property. Put in another way, Ridout's contention, in essence, was that completing the purchase of the Property was, by the time of the September 2009 Settlement, clearly no longer in the minds of KC Tan and Poh. According to Ridout, the exchanges between it and ECI showed that ECI exercised the First Option on 27 August 2009 merely for the purpose of preserving its bargaining portion, as opposed to for the purpose of completing its purchase of the Property. In support of this argument, Ridout pointed to Poh's evidence that even though ECI exercised the First Option on 27 August 2009, it was still prepared to forego completion of the purchase if it received more compensation from

Ridout: [note: 51]

> Q. So, although in your minds, on 27 August [2009], as you told us, you have already exercised your option to buy the [P]roperty, *you were still prepared to give it back if you got an extra $2 million; correct*?
>
> A. Yes.
>
> [emphasis added]

We also note that the Judge, at [30] of the Judgment, said:

> On [ECI]'s side, I find that [it] sensed an opportunity to make money. If [it] could drive a hard bargain, [it] had nothing to lose. If [Anwar] managed to pay off the $1.5m, [ECI] would reap a profit of $180,000 for [its] 60-day loan. If [Anwar] did not manage to pay off the $1.5m, [it] had the option to purchase the Property at $3.2m below the forced sale valuation of $23.2m.

71 We do not see how the circumstances enumerated above entail that the Transaction should be regarded as a loan *simpliciter* and nothing else. While ECI *did* drive a hard bargain in the hope (as so aptly put by the Judge at [30] of the Judgment) of achieving a gain regardless of whether or not Ridout cancelled the First Option, the Transaction was nevertheless an arrangement entered into freely by Anwar on behalf of Ridout. No one and nothing compelled Anwar to enter into it, except for his own financial predicament at the material time. It cannot be sufficiently emphasised that Anwar had the benefit of legal advice before he entered into the Transaction. The fact that he miscalculated his own capacity – *viz*, he believed (mistakenly, as it turned out) that he could raise, within the 60-Day Period, the $1.68m needed to have the First Option cancelled – cannot alter what the parties had agreed on. Moreover, the fact that ECI, after exercising the First Option on 27 August 2009, was dilatory in taking steps to complete the purchase of the Property cannot alter the fact that ECI was contractually entitled to have the Property conveyed to it at the price of $20m. ECI's tardiness in this regard is relevant only to the Second Main Issue (see [75] *et seq* below).

72 Before we leave the First Main Issue, we wish to address an argument raised by counsel for Thomas Chan. His contention was that the First Option, read with the Deed of Settlement, meant that ECI did not have a "true" option in the sense that ECI could not, within the 60-Day Period, choose to buy the Property by exercising the First Option. ECI's right to choose to buy the Property was deferred for 60 days; in other words, there was no option at the outset of the Transaction. It was submitted that had Ridout managed to pay ECI the $1.68m within the 60-Day Period (which ended on 6 August 2009 as agreed by the parties (see [9] above)), the obvious and only treatment of the Transaction would be as a secured loan which had been repaid with (an exorbitant) interest. Technically, no option to purchase the Property would ever have existed.

73 In our opinion, this argument disregards the essential features of the Transaction. The Two Instruments clearly provide that the First Option could be exercised by ECI after the expiry of the 60-Day Period unless Ridout fulfilled the condition to have the option cancelled. As things turned out, Ridout did not fulfil that condition. The First Option *did* become exercisable by ECI, and the latter did exercise it on 27 August 2009. The argument mounted by Thomas Chan's counsel is flawed as the 60-Day Period and the cancellation feature in the Deed of Settlement do not negate the *existence* of the First Option. In fact, much to the contrary, these aspects of the Transaction are *evidence* of the existence of the First Option: the 60-Day Period essentially created a period of deferment of ECI's right to exercise the First Option, which deferment in and of itself *presumes* the existence of the First Option. While it is true that had Ridout managed to raise the $1.68m within the 60-Day Period, it

would have cancelled the First Option, the very idea that Ridout had a right to cancel the First Option similarly acknowledges the existence of this option.

74 In the light of the foregoing, we are, with respect, unable to agree with the Judge's holding that the Transaction was in truth a secured loan. We find that the weight of the evidence inextricably points towards the converse finding that the true nature of the Transaction (as embodied in the Two Instruments) is that of a genuine agreement for the sale of the Property by Ridout to ECI. As Ridout did not fulfil the condition to have the First Option cancelled within the 60-Day Period, we hold that ECI validly exercised that option on 27 August 2009, and there came into being a valid contract (*ie*, the Sale Agreement as defined at [15] above) under which Ridout was required to sell the Property to ECI at the price of $20m.

The Second Main Issue: Whether specific performance of the Sale Agreement should be granted to ECI

75 We turn now to the Second Main Issue. Given our ruling on the First Main Issue, the Second Main Issue would now be more appropriately framed as, simply, whether ECI should be granted specific performance of the Sale Agreement (*cf* the way in which we set out the Second Main Issue earlier at sub-para (b) of [21] above). In the court below, the Judge held that even if a valid agreement for the sale of the Property to ECI had come into being between Ridout and ECI pursuant to the latter's exercise of the First Option on 27 August 2009, he would, in all the circumstances of the case and in exercise of his discretion, have refused to grant ECI the equitable remedy of specific performance. The crux of ECI's challenge to this ruling by the Judge is that as the Sale Agreement relates to immovable property, it is *prima facie* entitled to specific performance of that agreement.

