The One Suites Pte Ltd *v* Pacific Motor Credit (Pte) Ltd
[2014] SGHC 183

Case Number : Suit No 56 of 2013

Decision Date : 17 September 2014

Tribunal/Court : High Court

Coram : Edmund Leow JC

Counsel Name(s) : Michael Palmer and Chew Kiat Jinn (Quahe Woo & Palmer LLC) for the plaintiff; Albert Balasubramaniam (instructed counsel) and Chew Ching Ching (Ching Ching, Pek Gan & Partners) for the defendant.

Parties : The One Suites Pte Ltd — Pacific Motor Credit (Pte) Ltd

Land – Sale of land

Contract – Contractual terms – Implied terms

17 September 2014

Edmund Leow JC:

Introduction

1 The defendant ("the Vendor") was the lessee of a property at 11 Leng Kee Road ("the Property"). The Property was leased from the Housing and Development Board ("HDB").

2 The plaintiff ("the Purchaser") was in the business of the retail sale of motor vehicles (except motorcycles and scooters).

3 These proceedings relate to the option to purchase ("OTP") granted by the Vendor to the Purchaser for the Property. The purchase price was $16.8m. On 21 January 2013, the Purchaser brought a claim against the Vendor for the refund of the deposit paid ("the Deposit") on the ground that the OTP has been validly rescinded by the HDB's refusal to grant its approval for the sale. In response, the Vendor counterclaimed for various declarations, an order that the Purchaser proceed to apply to HDB for approval of sale of the Property, as well as damages. The Vendor also sought the forfeiture of the Deposit, as well as the withdrawal of the Purchaser's caveat against the Property.

4 On 8 August 2014, I dismissed the Purchaser's claim. I ordered the forfeiture of the Deposit and the withdrawal of the Purchaser's caveat against the Property. The Purchaser has appealed against my decision. I set out my reasons below.

Facts

5 Mr Cheong Sim Lam ("Cheong") was the Purchaser's sole director and shareholder. [note: 1] According to him, he had been interested in setting up and operating a car business in the Leng Kee Road area since late 2011. On 8 March 2012, Cheong (using a different corporate entity) completed the purchase of a commercial property unit at Alexandra Road. [note: 2] He also entered into a sale and purchase agreement on 4 May 2012 [note: 3] to purchase a property at 3 Leng Kee Road ("3 Leng

Kee Road") in his personal capacity. He claimed that the transaction for 3 Leng Kee Road later fell through, purportedly because HDB did not approve the transfer. [note: 4]

6 On 6 July 2012, the Vendor granted the Purchaser the OTP in exchange for the option fee of $504,000 (being 3% of the purchase price of $16.8m). The OTP was exercised on or about 27 July 2012 on the payment of the sum of $1.176m (being 7% of the purchase price). The total sum of $1.68m, being 10% of the purchase price of the Property, comprised the Deposit under cl 3(a) of the OTP.

7 Under cl 10 of the OTP, the Property was to be sold "subject to the existing approved use". Further, under cl 12(a) of the OTP, the sale and purchase was subject to the written approval of HDB or such other competent authority to the sale of the Property by the Vendor being obtained. [note: 5]

8 On 27 July 2012, KhattarWong LLP ("KW"), as the solicitors acting for the Purchaser, wrote to HDB for its consent to the sale and purchase of the Property. [note: 6]

9 On 15 August 2012, Cheong applied to the Urban Redevelopment Authority ("URA") *via* URA's E-Services to enquire on the approved use of the Property. [note: 7]

10 On the same day, Cheong also applied to the National Environment Agency ("NEA") for NEA's approval of the Purchaser's proposed use of the Property as a "general workshop, store, showroom, staff canteen, office, motor workshop and for auxiliary purposes" ("the Seven Uses") *via* NEA's Industrial Allocation System ("IA System") portal on its website. [note: 8]

11 Mr Gary Leong ("Mr Leong") was the senior industrial properties manager in HDB for properties along Leng Kee Road and Alexandra Road. [note: 9] He dealt with the applications for both the Property as well as 3 Leng Kee Road. [note: 10] On 16 August 2012, Mr Leong issued an inquiry for, *inter alia*, the reason the Purchaser was buying the Property and the proposed use of the Property, including the Purchaser's business plan. KW replied on 17 August 2012 stating that the Purchaser would be using the Property for the Seven Uses; however, it did not appear to contain a business plan. [note: 11]

12 On 21 August 2012, NEA sent the Purchaser a letter asking for clarifications on a number of matters. This included, *inter alia*, the estimated number of vehicles to be serviced, the operating hours, a brief description on the activities to be carried out at the motor and general workshop, the amount of wastewater that will be generated, the trade effluent, and so on. [note: 12] Cheong asked his brother-in-law, Mr Jason Tan ("Jason"), to address NEA's queries. [note: 13]

13 On 27 August 2012, the URA replied to the Purchaser's inquiry, stating that the Property was approved for "workshop, office and showroom use". [note: 14]

14 On 29 August 2012, KW fixed a meeting between the Purchaser and HDB for 12 September 2012. This was in response to a phone call from Mr Leong requesting for a meeting to understand the Purchaser's business plans for 3 Leng Kee Road and the Property. [note: 15]

15 On 3 September 2012, the Vendor's conveyancing solicitors responded to NEA's queries of 21 August 2012 stating that the Property would be used for the Seven Uses and that the details of the business would be furnished once available. [note: 16]

16 On 4 September 2012, NEA's Mr Chen Fu Yi sent an email to KW and Cheong requesting for them to "furnish [NEA] with the necessary information required in [NEA's] letter" so that he could process their application and upload their reply through the IA System. [note: 17]

17 During this time, Jason and another person, one Charles, worked on the answers to NEA's queries. Charles sent an email with the answers they came up with to one of Cheong's employees on 7 September 2012. [note: 18]

18 On 11 September 2012, KW supplied NEA with the Purchaser's further responses to NEA's queries. [note: 19]

19 Later on the same day, [note: 20] Cheong received the notice from NEA addressed to the Purchaser informing him that NEA was unable to "support" the Plaintiff's application for NEA's approval of the Purchaser's proposed use of the Property ("NEA's 11 Sep 2012 Letter"). It stated: [note: 21]

> …
>
> 2 We wish to inform you that under the URA Master Plan 2008, the long term land use plan for the subject site at 11 Leng Kee Road is for residential use, notwithstanding that it is currently being used by industry at this juncture.
>
> 3 As your proposed uses (i.e. general motor workshop, store, showroom, staff canteen, office and auxiliary purpose) do not conform to the long term land use plan for the subject site, we regret that we are unable to support your application.
>
> 4. Please source for alternative industrial premises, which is zoned for B2 industry use (ie. general special) in the URA Master Plan. …
>
> …

20 On 12 September 2012, the planned meeting with HDB took place. According to Jason, the persons who were present were two HDB officers (namely, Mr Leong and his superior), two solicitors from KW, as well as the architects that the Purchaser had engaged. [note: 22]