76 The remedy of specific performance is founded in equity and is discretionary in nature. It is settled principle that an appellate court will only interfere with a first instance judge's exercise of discretion on limited grounds. As noted in *Guan Chong Cocoa Manufacturer Sdn Bhd v Pratiwi Shipping SA* [2003] 1 SLR(R) 157, an appellate court will only interfere if it is shown that either: (a) the judge's exercise of discretion was based on a misunderstanding of the law and/or the evidence before him; or (b) the judge's decision was so aberrant that it must be set aside on the ground that no reasonable judge mindful of his duty to act judicially could have reached it. Enunciating the same principle are the cases of *The Vishva Apurva* [1992] 1 SLR(R) 912 and *Federal Computer Services Sdn Bhd v Ang Jee Hai Eric* [1991] 2 SLR(R) 427.

77 In the Judgment, the Judge gave five broad grounds for refusing to grant ECI specific performance of the Sale Agreement, namely:

(a) ECI had sought to purchase the Property for investment/financial gain, for which purpose the equitable remedy of specific performance was not granted as a matter of course;

(b) damages would be an adequate remedy for ECI;

(c) ECI had come to equity with "unclean hands";

(d) ECI had agreed to accept an enhanced compensation of $5m pursuant to the November 2009 Settlement (*cf* the compensation of $3.5m under the September 2009 Settlement) in exchange for not completing the purchase of the Property; and

(e) ECI had acquiesced to Ridout's sale of the Property to another party and was therefore estopped from insisting on completing its purchase of the Property.

78 In declining to grant ECI specific performance of the Sale Agreement, the Judge departed from the orthodox position that specific performance will always be decreed for what we will hereafter term "land contracts", *ie*, contracts relating to immovable property (see Gareth Jones & William Goodhart, *Specific Performance* (Butterworths, 2nd Ed, 1996) ("*Jones & Goodhart*") at pp 128–132). The orthodox position is rooted in the premise that land is deemed to be unique and no substitute is adequate (see *Wong Chee Siong and another v Tan Boon Hwa and another* [2010] SGHC 222 at [20]). Damages are considered inadequate even when the interest in question is a mere commercial lease for a short term (see *Excelsior Hotel Pte Ltd v Hiap Bee (Singapore) Pte Ltd (OCBC Finance (Singapore) Ltd, intervener)* [1989] 2 SLR(R) 322 at [10]). The Judge departed from this orthodox position and relied on the Canadian Supreme Court's decision in *Sinnadurai Paramadevan and Blossom Paramadevan v Bernard Semelhago* [1996] 2 SCR 415 ("*Semelhago*") for the proposition that specific performance should not be granted as a matter of course for land contracts, absent evidence that the property concerned is unique. He opined (at [106] of the Judgment) that as "the equitable origin of specific performance … meant that discretion [was] its hallmark" (see Robert J Sharpe, *Injunctions and Specific Performance* (Canada Law Book, Looseleaf Ed, 2010 release) ("*Sharpe*") at para 8.90, which was cited at [103] of the Judgment), he preferred the approach taken by the courts in Canada and also in New Zealand. Reference was also made to the earlier local case of *Good Property Land Development Pte Ltd v Société Générale* [1989] 2 SLR(R) 97, where our High Court observed at [26]:

> … [W]here the main object of owning land is not the personal enjoyment thereof but the profit derivable therefrom, it would be unrealistic to believe that damages would not be an adequate remedy to the owner for the loss of the mortgaged property. …

In such a situation, damages may still be considered adequate notwithstanding that land is generally deemed to be unique (see *Coastland Properties Pte Ltd v Lin Geok Choo* [1993] 3 SLR(R) 890 at [2]).

79 In the discussion which follows, we will first set out the respective parties' submissions on the Judge's view that specific performance should not be granted as a matter of course for land contracts and the Judge's reasons for declining to grant ECI specific performance of the Sale Agreement in the present case. We will then set out our decision on the Second Main Issue proper.

The parties' submissions on the Judge's view that specific performance should not be granted as a matter of course for land contracts

80 ECI submitted that *Semelhago* should not be followed by the Singapore courts because it has been the subject of much criticism, and applying the principle therein would only lead to unwarranted uncertainty. ECI pointed to the fact that the Alberta Law Reform Institute had appointed a board ("the Alberta Board") to consider whether the decision in *Semelhago* ought to be overturned by legislation. In its final report entitled "Contracts for the Sale and Purchase of Land: Purchasers' Remedies" (Final Report No 97, October 2009) ("Final Report No 97"), the Alberta Board recommended that the decision in *Semelhago* should be statutorily reversed and that land should be conclusively deemed to be unique for the purposes of obtaining specific performance. This approach was thought to be necessary as it would avoid the inherent uncertainties of an assessment of damages and would put the prospective purchaser in a land contract in the precise position that he would have been in had the contract been performed. To buttress its position, ECI observed that the inherent difficulty of assessing damages for land contracts was recognised by our High Court in *Ong Hien Yeow and another v Central Chambers LLC and another* [2011] 1 SLR 1186.

81 ECI further submitted that in the present case, the quantification of the damages to be awarded to it in lieu of specific performance would be especially difficult as it had sought to purchase the Property for development. According to ECI, damages should not be computed solely by reference

to the difference between the market value of the Property at the material time and the purchase price of $20m stated in the First Option, but should also take into account the profit that ECI would have earned had it sold the Property after developing it.

82 Additionally, ECI argued that if specific performance were denied to a prospective purchaser in a land contract on the basis that the land in question had not been shown to be unique or that the prospective purchaser was a property developer or speculator, it would mean that such a purchaser's rights would be nothing more than a personal right against the vendor. The prospective purchaser would have no interest in land capable of protection by way of a caveat, and might not even be entitled to lodge a caveat against the property even though he had been granted an option to purchase the property. There would also be wider repercussions in that the land register would no longer afford protection to prospective purchasers, who, given the prevalence of condominium and strata developments in Singapore, would constitute a substantial portion of the users of the land register. In short, ECI contended that following the principle laid down in *Semelhago* would lead to the creation of a new rule *vis-à-vis* the availability (or otherwise) of specific performance to property developers or speculators who viewed land as a fungible good. A party who intended to purchase property for personal enjoyment would be in a better position than one who intended to purchase property for purposes other than self-occupation, and that would contravene the fundamental legal principle of equality of law as well as the equitable maxim that "equity is equality" (see generally Paul J Brenner, "Specific Performance of Contracts for the Sale of Land Purchased for Resale or Investment for Resale or Investment" (1978) 24 McGill LJ 513 ("the 1978 McGill Law Journal article")).

83 In response to ECI's submissions, Thomas Chan pointed out that the recommendations contained in Final Report No 97 had not been accepted and enacted into law, and that the Canadian courts had continued to apply the principle laid down in *Semelhago*. He contended that it was not true that adopting the principle established in *Semelhago* would create unwarranted uncertainty, citing, in support of his argument, *Sharpe* at para 8.90 (also quoted by the Judge at [103] of the Judgment), which states that "[c]ertainty is not the only legal value worth pursuing in the remedial context". What *Semelhago* did, according to *Sharpe* at para 8.60, was "not to replace the presumption of uniqueness with the presumption of replaceability, but … to open the door to a critical inquiry as to the nature and function of the property in relation to the prospective purchaser". Where the prospective purchaser's interest in a particular piece of property was in relation to investment or resale, the proposition that a substitute for the property could not be found and, therefore, damages would be inadequate was dubious and specific performance would be refused.

84 As for Orion, it pointed out that the English courts' reservation of a special position for land (*ie*, that land was unique and damages would not be an adequate remedy) derived from socio-political factors. As explained by David Cohen in his article "The Relationship of Contractual Remedies to Political and Social Status: A Preliminary Inquiry" (1982) 32 Univ of Toronto LJ 31, land in pre-industrial England accorded its owner the right to vote and also granted its owner considerable political influence; therefore, damages were never adequate because of the intangible rights and social status that each parcel of land in England conferred upon its owner. Orion submitted that those considerations had no application in modern-day Singapore. Moreover, the vibrant real estate market in modern society meant that land was more easily and readily valued as compared to the past. Orion pointed out that even Paul J Brenner, one of the proponents of granting specific performance as a matter of course for land contracts, had recognised in the 1978 McGill Law Journal article (see [82] above) that where the property involved was intended to be purchased for resale or speculative purposes with the sole view of making a quick profit in a short period of time, damages would be easily quantifiable.

85 It appears that the Canadian courts have recognised that land today is no longer tied to the

attributes which might have driven the *almost* automatic availability of specific performance for land contracts in the past, and have, accordingly, taken what seems like an increasingly principled approach in areas where the rigid application of the orthodox position (as set out at [78] above) has sometimes outstripped its true purpose (see, *eg*, *Domowicz et al v Orsa Investments Ltd* (1993) 15 OR (3d) 661). An earlier case where this more principled approach was canvassed and adopted was the Ontario High Court case of *Heron Bay Investments Ltd v Peel-Elder Developments Ltd* (1976) 2 CPC 338, where it was noted (at [4]) that the reasoning behind the grant of specific performance for land contracts did not apply in instances where land was purchased merely as an investment for the purposes of development and resale at a profit. In such cases, any loss of profits could obviously be compensated in damages (see also *Chaulk v Fairview Construction Limited* (1977) 33 APR 13 and the more recent case of *Neretlis v Meade* [2005] OJ 638 at [42]–[43]).

86 We also note that the Canadian courts are not alone in adopting this restrictive approach. In *Landco Albany Ltd v Fu Hao Construction Ltd* [2006] 2 NZLR 174, the New Zealand Court of Appeal denied specific performance as the party seeking this remedy only had a "plainly commercial rather than private or sentimental [interest]" (at [43]) in the property in question. Since that party had entered into the transaction for profit-making purposes, it was found that damages would be an adequate remedy.