21 As to what was discussed at the meeting, Mr Leong (a subpoenaed witness) said that he wanted to know the reasons why the Purchaser had wanted to buy the Property and 3 Leng Kee Road together and to find out their business plan. [note: 23] Mr Leong's evidence was that the discussion was focused on 3 Leng Kee Road and not the Property as the Purchaser wanted to close the 3 Leng Kee Road deal very quickly. [note: 24] He therefore asked the Purchaser to provide a written proposal [note: 25] for 3 Leng Kee Road. [note: 26]

22 Mr Leong also said that the subject of NEA non-approval or non-consent for the Property did not come up during the discussion. [note: 27] Mr Leong also did not recall Jason saying anything about not being able to run a workshop on the Property and do car servicing because of NEA's refusal to grant its approval. [note: 28] Nor did he recall himself or his superior assuring Cheong and Jason that HDB would speak to NEA about letting the Purchaser run a workshop on the Property. [note: 29]

23 On 21 September 2012, KW wrote to Mr Leong, saying that Mr Leong had given instructions that in order to obtain HDB's approval, HDB required clearance from all relevant government authorities, including NEA and URA. The email stated that '[i]n light of NEA's rejection, please confirm the status of the application for HDB approval by the vendor and our clients". NEA's 11 Sep 2012 Letter was attached to this email. [note: 30]

24 On the same day, Mr Leong wrote an email to the Vendor's solicitors, Ching Ching, Pek Gan & Partners ("CCPG") stating that KW has informed HDB that NEA's consent has not be obtained for the Seven Uses and as such, HDB was "unable to process the request for transfer of lease" at the Property. [note: 31]

25 On 21 September 2012, Cheong provided HDB with the details of his business plans for 3 Leng Kee Road (but apparently not the Property). He did so again on 26 September 2012. Cheong claimed that HDB was not contented with his two responses and was not going to approve. [note: 32] However, Mr Leong said he did not recall saying that HDB was not going to give approval. [note: 33]

26 On 24 September 2012, Mr Leong wrote an email to KW stating the following:

> We wish to inform you that NEA's approval for the proposed use is required before HDB can give in-principle approval for the transfer of lease. As NEA's consent has not been obtained in this case, we are unable to grant in-principle approval. … [note: 34]

27 On 25 September 2012, KW wrote to CCPG stating the sale and purchase of the Property had been rescinded as a result of HDB's refusal to approve and requested a refund of the Deposit. [note: 35]

28 On 1 October 2012, CCPG responded to KW rejecting the Purchaser's purported notice of rescission. The letter noted that the existing tenant of the Property did not use the place as a workshop, which was consistent with clean industry use, and asked the Purchaser to revise their application. They also asked the Purchaser to appeal to NEA by highlighting that currently all properties in the same stretch of Leng Kee Road was used for motorcar-related industrial purposes and it would be inequitable to refuse consent on its use "especially when it is to be used as a clean industry basis [*sic*]". [note: 36]

29 On 5 October 2012, KW responded by noting that the Property was sold subject to the existing approved use (*ie*, the Seven Uses) and not just existing use. It stated that the Purchaser saw no appealable errors in NEA's 11 Sep 2012 letter. There was therefore no reason to revise their application or appeal NEA's decision. [note: 37]

30 On 8 October 2012, CCPG replied saying that the Vendor was checking on the matter with NEA. [note: 38]

31 On 15 October 2012, a meeting took place between two NEA officers (including Mr Chen Fu Yi) and the Vendor's director, Mr Tan Kah Tong ("Tan"). [note: 39]

32 On 19 October 2012, CCPG wrote to KW disclosing that a meeting with NEA had taken place and that NEA's concern was to highlight to the Purchaser that the Property was zoned residential. The letter also asked the Purchaser to inform NEA that they were aware of the zoning of the Property

and there was to be no change to the current existing use. It also stated that if this assurance was given to NEA on appeal, the chance of obtaining approval based on the fact that there was no change to the existing use would be very high. Finally, it also highlighted that approval had been granted for the existing use in respect of 3 Leng Kee Road. [note: 40] On the stand, Cheong accepted that he did obtain NEA's in-principal approval for the use of 3 Leng Kee Road as a vehicle showroom and workshop. [note: 41]

33 On 22 October 2012, KW replied, reiterating that they found no reasonable grounds to appeal against the decision by HDB which had taken into consideration NEA's 11 Sep 2012 Letter. It added that the trigger event in cl 12a of the OTP had been fulfilled. It then asked for the return of the Deposit without further delay. [note: 42]

34 On 1 November 2012, KW issued the formal notice and demand to CCPG for the return of the Deposit. [note: 43] On 6 November 2012, KW wrote to CCPG again, reiterating the Purchaser's demand of the Deposit. [note: 44] CCPG wrote back on the same day stating that they expected to reply within the next seven days or so. [note: 45]

35 Tan then decided to take matters into his own hands. On 8 November 2012, he wrote to NEA, urging it to review and reconsider their position as stated in NEA's 11 Sep 2012 Letter. He asked NEA to grant its approval with the express qualification that the Property remained zoned "residential" and there was to be no change to the "existing use" of the Property. [note: 46] Even though this letter stated that it was copied to the Purchaser, the Purchaser in fact only received this letter on 3 December 2012. [note: 47]

36 On 14 November 2012, NEA wrote to the Vendor by email stating that it was "currently seeking inputs from HDB/URA" on their appeal and that NEA would inform the Vendor on the outcome of the appeal upon URA and HDB's reply. [note: 48]

37 On 23 November 2012, NEA sent an email to Cheong stating that NEA had jointly assessed *Cheong's* appeal with HDB and URA and that they had acceded to his appeal. It attached a letter dated 23 November 2012. In that letter, NEA stated that it had noted *the Purchaser's* declaration and confirmation that the Purchaser was taking over the Property from the Vendor "without any change of use". It further added that it had "in-principle no objection" to this, subject to compliance with various requirements. [note: 49]

38 On 28 November 2012, KW wrote to NEA to state that neither the Purchaser nor KW had lodged any appeal with NEA and were completely taken by surprise by the reference to an appeal by the Purchaser. It also stated that the Purchaser rejected the representations, unauthorised appeal and NEA's "purported decision". [note: 50]

39 On 29 November 2012, Tan wrote to the Purchaser stating that, *inter alia*, NEA's approval of 23 November 2012 had retrospective effect as of 11 September 2012. He asked the Purchaser to proceed to apply to HDB since HDB's pre-requisite for NEA's approval to be obtained had been fulfilled. [note: 51] CCPG wrote a similar letter to KW on 30 November 2012. [note: 52]

40 On 11 December 2012, KW wrote to CCPG maintaining that the OTP had been terminated and cannot be revived by NEA's letter dated 23 November 2012. [note: 53]

The Plaintiff's claim

The parties' cases

41 The Purchaser submitted that it had validly rescinded the OTP and was entitled to a refund of the Deposit for the following reasons:

(a) First, cl 12a of the OTP entitled the Purchaser to immediately rescind in the event that HDB refused to give written approval for the sale and purchase of the Property, provided that the Purchaser exercised all reasonable endeavours to obtain HDB's written approval, which has been done.

(b) Second, on a *proper* interpretation of cl 4, the completion date ought to be 19 October 2012 ("the Alleged Completion Date") at the latest and if HDB had not given its written approval for the sale and purchase of the Property by that date, the Purchaser was entitled to rescind the sale and purchase of the Property by the Alleged Completion Date, provided that it has exercised reasonable endeavours to obtain HDB's written approval by that date.

(c) Third, given the wording of cl 12a, the court could not imply any terms "in fact" in the OTP.

42 As for the Vendor's various submissions, they were not easy to understand as the arguments were not presented in a clear and logical way. In any event, the key planks of the Vendor's case appeared to be following:

(a) NEA's 11 Sep 2012 Letter, which stated that it was "unable to support" the Purchaser's application, meant just that, and was not a non-approval. Cheong had already obtained NEA approval for 3 Leng Kee Road and the plain and obvious thing to do was for the Purchaser to ask NEA to review their decision, or to appeal that decision. Indeed, upon the Vendor's appeal, NEA reversed their earlier decision.

(b) The OTP included implied terms which required the Purchaser to take all reasonable steps to get the written approval of HDB or such other competent authority for the sale of the Property, and for the parties to cooperate to effect the sale and purchase of the Property.

(c) The Vendor did nothing to "disabuse" NEA on its position that they were unable to support the Purchaser's application and that the Purchaser had *deliberately* kept the Vendor in the dark to pre-empt the Purchaser from being able to take the matter up with NEA until after the Alleged Completion Date.

(d) HDB did not refuse to give their grant of written approval.

Construction of the OTP

43 I begin by ascertaining the rights and obligations of the parties under the OTP.

Implication of terms

44 The OTP was a five page document, containing 18 clauses. The Law Society of Singapore's Conditions of Sale 2012 ("the Conditions of Sale") was expressly incorporated into the OTP by way of cl 1, subject to the usual proviso that where the terms and conditions in the OTP and the Conditions

of Sale conflict, the former shall prevail. I also note that the drafting of the OTP was subject to negotiation and amendment by the solicitors of both parties, [note: 54] and the previous drafts of the OTP have been disclosed.

45 The dispute revolved around two sets of clauses in the OTP, namely cll 12 and 4. The numbering of cl 12 was unusual. It began with cl 12(a) although there was no clause 12(b), and the subsequent clauses were numbered with the small letters "a", "b" and "c". In any event, I reproduce the clause in full:

> 12(a) The sale and purchase herein is *subject to the written approval from the Housing and Development Board ("HDB") or such other competent authority* to the sale of the Property by the Vendor being obtained and the parties hereto hereby covenant with the other of them to comply with such relevant terms and conditions that may be laid down or imposed by the HDB on them respectively.
>
> a. In the event, *the HDB refuses to approve the sale and purchase herein the sale herein shall be rescinded* and all moneys paid to account of the purchase price herein shall be refunded free of interest compensation or otherwise, within seven (7) days from the date of the Vendor's receipt of the refusal to the sale and purchase herein to the Purchaser in exchange for the Purchaser's return to the Vendor's Solicitors of all documents of title and the withdrawal by the Purchaser at the Purchaser's cost of all caveats and cancellation of all entries relating to the Property at the Singapore Land Authority as may relate to the sale and purchase herein, neither party to have any claim or lien against the other whatsoever thereafter.
>
> b. The Purchaser *shall within two (2) weeks from the date of exercise of Option, apply or submit the relevant application to the HDB and all other competent authorities (if applicable) for the necessary approval(s).* The HDB processing / administrative fees shall be borne by the Purchaser. The Vendor shall bear the assignment fee imposed by HDB in respect of the sale and purchase.
>
> c. For the avoidance of doubt, if the approval letter by the HDB is subject to rectification of any unauthorised additions or alteration in the Property, for the purposes of enabling completion, the Vendor shall give the necessary undertaking to the HDB to attend to the rectification within the deadline given by the HDB.
>
> [Emphasis added]

46 Cl 4 of the OTP, which dealt with the completion date for the sale and purchase of the Property, stated:

> 4. Subject to the terms and conditions herein, the balance of the sale price together with any other sum hereby agreed to be paid shall be paid by the Purchaser and the sale and purchase shall be completed at the office of the Vendor's solicitors, or such other place as the Vendor's solicitors may direct on:-
>
> (a) the date of expiry of twelve (12) weeks from the date of exercise of this Option; or
>
> (b) the date of expiry of three (3) weeks from the date of receipt by the Purchaser's Solicitors of the approval of the sale of the Property by the Housing & Development Board,
>
> *whichever is the later ("the Completion Date").* On completion, the Vendor shall execute an

assurance of the Property in favour of the Property in favour of the Purchaser, such assurance to be prepared by and at the expense of the Purchaser.

[Emphasis added]

47 On a literal reading of the above clauses, it was clear that that the completion date was tied to the grant of approval by HDB. Based on cl 4(a), the scheduled completion date would have been 19 October 2012, being the expiry of 12 weeks from the date the OTP was exercised (*ie*, 27 July 2012). However, if HDB's approval was not procured soon enough, the completion date would be shifted towards an uncertain future date, depending on when approval from HDB is obtained. This is the effect of cl 4(b) read with the words "whichever is the later".

48 Further, the sale and purchase was conditional upon the written approval of HDB or such other competent authority. The obligation to apply for such approval fell on the Purchaser. However, if HDB refused to approve the sale and purchase, the sale was rescinded and the Purchaser was entitled to a refund of the Deposit. Strangely enough, cl 12a made no reference to other competent authorities even though cll 12(a) and 12b did.

49 There was, however, a problem in these clauses. Under the express contractual framework, the time for completion was contingent on the grant of HDB's approval but the OTP did not specify any time limit for such approval to be obtained, or a long stop date for the determination of the contract. It put no obligation on the Purchaser to pursue the relevant approvals beyond the submission of the applications. The end result was that if the Purchaser had simply sat on his hands after making the applications, and the relevant authorities remained silent, the OTP could continue indefinitely. I note that cl 15 of the Conditions of Sale allowed for the parties to issue a Notice to Complete but that, again, may only be given after the completion date. The parties would find themselves in limbo.

50 The question then is whether the court should intervene, and if so, how. I am guided by the Court of Appeal in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 ("*Sembcorp Marine*"), which laid down a three-step test for implication of terms in fact (at [101]):

(a) The first step is to ascertain how the gap in the contract arises. Implication will be considered only if the court discerns that the gap arose because the parties did not contemplate the gap.

(b) At the second step, the court considers whether it is necessary in the business or commercial sense to imply a term in order to give the contract efficacy.

(c) Finally, the court considers the specific term to be implied. This must be one which the parties, having regard to the need for business efficacy, would have responded "Oh, of course!" had the proposed term been put to them at time of the contract. If it is not possible to find such a clear response, then, the gap persists and the consequences of that gap ensue.

51 As for the first step, the Purchaser argued that there was no gap in the OTP requiring the implication of any terms by this court on the basis that both parties were represented by solicitors during the drafting and signing of the OTP. [note: 55] I disagreed. I was disappointed that a contract drafted and negotiated by solicitors for such a large transaction contained such a glaring gap. In any event, even the most well-meaning drafter of contracts cannot anticipate every eventuality. Similarly, the existence of negotiations does not *ipso facto* mean the parties contemplated the gap and chose to leave it as it is.