87 Interestingly, the seeds of this restrictive approach towards the grant of specific performance for land contracts were sowed in the much earlier case of *Loan Investment Corporation of Australasia v Bonner* [1970] NZLR 724, a decision of the Privy Council on an appeal from New Zealand. In that case, the purchaser sought specific performance of a contract for the sale and purchase of a parcel of land at the price of £13,300, with a provision for £11,000 of the purchase money to be lent to the purchaser for a ten-year term. The Privy Council reversed (by a majority of 4:1) the New Zealand Court of Appeal's decision that specific performance would be granted as of right since the contract in question was for the sale of land. Lord Pearson (delivering the judgment of the majority of the Privy Council) held that specific performance would be denied as the agreement was a "composite contract … predominantly in the nature of a commercial bargain" (at 735). The majority of the Privy Council found that, on the facts, the provision for a loan to the purchaser was not the ancillary but the principal transaction, and, thus, damages would be a sufficient and suitable remedy.

The parties' submissions on the Judge's reasons for declining to grant ECI specific performance of the Sale Agreement

88 We now move on to the parties' submissions on the Judge's reasons for declining to grant ECI specific performance of the Sale Agreement in the present case.

Damages would be an adequate remedy

89 We begin with the Judge's ruling that damages would be an adequate remedy for ECI. It is well-established that where a defendant is not "good for his money" (so to speak), the court will take this factor into account in deciding whether to grant a decree of specific performance in favour of the plaintiff (see *Chitty on Contracts* (H G Beale gen ed) (Sweet & Maxwell, 30th Ed, 2008) at vol 1, para 27-008). ECI reminded this court that if it were denied specific performance of the Sale Agreement, it would be left with nothing but an unsecured claim against an insolvent debtor.

90 In our view, it is necessary to take a closer look at the validity of ECI's assertion. In its application in Summons No 2585 of 2010 to discharge HLF as a party to OS 1357, ECI sought, *inter alia*, the following order: [note: 52]

> That the proceeds of any mortgagee's sale of the Property … that may be conducted by [HLF] be paid into Court, less the money and liability secured by the mortgage and the costs incurred by [HLF] in defending [the] action …

This, counsel for Thomas Chan argued, showed that ECI was content to let HLF sell the Property and to maintain its claim only against the remainder of the sale proceeds.

91 Equally germane in this regard is ECI's conduct during the period leading up to the September 2009 Settlement and the November 2009 Settlement. It clearly shows that ECI was at all times amenable to giving up its entitlement to the Property in return for monetary compensation, provided the quantum was right. Thus, its assertion now that damages alone would not be an adequate remedy rings hollow.

ECI did not come to equity with "clean hands"

92 As stated at (*inter alia*) sub-para (c) of [19] above, one of the Judge's reasons for refusing ECI the remedy of specific performance was that it had not approached the court with "clean hands". In this regard, it is trite that any conduct which disentitles a party from equitable relief must stem from the facts relied upon to invoke the court's conscience. In other words, the conduct complained of must have an immediate and necessary relation to the equity sued for, and it must be a depravity in the legal as well as moral sense (see *Halsbury's Laws of Singapore* vol 9(2) (LexisNexis, 2003) at para 110.016).

93 In I C F Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages* (Sweet & Maxwell, 8th Ed, 2010) ("Spry's *Equitable Remedies*"), the learned author opines at p 246 that the cases in which an applicant is denied specific performance generally fall in two main categories, namely:

> (a) cases where the applicant has materially misled the court or abused its process, or has attempted to do so (an example given by the author is the conscious making to the court of a material statement which is untrue); and
>
> (b) cases where the grant of specific performance would enable the applicant to achieve a dishonest purpose and would, in all the circumstances, be inequitable.

94 In the present case, the Judge found that ECI did not come to court with "clean hands" because: (a) the purchase price of $20m, being at a gross undervalue, would cause hardship to Ridout; (b) ECI initiated OS 1357 without making full disclosure of the material facts as to how the First Option came to be exercised (in particular, no mention was made of the Deed of Settlement); and (c) ECI failed to make timely discovery.

95 ECI took issue with the Judge's finding (at sub-para (a) of [114] of the Judgment) that it had sought to purchase the Property at an undervalued price which had no relation to the then market value of the Property. It contended that its act of negotiating a deal for its own benefit could not be an inequitable or unconscionable act as it was under no legal duty to do otherwise (citing *Beckkett v Deutsche Bank* at [114]). On the other hand, the three respondents argued that ECI's argument wholly missed the point, *viz*, that the Judge's view was that: (a) there was inequitable conduct on the part of ECI in insisting on carrying through the Transaction when it clearly knew that the parties never intended for it to be an actual sale of the Property by Ridout to ECI; (b) it was totally illogical for Anwar to agree to a purchase price which was significantly lower than both the open market value and the forced sale value of the Property; and (c) the common intention of the parties could not

have been to truly enter into an agreement for the sale of the Property to ECI.