52 As for the second step, it is clear for the reasons I have stated that it was necessary in the business or commercial sense to imply a term in order to give the OTP efficacy.

53 This brings me to the third step. It seemed to me the real issue was how the gap should be filled.

54 The Defendant submitted that the OTP contained two implied terms:

(a) That it was incumbent upon the Purchaser to act with due diligence and despatch and take all reasonable and necessary steps that were and/or are necessary to facilitate and expedite the procurement of the written approval of HDB or such other competent authority for the sale of the Property by the Vendor under and in accordance with cl 12(a) of the OTP; and

(b) That the Purchaser and Vendor would co-operate with each other and do all reasonable and necessary things to effect the consummation and completion of the sale and purchase of the Property.

55 The Purchaser disputed this. However, it accepted that, in order for the Purchaser to have the benefit of cl 12a and rescind the OTP, it had to show that it had exercised all reasonable endeavours to secure written approval from HDB. It had formulated this on the basis that this was the "plain and ordinary meaning of the language of cl 12a". [note: 56] It did not seem to me that this was a plain reading of the clause at all.

56 Nevertheless, the Purchaser could hardly have disputed that it did have this obligation, based on the authority of *Tan Soo Leng David v Wee, Satku & Kumar Pte Ltd and another* [1997] 3 SLR(R) 257 ("*Tan Soo Leng David (HC)*"). It was stated by Judith Prakash J at [61]:

> 61 It is established law that where a contractual provision provides that performance by one party is subject to the consent of a third party, the first party cannot say that having asked for such consent thereafter the matter is completely out of his hands so that if the consent is not forthcoming he is released from further performance. Rather, as the Court of Appeal put it in this case, **to avail himself of the right to rescind, such party has a duty to show that he has taken all reasonable steps to obtain the consent of the third party or that it was useless for him to pursue the matter with the third party after the initial withholding of consent because it would have been quite impossible for him to obtain the consent of the third party**. …
>
> [emphasis added in bold]

57 Having set out the foregoing, the difference between the parties' positions was not obvious at first glance. It appeared to me that, based on the Purchaser's interpretation of cl 12a, any failure to take all reasonable steps would only operate to *disentitle* his right to rescission, while the Vendor's implied terms would create *positive* obligations on the Purchaser such that it would be in breach of contract if it failed to do so. Assuming this was the Purchaser's position, this would not cure the gap that I have identified. If the Purchaser failed to take all reasonable steps, it cannot rescind, but there would still be no way forward. We return to the problem of when completion should take place.

58 The Purchaser also submitted that "on the plain wording" of cl 4(a), the OTP provided that the completion date ought to have been 19 October 2012 *at the very latest*. Therefore, if the Purchaser failed to obtain approval from HDB by the Alleged Completion Date, even if there was no express refusal, it would be entitled to rescind if it had exercised all reasonable endeavours by then. [note: 57]

Once HDB refused to grant its approval, cl 4 of the OTP ceased to operate, with the result that cl 12a of the OTP operated to entitle the Purchaser to rescind the sale and purchase of the Property. [note: 58]

59 I disagreed. The plain wording of cl 4 indicated that the Alleged Completion Date was the *earliest* possible completion date rather than the *latest*. Clearly, it must be possible for the relevant approval by HDB to occur after the date of approval.

60 In this respect, the Purchaser submitted that this court should also draw guidance from *Tan Soo Leng David (HC)* at [62] where, after analysing the relevant clause in that case, the learned judge found that the natural and ordinary meaning of that clause was that the sale and purchase would be *immediately* rescinded in two instances. [note: 59] First, if the third party refused to give its consent, and secondly, if the third party did not respond to the request for consent for such a long period that its consent had not been received by the completion date.

61 However, the clause in question in *Tan Soo Leng David (HC)* expressly stated that where such consent was not forthcoming by the completion date, the sale and purchase of that property shall be deemed to be rescinded (see [12]). That clause stated:

> The sale shall also be subject to the consent of the Developers, which said consent to the sale is required under the terms of the principal agreement. *In the event such consent is refused or not received by the Completion Date (as defined in Clause 7 below)*, *the sale and purchase herein shall be deemed rescinded* forthwith whereupon all moneys paid hereunder shall be refunded to you free of interest and subject thereto the sale and purchase herein shall be cancelled and of no effect and neither party shall have any claim or demand against the other for damages, costs, compensation or otherwise. [emphasis added]

62 Cl 12a of the OTP did not contain such a stipulation. In effect, the Purchaser was asking the court to *imply* a cut-off date for pursuing all reasonable endeavours. In my view, had the need for a cut-off date been brought to the parties' attention at the time of contract, they would have said "Oh, of course!" (as specified in the third step of the *Sembcorp Marine* test). But it was impossible for a court to specify an exact date as it would have no basis to prefer one date over another.

63 Having regard to the foregoing, I found that there was an implied term that the Purchaser had to use all reasonable endeavours to obtain the written approval of HDB and such other competent authority to the sale of the Property within a reasonable time. If no such approval was forthcoming within a reasonable time after the exercise of all reasonable endeavours, either party may give notice to rescind.

64 In any event, based on the Purchaser's own argument, the implication of the Alleged Completion Date as the cut-off date for the exercise of all reasonable endeavours would not assist the Purchaser. They had not taken any further steps in pursuance of the relevant approvals after KW's email to HDB on 21 September 2012. Indeed, that is generous, since an email which merely informed HDB that NEA had refused to give its approval could more reasonably be construed as an invitation for HDB to follow suit than an attempt to convince HDB to give its consent. Accordingly, if it was not entitled to rescind when it purported to do so on 25 September 2012, the existence of a long stop date made no difference.

What is meant by "existing approved use"

65 Cl 10 of the OTP stated that the Property is sold subject to the "existing approved use". The

Purchaser submitted that by "existing approved use", it was referring to the Seven Uses as set out in the State Lease for the Property as supplemented by the Supplemental Deed dated 2 April 1983. [note: 60] In its correspondences, CCPG had initially taken the position that the phrase actually meant "current existing use" *ie*, how the existing tenant of the Property was using the Property. However, this point was not seriously argued by the Vendor in its submissions. In any event, I found the "existing approved use" was in fact the Seven Uses. Cheong had known as early as 7 September 2011 that the Purchaser's application to NEA was for the Seven Uses, and if that had not been the intention of the parties, he would not have waited to highlight this fact. [note: 61]

Whether HDB refused the sale and purchase of the Property

66 Before I turn to consider whether the Purchaser had in fact taken all reasonable steps to obtain HDB's approval, I have to first consider whether HDB had actually refused to give its written approval. If not, then the Purchaser's purported notice to rescind on 25 September 2012 would have no effect. The Purchaser argued that HDB had done so by its email to KW on 24 September 2012 when Mr Leong informed KW that, since NEA's consent has not been obtained, HDB was unable to grant in-principle approval. This email was in response to KW's email dated 21 September 2012 where KW had asked Mr Leong, *in light of NEA's rejection*, to confirm the status of the Purchaser's application for HDB's approval.