96 We have, at [65]–[74] above, explained why we do not share the Judge's view that Ridout did not intend to grant to ECI (via the First Option) a genuine option (although cancellable by Ridout within the 60-Day Period) to purchase the Property. For the same reasons, Ridout must be taken to have agreed to sell the Property to ECI at the price of $20m. It is not for the court to review, *ex post facto*, the reasonableness of a transaction freely concluded between (what are essentially) two commercial entities. The court should not substitute its views on commercial wisdom for those of the contracting parties, especially in a case like the present where both parties (*viz*, Anwar acting via Ridout, and KC Tan and Poh acting via ECI) are men of business. It must be borne in mind that the property market at the material time was very much affected by the unprecedented global financial collapse. The real effects of that financial collapse on the Singapore property market were not something which any person could reasonably predict at that time. We should not use the benefit of hindsight to determine the wisdom of the Transaction. Perhaps because of the then uncertainty in the property market, ECI acted cautiously (by offering a low price for the Property); or, alternatively, knowing of Anwar's financial desperation, ECI tried to "squeeze" him, which was what the Judge thought was the case (see [30] of the Judgment). Whatever might have been the case, ECI's conduct in driving down the purchase price of the Property as much as it could was neither legally improper nor unconscionable. Thus, on the question of the low purchase price of the Property alone, there is, in our view, nothing "unclean" on that account in ECI seeking to enforce the Sale Agreement. We would reiterate that both parties were represented in the Transaction by solicitors.

97 Similarly, we do not think that there was really any material lack of candour on the part of ECI in commencing OS 1357 without mentioning the Deed of Settlement. This is because after the expiry of the 60-Day Period, Ridout's right to cancel the First Option lapsed, with the consequential effect that the Deed of Settlement became spent. It was not really wrong for ECI to take the view that the Deed of Settlement was irrelevant to its claim for specific performance of the Sale Agreement.

98 Before we move away from this sub-issue as to whether ECI approached the court with "clean hands", we ought to address the Judge's adverse comments on ECI's conduct in making late discovery of the litigation search conducted on Anwar as well as the documents relating to the settlement negotiations between the parties. On this, we do not think that the following explanation offered by ECI lacked reasonableness: Ridout did not take any issue with the litigation search until Anwar's AEIC was filed on 25 June 2010. ECI gave discovery of the litigation search on 30 June 2010 after Orion, by way of letters dated 23 and 28 June 2010, requested for copies of all searches conducted by ECI in connection with its intended purchase of the Property. As for the documents relating to the parties' settlement negotiations, the point made by ECI was that those negotiations had been conducted on a "without prejudice" basis and it therefore thought the documents ought not to be disclosed. In any event, upon the appointment of Rajah & Tann LLP as its solicitors, ECI did provide full discovery of all the relevant documents. All the purported "omissions" on ECI's part *vis-à-vis* discovery were rectified before the start of the trial and none of the three respondents complained that it was taken by surprise.

Estoppel by acquiescence applied to ECI

99 Estoppel by acquiescence was another factor relied on by the Judge in deciding not to grant ECI specific performance (see sub-para (e) of both [19] and [77] above). ECI argued that the Judge erred in holding that estoppel by acquiescence would apply following from (*inter alia*) the November 2009 Settlement. It averred that under the terms of that settlement, the settlement sum of $5m was to be paid upfront (to be precise, by noon on 16 November 2009), and not only upon the completion of the sale of the Property to another purchaser. As the payment did not materialise by the stipulated

deadline, ECI was entitled to enforce its rights under the Sale Agreement (the First Option having been exercised on 27 August 2009). Given that it was an express term of the November 2009 Settlement that ECI could proceed with the purchase of the Property should Ridout fail to comply with the terms of that settlement, it was plainly impermissible for the Judge to infer an estoppel by acquiescence.

100 In this regard, ECI also submitted that the Judge erred in inferring an estoppel by acquiescence from the fact that it did not object or protest when informed that Ridout was trying to sell the Property to another purchaser. ECI explained that its lack of response to this news was because it saw no cause for it to object or protest since it already had a valid agreement to purchase the Property and had also lodged two caveats against the Property to protect its interest therein. In any event, ECI submitted, it should not be deprived of its legal rights simply because it had not warned Ridout to refrain from doing something that Ridout could not legally have done: as long as ECI's caveats remained, Ridout could not have validly sold the Property to another purchaser. ECI also pointed out that when it learnt on 3 November 2009 of the grant of the Second Option to Thomas Chan, its solicitors immediately wrote to Ridout's solicitors on 4 November 2009 to register its objection and stated that ECI "was now compelled to seek legal recourse by way of specific performance". [note: 53] This, ECI contended, was clearly not the conduct of a prospective purchaser who had allegedly acquiesced to the sale of the Property to another party.

101 In response to the above arguments by ECI, Ridout contended that it had relied on ECI's representation that it could look for other buyers. This followed as a result of Ridout's failure to have the First Option cancelled and Ridout's appeal to ECI not to exercise that option. Ridout submitted that its detrimental reliance on ECI's conduct was evidenced by its having incurred time and expenditure in searching for an alternative purchaser, as well as liability to Thomas Chan and any intermediaries involved in the grant of the Second Option. Ridout also argued that while it was no doubt true that ECI's solicitors wrote to Ridout's solicitors on 4 November 2009 to object after ECI found out (on 3 November 2009) that the Second Option had been granted to Thomas Chan, that letter was, at best, a perfunctory letter. Thereafter, further negotiations between the parties continued, culminating in the November 2009 Settlement. Ridout submitted that it would be inequitable for ECI to renege on its position and feign ignorance of the sale to Thomas Chan, which it had acquiesced to (citing *Lam Chi Kin David v Deutsche Bank AG* [2010] 2 SLR 896).

102 As for Orion and Thomas Chan, they submitted that in the light of the subsequent agreements reached between ECI and Ridout after 11 August 2009 (the date on which ECI rejected Ridout's purported cancellation of the First Option) to allow Anwar to seek another purchaser for the Property and to pay ECI much higher compensation in return, the First Option, which formed the basis of ECI's claim for specific performance, fell away and, as such, the Judge was correct in holding that ECI's claim for specific performance must fail as ECI's rights under the First Option (if any) would have been superseded by the subsequent settlement agreements (*viz*, the September 2009 Settlement and the November 2009 Settlement).

Our decision on whether specific performance of the Sale Agreement should be granted

103 In the light of the discussion above, it can be seen that *vis-à-vis* the Second Main Issue, we are not in agreement with two of the Judge's grounds for refusing to grant ECI specific performance of the Sale Agreement: one, that the Transaction was "unclean" because of the extremely low purchase price of the Property; and two, that ECI had not approached the court with "clean hands" because it had suppressed material information and had been late in making discovery. However, apart from these two aspects, we are in agreement with the Judge's holding that in the circumstances of this case, specific performance of the Sale Agreement should not be granted to ECI.

In coming to this conclusion, we do not find it necessary, on the basis of the prevailing facts, to rely upon the more restrictive approach towards the grant of specific performance for land contracts espoused in the Canadian and the New Zealand cases. As specific performance is an equitable and discretionary remedy, the court must, in any event, take into consideration all the circumstances of the case at hand in order to ensure that it would be just and equitable to grant the relief. In the present case, the following considerations are, in our view, germane.

104 First, we note that after ECI exercised the First Option on 27 August 2009, it was quite content to forego its right to acquire the Property if the compensation offered to it was right. This is shown by the fact that following the improvement in the property market during that period, the compensation demanded by ECI escalated from $180,000 (as set out in the Deed of Settlement) to $3.5m under the September 2009 Settlement, and subsequently, to $5m under the November 2009 Settlement.

105 Second, in line with its desire for a settlement if the compensation offered was right, ECI implicitly permitted Ridout to look for other buyers as ECI knew quite clearly that Ridout/Anwar had no other means to pay the compensation demanded except by selling the Property to another person. We agree with the Judge's observations that: (a) "it [was] clear [ECI] was happy not to proceed with completion and was trying to seek some kind of quick turnaround and large payout" (see [108] of the Judgment); and (b) "[ECI] by its conduct after 11 August 2009 clearly led [Anwar] to believe that it agreed, for a higher 'compensation', to allow [Anwar] to look for another buyer and … would not proceed to complete the purchase of the Property" (see [120] of the Judgment).

106 Third, there should have been a happy ending under the November 2009 Settlement, but it was not to be. It is true that by JLC's letter to TLP of 11 November 2009, Ridout agreed to pay ECI the sum of $5m by noon on 16 November 2009, but, as things turned out, Ridout could not raise that sum in time. Its request for a mere two-day extension to make payment was rejected. We agree with the Judge's finding (at [115] of the Judgment) that ECI did not agree to this extension "because of the significant rise in property prices and decided to go for a bigger payout, by claiming the Property itself".

107 Fourth, during the hearing of the present appeals, counsel for ECI brought it to our attention that in the event of our ruling that the Transaction was indeed for the sale of the Property by Ridout to ECI, this court should order that the transfer of the Property to Thomas Chan (which was effected on 17 December 2010 following the judgment of the court below) be undone. It is trite that an appeal does not operate as a stay of execution (see s 41 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) and O 57 r 15(1)(*a*) of the Rules of Court). Although ECI's failure/omission to apply for a stay of the transfer of the Property to Thomas Chan does not *ipso facto* disentitle it from praying to this court for specific performance of the Sale Agreement, its failure/omission in this regard is a factor which the court can take into account in determining fairness and in exercising its discretion to grant or refuse specific performance.