67 In a strict sense, Mr Leong did "refuse", but not every "refusal" by the authority would entail a sufficient refusal for the purposes of cl 12(a) of the OTP. In *Group Exklusiv Pte Ltd v Diethelm Singapore Pte Ltd* [2003] 4 SLR(R) 582 ("*Group Exklusiv*"), Choo Han Teck J considered the effect of the following clause:

> (e) If the *consent* of HDB, LTA and other relevant authorities in respect of the sale and purchase and the change of use and the erection of the private access road *is not obtained or refused* by the date falling one (1) month before the date fixed for completion, the sale and purchase may, at either party's option, be rescinded, whereupon all monies (including but not limited to the deposit and goods and services tax, if any) paid by the Purchaser herein shall be refunded to the Purchaser without any interest or compensation. [Emphasis added]

68 In that case, the defendant was the lessee of a property. The defendant entered into a sale and purchase agreement with the plaintiff to sell the remainder of the lease to the plaintiff. The approval of NEA was needed for the change of use of the property to a motor vehicle showroom and workshop. NEA called for a meeting with the plaintiffs where NEA informed the plaintiff that spray-painting would not be approved, despite the attempts by the plaintiff to persuade NEA's representatives otherwise. NEA subsequently wrote a letter stating that while the proposed vehicle showroom was acceptable, pollutive uses such as vehicle repair and spray painting should not be conducted.

69 One of the issues that the learned judge had to deal with was the effect of NEA's letter. Choo J held that the plaintiff would be entitled to rescind if it had received a clear and conclusive rejection of their application. Choo J found that the NEA letter was such a rejection. Whether or not a rejection was clear and unequivocal was to be looked at from the applicant's point of view. While the relevant authority may have considered it a part approval, from the defendant's perspective it was a total rejection. The learned judge further added that the plaintiffs would not have discharged their duty to their best endeavours if there was a formal appeal process, but no evidence of a procedure for appeal was provided (at [9]).

70 In the present case, my view was that HDB's email of 24 September 2012 was not a clear and

unequivocal rejection, but merely a statement that NEA's approval was required in order for it to proceed. This was reinforced by Mr Leong's evidence in court. He had explained that HDB was "not able to grant the approval" because NEA's approval was not given, which meant that they could not go to the next step, which is to bring up the case to process (*ie*, to submit the documents for approval). [note: 62]

71 However, since HDB could not even process the application without NEA's approval, it seemed to me that the key question was really whether all reasonable steps had been taken to obtain NEA's approval. This brings me to the next point.

Whether the Purchaser has exercised all reasonable endeavours

The applicable law

72 In *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905 ("*KS Energy*"), the Court of Appeal considered the effect of an "all reasonable endeavours" obligation, albeit in the context of an *express* contractual provision. It held that the test for whether an "all reasonable endeavours" obligation had been fulfilled would ordinarily be the same as the test for determining whether a "best endeavours" obligation has been fulfilled (at [62]). This was the test laid down in *Travista Development Pte Ltd v Tan Kim Swee Augustine* [2008] 2 SLR(R) 474, which was restated by the Court of appeal in *KS Energy* as follows (at [47]):

> 47 Travista lays down the following propositions regarding a "best endeavours" obligation:
>
> (a) The obligor has a duty to do everything reasonable in good faith with a view to procuring the contractually-stipulated outcome within the time allowed. This involves taking all those reasonable steps which a prudent and determined man, acting in the interests of the obligee (see further [52] below) and anxious to procure the contractually stipulated outcome within the available time, would have taken.
>
> (b) The test for determining whether a "best endeavours" obligation has been fulfilled is an objective test.
>
> (c) In fulfilling its obligation, the obligor can take into account its own interests.
>
> (d) A "best endeavours" obligation is not a warranty to procure the contractually-stipulated outcome.
>
> (e) The amount or extent of "endeavours" required of the obligor is determined with reference to the available time for procuring the contractually-stipulated outcome; the obligor is not required to drop everything and attend to the matter at once.
>
> (f) Where breach of a "best endeavours" obligation is alleged, a fact-intensive inquiry will have to be carried out.

73 The Court of Appeal also set out a summary of the guidelines applicable both "all reasonable endeavours" clauses and "best endeavours" at [93]:

> 93 … following on our holding (at [62] above) that the test for determining whether an "all reasonable endeavours" obligation has been satisfied should ordinarily be the same as the test for determining whether a "best endeavours" obligation has been satisfied (*ie*, the *Travista* test), we

also endorse the guidelines below vis-à-vis the operation and extent of both "all reasonable endeavours" and "best endeavours" clauses:

(a) Such clauses require the obligor "to go on using endeavours until the point is reached when all reasonable endeavours have been exhausted" (see *Yewbelle (HC)* ([75] supra) at [123] and *Yewbelle (CA)* ([79] supra)), or "to do all that it reasonably could" (see Jet2 (CA) ([84] supra) at [31]).

(b) The obligor need only do that which has a significant (see *The Talisman* ([71] supra)) or real prospect of success (see *Yewbelle (HC)* and *Yewbelle (CA)*) in procuring the contractually-stipulated outcome.

(c) If there is an insuperable obstacle to procuring the contractually-stipulated outcome, the obligor is not required to do anything more to overcome other problems which also stood in the way of procuring that outcome but which might have been resolved (see *Yewbelle (CA)*).

(d) The obligor is not always required to sacrifice its own commercial interests in satisfaction of its obligations (*see CPC Group* ([82] supra)), but it may be required to do so where the nature and terms of the contract indicate that it is in the parties' contemplation that the obligor should make such sacrifice (see Jet2 (CA)).

(e) An obligor cannot just sit back and say that it could not reasonably have done more to procure the contractually-stipulated outcome in cases where, if it had asked the obligee, it might have discovered that there were other steps which could reasonably have been taken (see *EDI* ([59] supra)).

(f) Once the obligee points to certain steps which the obligor could have taken to procure the contractually-stipulated outcome, the burden ordinarily shifts to the obligor to show that it took those steps, or that those steps were not reasonably required, or that those steps would have been bound to fail (see *EDI*).

Application to the facts

74 In its closing submissions, the Purchaser highlighted the various steps taken to obtain HDB's approval for the sale and purchase of the Property, the gist of which I have set out in my rendition of facts. [note: 63] While it seemed substantial at first glance, it was clear that most of the steps related to their communications with HDB.

75 Even if I accepted that the Purchaser's implied obligation to take all reasonable steps to procure approvals only related to HDB (and I did not), they cannot establish that they had done so *unless* they can show that all reasonable efforts were also taken to obtain NEA's approval, when they were aware that NEA's approval was a *pre-requisite* to HDB's approval. Whether or not an applicant has exercised all reasonable endeavours is not a mere counting game as to how many steps were taken. An applicant can hardly say it has fulfilled its obligation to exercise all reasonable endeavours if he has omitted to attempt to satisfy, with reasonable diligence, any express requirement that it knows would allow it to obtain the authority's consent.