108 Fifth, and more importantly, we note that Orion has a charge over the balance of the sale proceeds of the Property (after the satisfaction of HLF's prior interest) as security for its loan of $10m to Anwar (see, *inter alia*, [3] above). Tremendous hardship would be suffered by Orion should specific performance of the Sale Agreement be granted to ECI as the Property would then be sold to ECI for a mere $20m. There would, in that scenario, be very little money left from the sale proceeds of the Property for Orion after HLF has taken its share of the sale proceeds as mortgagee. This would be extremely unfair to Orion. On the other hand, Orion would not suffer any hardship if the sale of the Property to Thomas Chan is allowed to stand, *ie*, if ECI is refused specific performance. Hardship to a third party is a factor which the court can take into consideration in determining whether to grant

specific performance (see Spry's *Equitable Remedies* at pp 201–203). This ground for refusing specific performance generally applies to the sale or mortgage of limited or part interests in immovable property where the sale of the entire property in question might prejudice the rights of other persons beneficially interested in that property. For example, a subsequent purchaser who has contracted to purchase land from the vendor may suffer hardship if the earlier purchaser is granted specific performance (for instance, the subsequent purchaser may have spent money on improvements to the land (see *Mitz v Wiseman et al; Strathalian Beach Association, Third Party* (1971) 22 DLR (3d) 513; see also *Jones & Goodhart* at pp 112 and 121–122)). That said, we also note that such hardship may not necessarily arise in every instance.

109 An example of when it would be appropriate to refuse specific performance on the ground of hardship to a third party can be found in *Wroth and Another v Tyler* [1974] Ch 30. In that case, the defendant agreed to sell a bungalow to the plaintiff. Unknown to the plaintiff, the defendant's wife, who was unhappy with the arrangement, registered her right of occupation under s 1(1) of the Matrimonial Homes Act 1967 (c 75) (UK) ("the Matrimonial Homes Act") the day after the contract was concluded. The defendant, being unable to complete the sale in view of his unsuccessful attempts to persuade his wife to remove her notice from the register, informed the plaintiff that he was unable to complete and offered to pay damages instead. The plaintiff issued a writ seeking specific performance of the agreement and damages in lieu of or in addition to specific performance, together with other reliefs. The agreed evidence before the court showed that the bungalow was worth £7,500 at the date fixed for completion and £11,500 at the date of the hearing. Megarry J held that an order for specific performance subject to the wife's right of occupation could lead to the defendant's family being split up because although s 1(1) of the Matrimonial Homes Act protected the defendant's wife against eviction, it gave no protection to either the defendant or the couple's daughter, and they, especially the defendant, might well be liable to eviction by the plaintiff after completion. Given those circumstances, Megarry J stated that if any reasonable alternative existed, the court should be slow to make an order for specific performance. Megarry J eventually awarded the plaintiff damages of £5,500 (assessed as at 11 January 1973) in lieu of specific performance. This case was applied in *Clark and another v Lucas Solicitors LLP* [2010] 2 All ER 955.

110 In this connection, it should be noted that hardship to one of the parties to a land contract (as opposed to hardship to a third party) can also be a ground for refusing specific performance. This can be seen from *Dowsett v Reid* (1912) 15 CLR 695, a decision of the High Court of Australia. In that case, the appellant sought to lease his land (and the structures thereon) to the respondent, who also had an option to purchase the land, on terms which later turned out to be totally unfavourable to the appellant. The appellant repudiated the agreement. The respondent's claim for specific performance succeeded at first instance. On appeal to the High Court of Australia, the court allowed the appeal and substituted the order for specific performance with damages. Griffith CJ, clearly moved by the argument that an order for specific performance should be weighed against the great hardship that might result, stated that "[t]he Court [was] not bound to enforce a bargain which would work great hardship upon either party" (at 706).

111 Reverting to the present appeals, having regard to the totality of the considerations discussed at [104]–[110] above, particularly the fact that the grant of specific performance to ECI would be unfair and would cause great hardship to Orion, we do not think that it would be just and equitable to grant such relief to ECI. In the context of this case, damages would be an adequate remedy for ECI.

112 As regards ECI's argument that Ridout is no longer good for its money, we can do no better than quote what the Judge said in this regard at [110] of the Judgment:

> … [ECI] *knew* of [Anwar]'s financial position, sought security for its loan, used the fact that there

were many actions taken out against [Anwar] as a credit risk and took the risk to lend money to [Anwar], albeit through [Ridout], for a handsome reward [in the form of the $180,000 compensation fee] in the first instance and a windfall in the second and third "agreements" [*ie*, the September 2009 Settlement and the November 2009 Settlement]. It chose to take the risk of allowing [Ridout] to look for a second buyer to enable it to reap those windfalls and having so chosen, it now must face the consequences of the risk materialising. [emphasis in original]

113 Finally, before we conclude, we ought to mention that *vis-à-vis* the Second Main Issue, ECI also raised other arguments before this court, *eg*, that it was entitled to the proceeds of sale paid by Thomas Chan under a constructive trust, and that the Judge was unduly sympathetic towards Thomas Chan. In the light of our decision, we do not see how a constructive trust could arise in favour of ECI; neither is the question of sympathy to Thomas Chan relevant.

Conclusion

114 In the result, CA 177 is dismissed because although we find (contrary to the Judge's ruling) that the Transaction was genuinely for the sale of the Property by Ridout to ECI, we agree with the Judge that it is not appropriate to grant ECI specific performance of the Sale Agreement in the present case. There shall, instead, be an assessment of the damages suffered by ECI as a result of Ridout's failure to honour the Sale Agreement. As regards CA 184, in view of our decision in CA 177, it must also be dismissed. On the question of the appropriate order on costs, the parties are to let us have their submissions in writing within one week from the date of this judgment.