76 I accepted that NEA's 11 Sep 2012 Letter looked like a clear and unequivocal rejection of the Purchaser's application. However, I note that prior to this rejection, all Cheong did was submit an application to NEA on 15 August 2012. After the submission, NEA had a number of queries. An incomplete reply to those queries was provided on 3 September 2012. The final answers were then

given on 11 September 2012. The question was whether this was sufficient to show that the Purchaser had taken all reasonable steps to obtain NEA's approval.

77 In this regard, the Purchaser placed considerable reliance on the circumstances in *Group Exklusiv.* In that case, the defendant's argument that the plaintiff was obliged to appeal or take further steps to persuade NEA to change its stance was rejected by Choo J. It is worth noting that in coming to his decision, he noted that the defendants in that case had pressed the managing director of the plaintiff company to make further efforts. As a result, the said managing director made an appointment to see an NEA representative. At the meeting, which took place well after NEA's rejection letter, NEA representative maintained his stance that NEA's decision was final and the application would not be granted. The learned judge also made the finding of fact that it was likely that the plaintiffs would have "proceeded expeditiously and strenuously for their own sake" and that their failure was "not a reflection of a lack of effort". He also could not infer that the plaintiff had deliberately forsaken the defendant's property (at [12]).

78 Similarly, in *Tan Soo Leng David (HC)*, there was some effort expended by the applicant after receipt of rejection. *Tan Soo Leng David (HC)* involved the sale of a unit in a hospital. The sale was subject to the consent of the developer. The first defendant had assumed that the contract was automatically rescinded when the developer informed them of their refusal of consent. However, the court did not consider that the first defendant had made all reasonable efforts to obtain the developer's consent at that time as all it had done was make a bare application. However, the first defendant did proceed to try to convince the developers subsequently. Its representatives met the CEO of the developer on two occasions. At the first meeting, they wanted to find out the reasons for the developer's refusal. After hearing the reasons, they felt it was unfair. They even considered suing the developer but did not, after advice from their lawyers. They then went to see the CEO again, who maintained his refusal.

79 Unlike in *Group Exklusiv* and *Tan Soo Leng David (HC)*, the Purchaser in the present case never met anyone from NEA face-to-face. They never took *any* active steps to try to change its mind, or even to clarify its decision. This omission was all the more glaring since Cheong had obtained NEA's approval for 3 Leng Kee Road, [note: 64] which was nearby and similarly zoned residential. The Purchaser argued that this was irrelevant since that was for a separate property and this did not mean that NEA would give approval for the Property. I was unpersuaded by this argument.

80 I also note that in NEA's 11 Sep 2012 letter, the stated reason was that the Seven Uses did not conform to the URA Master Plan 2008 as the long term use plan was for residential use. However, in the present case, the URA had already given its approval for the use of the Property as a workshop prior to NEA's letter.

81 Moreover, it was Mr Leong's evidence that HDB had a requirement that the sub-tenant should occupy the Property for *industrial* use. [note: 65] This meant that HDB did not allow for the Property to be used purely for commercial or residential use, which also contradicted the position expressed in NEA's 11 Sep 2012 Letter. This was another area that the Purchaser could have explored.

82 Accordingly, from the perspective of an ordinary applicant, NEA's rejection would have appeared to be inconsistent, if not unreasonable. As stated in *Tan Soo Leng David (HC)*, the applicant only had to "try" without going into whether the refusal was reasonable or not. However, I do not think this means that the applicant ought to stop trying the moment it received a refusal of consent, if it is not reasonable to do so.

83 In these circumstances, "a prudent and determined man, acting in the obligee's interests and

anxious to procure the contractually-stipulated outcome within the available time" would have *at least* checked with NEA.

The effect of NEA's subsequent letter on 23 November 2012

84 I now turn to the effect of Tan's letter to NEA of 8 November 2012 asking NEA to review and reconsider their position, and NEA's subsequent letter on 23 November 2012 stating that NEA had "in-principle no objection" to the proposal that the Purchaser take over the Property without "any change of use".

85 It is unclear what Tan meant when he asked NEA to grant approval with the express qualification that there is to be no change to the current existing use of the Property, or what were the assurances given by Tan when he met with NEA's representatives earlier on 15 October 2012. The letter from CCPG to KW of 1 October 2012 indicated that the Vendor considered that the "current use" of the Property did *not* include a "workshop".

86 During cross-examination, Tan moderated his position. He claimed he did not mean no workshop, but a clean workshop. He said it was possible to use a workshop, "but you cannot do like, panel beating, spray painting, engine overhauling or what". [note: 66] His tenant at the time had been using it as a workshop, because HDB did not allow full use of the Property as a showroom, but what the tenant used it for was as "a pre-delivery inspection bay, where he -- they just check the car, the engine, interior, whatever, electrical, whatever, before they deliver to their customer". [note: 67]

87 As I have already found, the "existing approved use" referred to the Seven Uses, which included a motor workshop. There was no condition that it had to be a "clean" workshop. In the circumstances, it was inappropriate for the Vendor to appeal to NEA on the Purchaser's behalf, making significant concessions that they knew that the Purchaser was not willing to make, without even letting the Purchaser know that they were doing so.

88 As a result, there was an ambiguity in NEA's letter on 23 November 2012 as to what it meant by no change of use. It was unclear if NEA allowed the use of a motor workshop at all, or whether it was conditional on it being a "clean workshop" that would have made it impossible for the Purchaser to carry out its intended business. If that was the case, NEA's approval would, from the Purchaser's point of view, nevertheless be "a total rejection" (to use the words in *Group Exklusiv*).

89 It seemed to me that if the Purchaser or the Vendor had been acting reasonably, either side could have written to NEA for clarification. Perhaps they did not do so because they feared that NEA's reply would not be in their favour. Be that as it may, the burden of proof was on the Vendor and they had not discharged this burden.

90 Nevertheless, the fact that NEA did reconsider its position showed that it was willing to do so. This did not mean that it would certainly have granted its approval on terms that the Purchaser would have found acceptable, but it demonstrated to me that it was not a situation where it would have been useless for the Purchaser to have made an attempt.

Conclusion on the Plaintiff's claim

91 To summarise, what is reasonable in each case will depend on the facts. In a situation where the authority has already considered all the possible arguments and made a clear decision, then it may not be reasonable to expect the applicant to appeal, because the likelihood of success on appeal may be very low. In this case, where the Purchaser knew that there were realistic prospects of

success on appeal, I think it was incumbent on the Purchaser to try.

92 Finally, after considering the evidence, it appeared that the Purchaser had already lost interest in the transaction and was already looking for an opportunity to rescind for reasons undisclosed to me, rather than looking for a way to persuade the authority to change its mind, which was what I thought the Purchaser should have been doing. To be clear, I am not saying that in the course of such an appeal, the Purchaser should be required to change its business plans to the extent that the Purchaser would be getting something quite different from what it contracted for. All I am saying is that the Purchaser should have written to NEA to reconsider, and to see if there was any scope for negotiation to achieve a mutually acceptable outcome. There was ample time and opportunity for them to do so.