[note: 1] See the Appellant's Core Bundle filed by ECI for CA 177 ("ACB (CA 177)") at vol 2, p 107.

[note: 2] See ACB (CA 177) at vol 2, p 115.

[note: 3] See ACB (CA 177) at vol 2, p 119.

[note: 4] See ACB (CA 177) at vol 2, p 151.

[note: 5] See ACB (CA 177) at vol 2, p 152.

[note: 6] See ACB (CA 177) at vol 2, p 151.

[note: 7] See ACB (CA 177) at vol 2, p 174.

[note: 8] See the Joint Record of Appeal dated 7 January 2011 ("ROA") at vol 5(A), p 3469.

[note: 9] See ACB (CA 177) at vol 2, p 186.

[note: 10] See ACB (CA 177) at vol 2, p 198.

[note: 11] See prayer 1 of OS 1357 (at vol 2, p 114 of the Appellant's Core Bundle filed by Ridout for CA 184 ("ACB (CA 184)")).

[note: 12] See the transcript of the notes of evidence for the hearing in the court below ("the NE") on 8 July 2010 as reproduced at ROA vol 3(E), pp 2532 (line 2)–2533 (line 2).

[note: 13] See the NE for 8 July 2010 as reproduced at ROA vol 3(E), p 2520 (line 15).

[note: 14] See the NE for 5 July 2010 as reproduced at ROA vol 3(D), p 2077 (lines 1–20).

[note: 15] See ACB (CA 177) at vol 2, p 107.

[note: 16] *Ibid*.

[note: 17] See the Supplemental Bundle of Documents dated 24 February 2011 filed by Thomas Chan for CA 177 ("the 4th Respondent's BOD") at p 13.

[note: 18] See the 4th Respondent's BOD at p 52.

[note: 19] See the NE for 5 July 2010 as reproduced at ROA vol 3(D), p 2110 (lines 15–22).

[note: 20] See the NE for 7 July 2010 as reproduced at ROA vol 3(E), p 2359 (lines 14–18).

[note: 21] See the NE for 8 July 2010 as reproduced at ROA vol 3(E), pp 2536 (line 13)–2537 (line 3).

[note: 22] See the NE for 6 July 2010 as reproduced at ROA vol 3(D), p 2213 (lines 18–19).

[note: 23] See the NE for 8 July 2010 as reproduced at ROA vol 3(E), p 2559 (lines 19–20).

[note: 24] See ACB (CA 177) at vol 2, p 169.

[note: 25] *Ibid*.

[note: 26] See ACB (CA 177) at vol 2, p 160.

[note: 27] See ACB (CA 177) at vol 2, p 172.

[note: 28] See ACB (CA 177) at vol 2, p 198.

[note: 29] See ACB (CA 177) at vol 2, pp 177 and 206 respectively.

[note: 30] See the 4th Respondent's BOD at pp 23–46.

[note: 31] See the 4th Respondent's BOD at p 47.

[note: 32] See ACB (CA 184) at vol 2, p 173.

[note: 33] See the NE for 6 July 2010 as reproduced at ROA vol 3(D), p 2145 (lines 6–7).

[note: 34] See the NE for 5 July 2010 as reproduced at ROA vol 3(D), p 2080 (lines 3–5); see also the NE for 7 July 2010 as reproduced at ROA vol 3(E), pp 2369 (line 2)–2370 (line 10).

[note: 35] See ACB (CA 177) at vol 2, p 185.

[note: 36] See ACB (CA 177) at vol 2, p 184.

[note: 37] See ACB (CA 177) at vol 2, p 186.

[note: 38] See the NE for 8 July 2010 as reproduced at ROA vol 3(E), p 2677 (lines 9–14).

[note: 39] See para 11 of Ridout's Defence and Counterclaim filed on 16 June 2010 (at ACB (CA 184) vol 2, p 122).

[note: 40] See para 26 of Anwar's AEIC filed on 25 June 2010 (at ACB (CA 184) vol 2, p 231).

[note: 41] *Ibid*.

[note: 42] *Ibid*.

[note: 43] See the NE for 8 July 2010 as reproduced at ROA vol 3(E), pp 2729 (line 7)–2730 (line 20).

[note: 44] See the NE for 8 July 2010 as reproduced at ROA vol 3(E), pp 2714 (line 20)–2718 (line 10).

[note: 45] See the NE for 9 July 2010 as reproduced at ROA vol 3(E), pp 2872 (line 22)–2873 (line 8).

[note: 46] See the NE for 9 July 2010 as reproduced at ROA vol 3(E), p 2877 (lines 1–3).

[note: 47] See the NE for 7 July 2010 as reproduced at ROA vol 3(E), p 2355 (lines 16–20).

[note: 48] See the NE for 9 July 2010 as reproduced at ROA vol 3(E), p 2871 (line 17).

[note: 49] See the 4th Respondent's BOD at pp 23–45.

[note: 50] see the 4th Respondent's BOD at p 47.

[note: 51] See the NE for 6 July 2010 as reproduced at vol 3(D), p 2239 (lines 15–19).

[note: 52] See the 4th Respondent's BOD at p 90.

[note: 53] See ACB (CA 177) at vol 2, p 212.