93 I therefore found that the purported rescission on 25 September 2012 was premature, and therefore invalid.

94 For the above reasons, I dismissed the Purchaser's claim.

The Counterclaim

95 In its Defence and Counterclaim, the Vendor sought a number of remedies against the Vendor :

(a) The following declaratory orders:

(i) That NEA's 11 Sep 2012 Letter was not and could not be construed as either approving or not approving the Purchaser's application ("1st Declaratory Order");

(ii) That the Vendor had the *locus standi* to write to NEA on 8 November 2012 to obtain confirmation as to whether NEA was approving or not approving the Purchaser's application ("2nd Declaratory Order");

(iii) That prior to 22 November 2012 NEA had not made any decision as to whether to approve or not approve the Purchaser's application ("3rd Declaratory Order");

(iv) That NEA's letter on 23 November 2012 took retrospective effect from 11 September 2012 ("4th Declaratory Order");

(v) That upon receiving NEA's letter dated 23 November 2012 approving the Purchaser's intended use of the Property, the Purchasers were and are under a continuing legal obligation to apply to HDB for consent to the sale and purchase of the Property ("5th Declaratory Order");

(vi) That the Notice of Rescission dated 25 September 2012 sent by the Purchaser's solicitors to the Vendor's solicitors was of no effect ("6th Declaratory Order"); and

(vii) That time for completion had not begun to run ("7th Declaratory Order").

(b) an order that the Purchaser proceed forthwith to apply to HDB for approval for sale of the Property:

(c) damages; and

(d) interest.

96 Subsequently, in its reply submissions, the Vendor prayed for the following additional orders (which were not specifically pleaded): [note: 68]

(a) the forfeiture of the Deposit; and

(b) that the Purchaser file a Withdrawal of Caveat against the Property.

The Declarations

97 Even though it had prayed for a variety of declaratory orders, the Vendor did not address this point in its closing submissions at all. They only made some arguments in their rebuttal submissions in response to the Purchaser's closing submissions.

98 With respect to the 1st to 4th Declaratory Orders, it was accepted by the Court of Appeal in *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2006] 1 SLR(R) 112 at [14] that "any person whose interests might be affected by the declaration should be before the court". Undoubtedly, NEA was such an interested party. The Vendor could have joined NEA as a defendant in the counterclaim but it did not do so. The Vendor did not even call anyone from NEA as a witness.

99 The Vendor relied on the passage in *London Passenger Transport Board v Moscrop* [1942] AC 332 at 345 which stated that "*except in very special circumstances*, all persons interested should be made parties, whether by representation orders or otherwise, before a declaration by its terms affecting their rights is made". They argued such special circumstances were present. [note: 69] I do not think there were any special circumstances in the present case.

100 Without any evidence from NEA, I could hardly have granted the declaratory orders sought. Moreover, the 1st, 3rd and 4th Declaratory Orders were inconsistent with my findings of fact.

101 As for the 5th Declaratory Order, I declined to grant such an order because it assumed that NEA's letter dated 23 November 2012 approved the Purchaser's intended use of the Property, which has not been established.

102 Finally, as for the 6th and 7th Declaratory Orders, I declined to grant those orders. The power to grant a declaration is discretionary, and where the court feels that a declaration will serve no useful purpose, no declaration will be granted (see *Latham Scott v Credit Suisse First Boston* [2000] 2 SLR(R) 30 at [74]). I was of the view that this was the case.

Specific performance

103 Again, while the Vendor had pleaded for an order that the Purchaser apply forthwith to HDB for approval of the sale of the Property, it barely addressed the issue in any of its submissions as to *why* specific performance ought to be granted. In its closing submissions, all it did was list two cases setting out some general principles relating to when specific performance should be granted. [note: 70]

104 On 4 July 2014, this court issued a letter directing parties to address, *inter alia*, the issue of whether it would be inappropriate for the court to exercise its discretion to grant specific performance. In their further submissions, the Vendor appeared to argue for the position that the

court should *not* exercise its discretion to award specific performance to the Vendor. [note: 71]

105 The Vendor has clearly lost its enthusiasm for the order it had sought. For this reason alone, I would decline a grant of specific performance.

106 In any event, I thought that it was impossible to order the Plaintiff to proceed with the purchase, since HDB's approval had not been obtained, and in any case this remedy was not sought. So the only specific performance that could be ordered was to apply to HDB *and* appeal to NEA.

107 However, any appeal would require the preparation of a business plan and negotiation over the approved uses. By now, the transaction was no longer a viable business proposition, and it was pointless to order the Purchaser to prepare a business plan when they no longer have any intention to operate the business. It would be a wholly artificial affair. Specific performance is of course a discretionary remedy, and I decided it would not be appropriate to exercise my discretion in this manner.

Damages

108 The next question that I had to consider was whether I ought to award damages for the Purchaser's breach of their implied obligation to exercise all reasonable endeavours.

109 First of all, the Defendant has not adduced *any* evidence of any loss they have suffered. There has also been no application for the trial to be bifurcated.

110 In the present case, it would be difficult to quantify the Vendor's loss, because we do not know what would have happened if the Purchaser had proceeded to appeal. In the end, NEA was persuaded to change its mind, but as I have found, this was apparently on terms that the Purchaser would not have agreed with. So if the Purchaser had appealed, we do not know for certain whether NEA would have approved the kind of workshop that the Purchaser intended to operate. Moreover, even if NEA did approve, there was no certainty that HDB would also approve.

111 In my view, to fail to take into account the possibility that cl 12(a) of the OTP may not be fulfilled would be unfair and would lead to over-compensation. This was also the view of the learned authors of *Chitty on Contracts* (at para 2-159). This reasoning is drawn from the general principle that, except in exceptional circumstances, the starting point is that a claimant is entitled to be placed, so far as money can do it, in the same position he would have been had the contract been performed (*MacGregor on Damages* at para 1-023), but not more.

112 In this respect, the Vendor bore the burden of proof. The Vendor did not call any witnesses from NEA. Furthermore, the Vendor has led negligible evidence as to the possibility of HDB's approval and indeed they did not even bother to cross-examine Mr Leong of HDB. In such circumstances, I did not think that the Vendor has shown on a balance of probabilities that the Purchaser's breach has caused him loss.

113 Even if I was to characterise the Vendor's loss as a *loss of a chance*, there was again no evidence before me that would allow the court to calculate what the chance lost actually was with any kind of accuracy. Moreover, this was not how the loss has been characterised by the Vendor; loss of a chance was not pleaded or argued.

114 In other words, we do not know whether an appeal would have been successful or not, and therefore we do not know whether the Vendor in fact suffered any loss from the Purchaser's failure to

appeal (although this issue is quite different from the question of whether it was useless for the Purchaser to have pursued the matter after the initial withholding of the consent by NEA). If the appeal would have been unsuccessful, then no loss would have resulted from the failure to appeal. In the absence of evidence of loss, I am unable to award any damages to the Vendor.

Forfeiture of the Deposit

115 Finally, there was the question of the Deposit. This was quite separate from the question of damages – the Vendor is not required to prove loss before it may be entitled to forfeit the Deposit. In *Lee Chee Wei v Tan Hor Peow Victor and others and another appeal* [2007] 3 SLR(R) 537 ("*Lee Chee Wei*"), the Court of Appeal summarised the law relating to deposits at [83] and [84]:

> 83 The law relating to deposits in a sale and purchase contract and its recoverability has been considered in some depth in *Triangle Auto Pte Ltd v Zheng Zi Construction Pte Ltd* [2000] 3 SLR(R) 594 which held (at [9]) as follows:
>
> > ... A deposit in a sale and purchase contract, if nothing more is said about it, is a security for damages for breach of contract. If the seller has not suffered any damage he must return it to the depositor. If, however, the contract provides that the deposit is to be forfeited to the seller upon breach by the purchaser, and provided the amount of deposit is customary or moderate, **the seller is entitled to retain it even if he suffered no loss.** ...
>
> 84 The invariable judicial approach to forfeitable deposits at common law is **that the deposit will be forfeited to the payee upon the discharge of the contract on the default of the payer, irrespective of whether it would have been deemed part-payment had the contract been completed. The payer cannot insist on abandoning the contract and yet expect to recover the deposit as this would enable him to take advantage of his own wrong** (*Howe v Smith* (1884) 27 Ch D 89 at 98). An advance payment, on the other hand, does not fall within the category of forfeitable deposits and is neither designed nor intended to secure performance (*Lim Lay Bee v Allgreen Properties Ltd* [1998] 3 SLR(R) 1028 ("*Lim Lay Bee*")). This is underscored by the premise that the vendor is already amply protected by the recovery of damages he has sustained (*Dies v British and International Mining and Finance Corporation Limited* [1939] 1 KB 724).
>
> [emphasis added in bold]

116 The question of whether a payment is recoverable depends upon the construction on the contract, *ie*, whether payment is construed as a deposit entitling forfeiture upon default, or as an advance payment, which is returnable. The contract is to be examined in its entirety to ascertain the parties' intention (*Lee Chee Wei* at [85] and [86]).

117 In my view, the Deposit should be seen as a security for Purchaser's performance of the contract. First, cl 3(a) of the OTP clearly referred to the Deposit as such. Second, the OTP is subject to the Conditions of Sale, which contained a provision for the forfeiture of the deposit at cl 15.9(c) upon the Purchaser's failure to comply with the terms of an effective Notice to Complete. The Deposit was not intended to be merely an advance payment. The Deposit was therefore "an earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract" (to quote *Howe v Smith* (1884) 27 Ch D 89 at 101). The Purchaser has clearly refused to perform. Since I have dismissed Purchaser's claim, I saw no basis to order the Vendor to refund the Deposit.

118 So in the end, I ordered the forfeiture of the Deposit. I also ordered the Purchaser to withdraw their caveat on the Property by 15 August 2014.

Conclusion and postscript

119 On 8 August 2014, after delivering my oral judgment, I directed counsel to give me written submissions on the issue of costs. After considering the matter, I now give my decision. I do not think that the Vendor should get its full costs even though it succeeded on the main claim, as they failed on a substantial part of the counterclaim, which they had not pursued with diligence. I award the Vendor 70% of its costs, to be taxed if not agreed.

120 The Vendor also asked for a costs order against Cheong personally. The overarching rule that governs the exercise of the court's discretion in ordering costs against a non-party is that it must, in all circumstances of the case, be just to do so (see *Goh Eileen née Chia and another v Goh Mei Ling Yvonne and another* [2014] SGHC 141 at [8]). I am of the view that it would be inappropriate for me to do so, and I decline to so order.

[note: 1] Cheong's AEIC, para 1.

[note: 2] Cheong's Supplementary AEIC, para 4.

[note: 3] NE, 15 Apr 2014, p 61 lines 2–4; see DB, p 4.

[note: 4] Cheong's Supplementary AEIC, para 6.

[note: 5] AB 58.

[note: 6] AB 76.

[note: 7] Cheong's Supplementary AEIC, p 41.

[note: 8] Cheong's AEIC, para 41; AB 89–90.

[note: 9] NE, 15 Apr 2014, p 84, lines 9–15.

[note: 10] NE, 15 Apr 2014, p 86, lines 1–11.

[note: 11] AB 93

[note: 12] Jason's AEIC, p 14.

[note: 13] Jason's AEIC, para 8.

[note: 14] Cheong's Supplementary AEIC, p 41.

[note: 15] Cheong's Supplementary AEIC, p 43.

[note: 16] Cheong's Supplementary AEIC, p 22.

[note: 17] Cheong's Supplementary AEIC, para 12; p 25.

[note: 18] Jason's AEIC, paras 9–10; pp 19–26; see also Cheong's Supplementary AEIC, para 13.

[note: 19] SAB 57–61.

[note: 20] SAB 62.

[note: 21] AB 108.

[note: 22] Jason's AEIC, para 14.

[note: 23] NE, 15 Apr 2014, p 97, lines 17–25.

[note: 24] NE, 15 Apr 2014, p 99, lines 1–6.

[note: 25] NE, 15 Apr 2014, p 98, lines 15–21.

[note: 26] NE, 15 Apr 2014, p 103 line 22 to p 104 line 7.

[note: 27] NE, 15 Apr 2014, p 99, lines 7–11.

[note: 28] NE, 15 Apr 2014, p 101, lines 7–13.

[note: 29] NE, 15 Apr 2014, p 101 line 24 to p 102 line 1.

[note: 30] AB 109.

[note: 31] AB 110.

[note: 32] Cheong's Supplementary AEIC, para 29.

[note: 33] NE, 15 Apr 2014, p 102, lines 2–20.

[note: 34] AB 112.

[note: 35] Cheong's AEIC, pp 63–64.

[note: 36] AB 121.

[note: 37] AB 122.

[note: 38] AB 123.

[note: 39] Tan's AEIC, para 37.

[note: 40] AB 124.

[note: 41] NE, 15 Apr 2014, p 74, lines 9 – 16; NE, 15 Apr 2014, p 63 line 16 to p 65 line 11; Tan's AEIC, para 36(c); DCS, para 11(g); see also PRS, paras 48 – 53.

[note: 42] AB 125–126.

[note: 43] AB 127.

[note: 44] AB 128.

[note: 45] AB 130.

[note: 46] AB 131–132.

[note: 47] PCS, para 49.

[note: 48] AB 133.

[note: 49] AB 138–140.

[note: 50] AB 142.

[note: 51] AB 146–147.

[note: 52] AB 148.

[note: 53] AB 149–150.

[note: 54] Cheong's AEIC, paras 6–9, 13.

[note: 55] PCS, paras 164–166.

[note: 56] PCS, para 67.

[note: 57] PCS, paras 111–112.

[note: 58] PCS, para 113.

[note: 59] PCS, para 82.

[note: 60] AB 15.

[note: 61] NE, 16 Apr 2014, p 54 line 7 to p 59 line 22.

[note: 62] NE, 15 Apr 2014, pp 105–106.

[note: 63] PCS, para 91.

[note: 64] NE, 15 Apr 2014, p 74, lines 9–16.

[note: 65] NE, 15 Apr 2014, p 89, lines 5–14.

[note: 66] NE, 16 Apr 2014, p 56.

[note: 67] NE, 16 Apr 2014, pp 57–58.

[note: 68] DRS, para 41.

[note: 69] DRS, paras 22–23.

[note: 70] DCS, paras 38–40.

[note: 71] DFS, paras 3–4.